



**ESTATE AGENTS COUNCIL**

**IMPEDIMENTS TO THE OPERATION  
OF A NATIONAL LICENCE  
CONTAINED IN CONDUCT  
PROVISIONS -  
RESEARCH PROJECT**

**REPORT ON CONTRACTS AND  
AGENCY AGREEMENTS**

**MAY 2010**



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## 1. EXECUTIVE SUMMARY

The fundamental question posed by this report is whether any jurisdictional differences in conduct provisions concerning contracts or agency agreements could potentially impede agents operating under a national licence across borders.

While the Council has highlighted differences between models, considered the potential for national harmonisation and assessed conduct provisions it views as representing best practice, it has found overall that there are no significant impediments posed to the operation of national licensing by contract and agency agreements conduct provisions.

It is not possible for the Council to consider all aspects of estate agency practice across Australia and in particular this report does not consider estate agency practice in regards to:

1. Sale of land by the Crown.
2. Terms contracts of sale.
3. Any codes of conduct<sup>1</sup>
4. Rules for public auctions<sup>2</sup>.

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<sup>1</sup> Codes of conduct generally address standards and behavioural conduct that will be dealt with in subsequent review papers. While codes of conduct are useful technically speaking they are not part of the legislative framework.

<sup>2</sup>

## **2. LIST OF RELEVANT LEGISLATION**

### **Australian Capital Territory**

Agents Act 2003 (ACT) (“ACT Act”)

Agents Regulations 2008 (ACT) (“ACT Regulations”)

### **New South Wales**

Property, Stock and Business Agents Act 2002 (NSW) (“NSW Act”)

Property, Stock and Business Agents Regulations 2003 (NSW) (“NSW Regulations”)

### **Northern Territory**

Agents Licensing Act (NT) (“NT Act”)

Agents Licensing Regulations 1979 (NT) (“NT Regulations”)

### **Queensland**

Property Agents and Motor Dealers Act 2000 (QLD) (“QLD Act”)

Property Agents and Motor Dealers Regulations 2001 (QLD) (“QLD Regulations”)

Property Law Act 1974 (QLD) (“PLA QLD”)

Land Sales Act 1984 (QLD) (“LSA QLD”).

### **South Australia**

Land and Business (Sale and Conveyancing) Act 1994 (SA) (“SA Act”)

Land and Business (Sale and Conveyancing) Regulations 1995 (SA) (“SA Regulations”)

Land Agents Act 1994 (SA)

Law of Property Act 1936 (SA)

### **Tasmania**

Property Agents and Land Transactions Act 2005 (TAS) (“TAS Act”)

Property Agents and Land Transactions Regulations 2006 (TAS) (“Tas Regulations”)

Conveyancing and Law of Property Act 1884 (“CLPA TAS”)

### **Victoria**

Estate Agents Act 1980 (VIC) (“EAA”)

Sale of Land Act 1962 (VIC) (“SOLA”)

Sale of Land Regulations 2005 (VIC) (“SOLA Regulations”)

Estate Agents (Contracts) Regulations 2008 (VIC) (“contract regulations”)

Estate Agents (Professional Conducts) Re

### **3. BACKGROUND**

In July 2008, the Council of Australian Governments (COAG) agreed to introduce national licensing for a number of occupational groups, including property agents. A national licensing body will be established by 2011 with the commencement of the national licensing scheme for the first wave of occupations including property agents scheduled to begin in 2012 with all current market participants transferred over to the new system.

The wide ranging regulatory reform agenda seeks to remove legislative duplication and inter-jurisdictional inconsistencies and in doing so create a seamless national economy in which practitioners can conduct business across borders free of impediments such as complying with the various licensing regimes of the states and territories. The introduction of national licensing offers the opportunity to consider the harmonisation of estate agency legislation with the view to adopting a best practice model based on the current provisions in the various states and territories. It also allows for the consideration of emerging issues such as if the licensing model is equipped to deal with the virtual office.

Potential benefits are presented for various segments of the market, for example for those working on complex transactions across jurisdictions in the commercial sector or estate agency practitioners operating in border towns such as Albury Wodonga. Furthermore, it is anticipated that business efficiency will improve through greater competition and productivity, less red tape and that consumers will ultimately benefit through increased market transparency.

#### **4. RESEARCH PROJECT**

The Estate Agents Council (the Council) has been asked by Hon Tony Robinson MP, Minister for Consumer Affairs, to consider conduct provisions within the current legislative framework-governing estate agents and the operation of their business in Victoria. While conduct provisions are still expected to be administered by state and territory regulatory authorities, the introduction of a national licence will require conduct provisions to be harmonised to ensure that the operation of a national licence for estate agents is not impeded by inconsistencies in the respective statutes of the various jurisdictions.

The Council has been asked to focus on the Estate Agents Act 1980 (EAA) and associated regulations in addressing the following:

1. Identify the major areas in Victoria where legislation regulates the work of estate agents and operation of estate agency businesses, that is conduct requirements;
2. Determine whether these areas are regulated in other states and territories and compare the legislative provisions across all jurisdictions;
3. Assess whether the differences in the legislative provisions across jurisdictions have the potential to impose an unnecessary burden and/or to impede agents wishing to operate across jurisdictional borders using a national licence.

It is not possible for the Council to examine every aspect of the vast statutes concerning estate agency practice across Australia in the timeline of this research project. Therefore, the Council has decided to feed into areas, which might be the most useful in contributing to the

## **5. A SNAPSHOT OF CONDUCT PROVISIONS CONCERNING CONTRACTS REGULATING PROPERTY AGENTS IN VICTORIA<sup>3</sup>**

### **(a) Form of contracts**

The EAA allows for the making of regulations prescribing standard forms of contracts (s.99 (1) (ge), EAA), a measure presumably designed to establish clear standards regarding contracts which serves as both a consumer protection mechanism and as a useful guide to industry. Similarly, the Estate Agents (Contracts) Regulations 2008 (contract regulations) also prescribe the forms and terms for the contract of sale for real estate (forms 1 and 2, contract regulations) and sale of businesses (reg. 5, contract regulations).

The EAA establishes that an estate agent or agent's representative is not guilty of an offence under the Legal Profession Act 2004 just because they fill in a standard form of contract or



interest issues being detected after entering into a contractual arrangement. If this right of withdrawal is exercised, the client is not liable to the other party to the contract in any way with the person holding any deposit paid by the other party being required to return it immediately. The client is also not required to pay the estate agent any commission or outgoings in respect of the failed sale (s.55, EAA).

On the other hand, the EAA does allow for so

who hold the money until the registration of the plan of sub-division. Alternatively this money can be kept in a special purpose account in an authorised deposit-taking institution in Victoria specified by the vendor in the contract and held in the joint names of the purchaser and the vendor, which can only be drawn on, with the signature of both parties. Such mechanisms prevent either party from inappropriately drawing on funds outside the terms of the contractual agreement. It is also prescribed that the deposit moneys payable under the contract should not exceed ten per cent of the purchase price of the lot (s.9AA, SOLA).

Provisions under the SOLA seek to ensure that there is sufficient transparency and disclosure embedded in the process, and that the property sale transaction is deemed void if false and misleading information is provided by the vendor making sure that the rights of purchaser are protected. Accordingly, a vendor under a contract for the sale of land must give the purchaser before he/she signs the contract a statement signed by the vendor. The statement should include the particulars of any mortgage, a description of any restrictions applying to the land, the name of the planning instrument, details of any rates, taxes/ charges, utility services, insurance when the land does not remain the risk of the vendor until possession and any terms contract set out in schedule 2. When there is a residence on the land, the vendor must give the purchaser a statement before they sign the contract of sale of land that outlines any building permits in relation to the land or any house contract guarantee regarding construction by an owner-builder both for the preceding seven years. The vendor should also provide the last conveyance, details of the sub-division or owners corporations. The contract can be rescinded if false information or the vendor fails to provide this material unless it can be established that the vendor has acted fairly and honestly (s.32, SOLA).

The SOLA also provides for terms contracts. A terms contract is when the contract regarding the sale of land involves the purchaser making two or more instalments (other than the deposit or final payment) to the vendor after the execution of the contract and before the purchaser is entitled to the title of the land. A person must not sell land unless at the day of the making of the contract the person is the owner of the property, mortgagee, and mortgagor or are empowered by legislation. A purchaser may request by written notice that the vendor transfer the land to the purchaser discharged from all mortgages upon the acceptance of the title or payment in full of the purchase money. Alternatively, when the land is sold under a terms contract and the terms are not more onerous than that of the mortgage the vendor may transfer the existing mortgage subject to the purchaser executing a mortgage to secure the amount payable to the vendor. This provision aims to ensure the consumer is protected under a perhaps messier terms contract arrangement involving multiple payments by way instalments prior to the transfer of the land. A legal practitioner must not act for both vendor and purchaser under a terms contract (part 1, div. 4, SOLA). Embedded in this section are basic principles that a legal practitioner should not represent both parties in prescribed contracts to avoid potential conflicts of interest.

#### **(e) Cooling off periods**

The SOLA features a cooling off period, which in Victoria also applies to such things as domestic building contracts and retirement village contracts. Cooling off periods are a consumer protection mechanism which cause a minor delay in the transaction and were designed to give consumers time to think and reconsider in cases where high pressure sales techniques may have been used to secure the sale or consumers have entered into a contract impulsively or lacking in information<sup>6</sup>.

The SOLA allows a purchaser under a contract for the sale of land to give the vendor notice that they wish to terminate the contract before the expiration of three clear business days after

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<sup>6</sup> Consumer Affairs Victoria, Cooling-off periods in Victoria –their use, nature, cost and implications, Research Paper No. 15 January 2009 (available via [www.consumer.vic.gov.au](http://www.consumer.vic.gov.au)).

the contract was signed. Under such circumstances the purchaser is entitled to the return of all money paid out under the contract except for the sum of \$100 or 0.2 per cent of the purchase price (whichever is the greater) which may be retained by the vendor. A contract is required to contain a conspicuous notice informing the purchaser that they may exercise these cooling off rights up to three days after signing the contract of sale. This power to terminate a contract for the sale of land does not apply if the land is used for industrial, commercial or farming purposes or has been sold by publicly advertised auction. The purchaser is also exempt if they sought independent advice from a solicitor before signing the contract or have previously entered into a similar contract (s.31, SOLA), but may seek advice from a conveyancer. The logic behind these exclusions seems to be that the objective of the cooling-off period is to protect the vulnerable consumer, which would seem to exclude business, those who have sought professional advice or have

An unfair term in a consumer contract or a prescribed unfair term in a standard contract is deemed void. However, the parties will continue to be bound by the contract if it is capable of existing without the unfair term or prescribed unfair term (part 2B, FTA).

**(h) Disclosure requirements or vendor's statements**

Disclosure requirements are important in terms of empowering consumers to make good decisions by having access to all the information available. Disclosure requirements are also a means of addressing areas such as conflict of interest and representations regarding the price or the condition of a property. As noted earlier in sections looking at price requirements, termination and payments, vendor statements regarding the sale of land (s.51, EAA) and sale of a small business (s.52, EAA) are featured in the EAA as well as in the SOLA (s.32, SOLA).

**(i) Service of documents**

The EAA requires that when an estate agent is signing any person to a contract agreement regarding the sale of a property or business they must at the time the signature is obtained deliver a copy of the contract to the person signing it and obtain from that person an acknowledgement in writing of the receipt of that copy. It is not necessary when there is more than one person signing the contract to deliver and receive written confirmation of receipt from more than one person (s53, EAA). Such a measure is a consumer protection mechanism ensuring that all parties have clearly understood and received contract material. However, it was suggested during the course of the consultation process of the Council's Modernisation Review that written confirmation of receipt of the contract is unusual and that this is something that perhaps should be explored in the context of the increased use of technology.

**(j) False and misleading statements or representation**

The FTA entrenches a number of provisions that protect the consumer through ensuring a level playing field in which fair trading principles are upheld. The FTA states that a person must not, in trade or commerce, in connection with the supply or possible supply of goods or services of a kind ordinarily used for personal, household or domestic purposes to a purchaser, engage in conduct that is, in all the circumstances, unconscionable (s.8, FTA). In determining unconscionable conduct, the Court or Tribunal may wish to consider:

The relative strengths of the bargaining positions of the supplier and the purchaser, as a result of conduct engaged in by the supplier;

Whether the purchaser was required to comply with conditions that were not necessary for the protection of the legitimate interests of the supplier;

Whether the purchaser was able to understand documents relating to the supply or possible supply of the goods or services;

Whether any undue influence or pressure was exerted on, or any unfair tactics were used against the purchaser or a person acting on behalf of the purchaser by the supplier regarding the supply of goods or services;

The amount for which, and the circumstances under which, the purchaser could have been supplied with identical or equivalent goods or services from a person other than the supplier.

Furthermore, under the FTA a person in trade or commerce must not engage in conduct that misleads the public as to the nature, the characteristics, and the suitability for their purpose or the quantity of any services (s.11, FTA). This extends to the supply (or possible supply) of goods or services or in connection with the promotion or advertising of the aforementioned goods or services. False representations regarding goods and services could concern the quality, sponsorship arrangements, price, origin, attached conditions or any general misleading statement (s.12, FTA).

**(k) Remedies**

As previously mentioned a purchaser may avoi



## Contract Provisions in Victorian Legislation Summary

### (a) Form of contracts

It is not an offence for an estate agent or agent's representative to fill in a standard form of contract or contract prepared by a legal practitioner (s.53A, EAA).

## **Contract Provisions in Victorian Legislation Summary (continued)**

### **(j) False and misleading statements or representations**

A person must not engage in unconscionable conduct or provide false or misleading information (s.8, s.11-12, FTA).

### **(k) Remedies**

Avoid contract (s.51-52, EAA, s.32, SOLA, s.32ZA, s.32ZC-D, FTA) or investigatory process (s.56A, EAA).

### **(l) Statutory warranties**

Statutory warranties regarding the contract to supply apply when the value of the goods or services is less than \$40,000 (except when not ordinarily used for personal, domestic or household use). Implied conditions includes that the goods will correspond with the description, are free of fault and of merchantable quality. A contract of supply of good or services is void if the contract or provision excludes, restricts or modifies liabilities for damages in respect of a breach by a supplier of a condition or warranty implied in the contract. A term of a contract of supply of goods or services is not void by reason only that the term limits the liability of the supplier for breach of a condition or warranty if the replacement or repair of the goods occurs. The purchaser may not discharge the contract on the grounds of the breach unless the purchaser has given notice to the supplier that the purchaser will discharge the contract unless the supplier provides the title to the good within a reasonable time (part 2A, FTA).

### **(m) Defences**

The purchaser will not be permitted to rescind the contract if the court is satisfied that the vendor has acted honestly and reasonably and ought fairly to be excused for the contravention and that the purchaser is substantially in as good a position as if all the relevant provisions of this section had been complied with (s.32, SOLA).



## **6. A COMPARATIVE ANALYSIS OF CONDUCT PROVISIONS CONCERNING CONTRACTS REGULATING PROPERTY AGENTS ACROSS AUSTRALIAN JURISDICTIONS<sup>8</sup>**

### **(a) Form of contracts**

#### **New South Wales**

The Property, Stock and Business Agents Act 2002 (NSW Act) features a number of general principles regarding contracts. Such as a real estate agent must not offer residential property for sale unless the required documents (including a copy of the proposed contract minus the particulars of the purchaser or purchase price) are available for inspection at the real estate agent's registered office by a prospective purchaser or agent.(s.63, NSW Act). This ensures that there is transparency regarding the documentation and that the purchaser is equipped with all of the relevant information before considering entering into such a transaction. In Victoria the vendor statement (s.32, SOLA and s.6 Sale of Land Regulations 2005) must be available prior to the auction and is commonly distributed by estate agents to prospective purchasers, the NSW Act goes further in stating that a property should not be offered for sale unless such documentation is available for inspection.

A real estate agent is considered to have offered residential property for sale or auction later when they have advertised the sale, placed a sign near the property indicating it is for sale, displays details of the property at their place of business or provides such information to

(professional conduct regulations) in terms of agents and representatives being required to communicate all offers made whether verbally or in writing to the principal as soon as possible (reg. 16, reg.24, professional conduct regulations).

The Land and Business (Sale and Conveyancing) Regulations 1995 (SA Regulations) prescribe that a statement must be incorporated into the start of the contract of sale alerting the purchaser to the fact that both the vendor and purchaser will be bound by the terms of the contract. In addition, if they are in doubt regarding the terms of the contract they should seek legal advice, be aware that a two-day cooling off period applies to the purchaser, any conditions and the proposed date of settlement (reg.16B, SA Regulations). This bears some similarity to the requirement in Victoria that a conspicuous statement must be featured in the contract pointing out the cooling off period (s.31, SOLA) as well as requirements under the schedules of the Estate Agents (Contracts) Regulations.

### **Northern Territory**

Under the Agents Licensing Act 1979 (NT Act) a real estate agent is not permitted to arrange the preparation and execution of a contract of sale of land unless the contract is in a form approved by the Registrar or Law Society Northern Territory for use by persons who are not legal practitioners (s.121A, NT Act). A similar provision is featured in Victoria legislation (s.53A, EAA).

### **Australian Capital Territory**

The Agents Act 2003 (the ACT Act) is similar to section 63 of the NSW Act in terms of it being an offence to offer residential property for sale if documents are not available at the agent's place of business for inspection by prospective purchasers. It also establishes that a property is deemed to be for sale if the agent or salesperson advertises that the property is for sale or will be auctioned at a later date, invites offers or indicates that someone may be willing to grant an option to buy the property (s.89A, ACT Act). There is also a comparable provision in the ACT Act to section 53A of the EAA enabling an agent or salesperson to fill in basic details on a contract unless there is a legal practitioner acting for the other party then an agent must not be involved in the making or exchanging of contracts. An agent cannot charge for filling in a contract and a contract is not rendered void by non-compliance of this provision (s.89B, ACT Act). As outlined previously the objective behind s.89A is to ensure transparency and s.89B aims at easing the burden on estate agency businesses by not requiring them to seek the services of a lawyer for the completion of administrative as opposed to legal tasks regarding contracts.

It should also be noted that section 201 of the Civil Law (Property) Act 2006 provides that instruments are required to be in writing.

### **Queensland**

The Property Law Act 1974 (PLA QLD) establishes that contracts must be in writing (s.59, s.11, PLA QLD).

There is also provision for circumstances where specific performance of a contract would not be enforced against the purchaser by the court because of defect or doubt as to the vendor's title but does not entitle the purchaser to rescind the contract. In such an event, the purchaser is still able to recover their deposit, any instalments paid on the contract and is relieved of liability under the contract (s.69, PLA QLD).

## **Western Australia**

In Western Australia, a contract must be in writing (s.34, PLA TAS).

The contract is made up of provisions, which are incorporated into the contract of sale such as those, which are prescribed pursuant to s.45 of the PLA WA and s.69 STA WA.

In Western Australia, lawyers are not required to prepare or settle contracts for sale of land. Real estate agents and sales representatives can prepare them (with the sales representative having it checked by their supervising agent). Standard form contracts are generally used<sup>9</sup>.

## **Tasmania**

In Tasmania, a contract must be in writing (s.36, CLPA TAS).

The contract is made up of provisions, which are incorporated into the contract of sale such as those, which are prescribed pursuant to section 3 of the CLPA TAS (s.3, CLPA TAS).

In Tasmania the balance of the contract (particulars of sale and any special conditions) are prepared by a legal practitioner. However, an agent is able to fill in the details of a standard form contract prepared by a lawyer without being in breach of the Legal Profession Act 2007 (TAS) (s.13, Legal Profession Act 2007 (TAS)). This is a similar arrangement to section 53A of the Estate Agents Act in Victoria (s.53A, EAA)<sup>10</sup>.

### **(b) Conflicts of interest**

## **New South Wales**

The NSW Regulations state that an agent must not accept an appointment to act, or continue to act, as an agent if doing so would place the agent's interests in conflict with the client's interests (Schedule 1, clause 11, NSW Regulations).

## **Queensland**

The QLD Regulations state that an agent must not accept an engagement if there is a conflict of interest (reg.17) and must disclose any conflict (perceived or actual) regarding any personal or commercial relationship before entering into an agency agreement (reg.26).

## **Tasmania**

An agent is prohibited from entering into an agency agreement for the sale of a property in which they have previously had a direct or indirect interest (s.22, TAS Act).

## **Western Australia**

Section 64 of the WA Act also states that an agent entering into an agency agreement must not have a conflict of interest and must not receive rewards for undertaking estate agency business as per the terms of the agreement (s.64, WA Act).

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<sup>9</sup> The Council thanks the Consumer Protection section of the Department of Commerce in Western Australia for their advice.

<sup>10</sup> The Council thanks the Real Estate Institute of Tasmania for their advice.

**(c) Price requirements**

**(d) Payments**

**New South Wales**

The NSW Act allows for expression of interest deposits, which are paid when an offer is made regarding a property for sale<sup>11</sup>. When an agent issues a receipt for an expression of interest deposit made prior to exchange of contracts the agent must inform the person who paid the deposit that the principal has no obligation to sell the property or the purchaser to buy the property. This information must be in writing and can be contained on the receipt. The deposit is refundable if a contract for the sale does not proceed in the event that the offer is not accepted. The agent must promptly inform the principal when an expression of interest deposit has been paid and promptly inform the person who paid the deposit when the agent becomes aware of any subsequent offer to purchase the property received from any other person. The agent must also advise the person who paid the deposit that they have the right to make further offers up until exchange of contracts has taken place. Such a system is very different to the model in place in Victoria (s.5, NSW Act).

**South Australia**

The SA Act features a cooling off period whereby the purchaser can give the vendor written notice of their intention to rescind the contract before the prescribed time. The prescribed



## **South Australia**

In addition to cooling off rights, which were detailed above, the SA Act has a provision like Victoria and New South Wales in prohibiting an agent from demanding, retaining or receiving a commission regarding a rescinded agency agreement (s.23, SA Act). This establishes clear direction regarding when an agent is not entitled to retain a commission.

## **Queensland**

If a house is subject to a contract which has not been completed or possession taken place and the house is so destroyed or damaged that it is unfit for occupation the purchaser may rescind the contract by way of written notice to the vendor or their solicitor. Any money paid out on the contract is able to be recovered by the purchaser, while the vendor is entitled to recover any benefit from any insurance policy held (s.64, PLA QLD).

A vendor is not entitled to exercise any right to rescind the contract on the ground of any requisition or objection made by the purchaser unless the purchaser is given seven days notice of the vendor's intention to rescind the contract (s.67, PLA QLD).

A vendor who in breach of contract fails to perform a contract for the sale of land shall be liable by way of damages as compensation for the loss sustained by the purchaser (s.68, PLA QLD).

## **Western Australia**

A contract can be rescinded by way of written notice on the grounds of the failure to provide all the necessary disclosure material with the purchaser able to recover all money paid out on the contract (s.69D-69E, STA WA).

### **(g) Void contracts and unfair terms**

Unfair contract terms, which are a key feature of the FTA, are unique to Victorian legislation.

## **New South Wales**

The NSW Act touches upon agency agreements being void to the extent that it would have the effect of excluding, modifying or restricting the operation of the division concerning cooling off rights (s.62, NSW Act).

## **South Australia**

The SA Act also features provisions concerning void contracts. As previously outlined these concern the payment of money prior to settlement aside from the deposit or when a person has the right to purchase land but obligation to pay rent for a period of occupation (s.6, SA Act). A contract can be made void within six months of the making of the contract if a person has been induced into purchasing subdivided land (s.18, SA Act) or undue influence has been applied with commission able to be recovered (s.23).

### **(h) Disclosure requirements or vendor's statement**

## **South Australia**

Under the SA Act ten days before settlement a vendor must provide the purchaser with a statement in the prescribed form, signed by the vendor that sets out such things as all





damages from the vendor. In addition, a land valuer can be appointed to determine the loss arising from the breach of a condition of the contract

featured in published advertisements or oral and written representations made to prospective purchasers (s.73, NSW Act). This provision in the NSW Act is consistent with fair trading principles.

### **South Australia**

The SA Act features a number of provisions addressing false and misleading representations. These include providing false information in certificates (s.13, SA Act), the ability to claim damages due to misrepresentation within terms of an agreement for sale (s.35, SA Act) or providing false or misleading information for the purposes of inducing a person to sell or purchase property (s.36, SA Act). Again, this is in line with fair trading principles.

#### **(k) Remedies**

### **South Australia**

The SA Act provides that where a vendor's statement is not given or certified as required, the purchaser may apply to a court for an order. If the court is satisfied that the purchaser has been prejudiced by a failure to comply with the provision it may allow the contract to be avoided, award damages or take any other action seeking to restore the parties to the contract to their respective positions before entering into the contract (s.15, SA Act). This is similar to the provisions in Victoria in terms of allowing the contract to be avoided with the additional feature of damages aside from expenses being refunded.

#### **(l) Statutory warranties**

#### **(m) Defences**

### **South Australia**

Under the SA Act, it is a defence to a charge of an offence, or to civil proceedings related to a contract for the sale of land, if the defendant proves the purchaser received independent advice from a legal practitioner (who signed the required certificate attesting to the provision of such advice) and the purchaser has signed an instrument of waiver in the form required by regulation (s.16, SA Act, reg.16, SA Regs). It is also a defence if the offence was not committed intentionally and did not result from any failure on the part of the defendant to take reasonable care to avoid the commission of the offence (s.37B). An officer, employee or agent of a person will be taken to be liable unless it is established that they acted outside the scope of their authority (s.38, SA Act). In the event that a body corporate is guilty of an offence each director is liable to the same penalty as imposed on the principal unless it can be shown that the director could not by the exercise of reasonable diligence have prevented the commission of the offence (s.39, SA Act).

### **Tasmania**

Under the TAS Act a purchaser may not rescind a contract if a court is satisfied that the vendor has acted honestly and ought fairly to be excused for the contravention and the purchaser is in as good a position as if the relevant provisions of the division had been complied with (s.198, TAS Act).

## Contract Provisions in Other Australian Jurisdictions Legislative Summary

### (a) Form of contracts

The property must not be for sale unless the required documents are available for inspection at real estate agent's registered office (s.63, NSW Act, s.89A, ACT Act).

Contracts for the sale of land should be in writing (s.63, NSW Act, s.26, SA Act, s.11 & s.59, PLA QLD).

Contract can be rendered void within six months of the contract being made unless in writing and the purchaser will be able to recover costs (s.18, SA Act).

Agent is authorised in writing to sell the property and this agreement is signed with a copy given to the vendor

## Contract Provisions in Other Australian Jurisdictions Legislative Summary (continued)

### (f) Termination

Agent must not retain commission on rescinded contract (s.61 NSW Act, s.23, SA Act)

Contract can be rescinded by purchaser by way of written notice if the house is damaged prior to the completion of the contract (s.64 PLA QLD).

A vendor is not entitled to exercise any right to rescind the contract on the ground of any requisition or objection made by the purchaser unless the purchaser is given seven days notice of the vendor's intention to rescind the contract (s.67, PLA QLD).

A vendor who in breach of contract fails to perform a contract for the sale of land shall be liable by way of damages as compensation for the loss sustained by the purchaser (s.68, PLA QLD).

Ability to terminate contract if not all disclosure material provided, purchaser able to recover all money paid (s.69D-E, STA WA).

### (g) Void contracts and unfair terms

### h) Disclosure requirements or vendor statement

Disclosure documents to be made available thirty minutes prior to auction (s.11, SA Act, reg.14A, SA Regulations, s.188, TAS Act).

Notice to given re changes to the vendor statement (s.10, SA Act, s.194 TAS Act)

The availability of disclosure documents during business hours to be cited in advertising (s.186-187, TAS Act).

Liability of the vendor and agent to disclose information (s.196-7, TAS Act).

Not applicable if the sale of the property has been advertised in the preceding six months (s.185, TAS Act).

## **7. A SNAPSHOT OF CONDUCT PROVISIONS CONCERNING AGENCY AGREEMENTS REGULATING PROPERTY AGENTS IN VICTORIA**

### **(a) Requirements for agency agreements**

An agent cannot recover commissions or any outgoings unless a signed engagement or appointment to sell real estate is in place at the finalisation of the contract. Upon signing the agency agreement, the agent must inform the person that the commission to be paid to the agent under the engagement or appointment and any money to be paid by the person in respect of outgoings are subject to negotiation (s.49A (1) (b)).

An agent must also ensure that an estimated selling price has been stated (s.47A, EAA). The estimated selling price is what the agent based on their knowledge, experience and relevant evidence such as comparable sales or capital site improvement believes to be an indication of the market value of the property, as opposed to the asking price of the vendor, which may be different. This establishes a figure, which can be quoted in marketing material that should provide potential purchasers with a reasonable estimate of the price range of the property and give vendors a sense of the potential worth of their property.

An estate agent engaged or appointed to do any agency work for a client is not entitled to retain any amount the agent receives from another person as a rebate. Upon receiving any rebate, the agent must immediately pay the amount to the client (s.48A, EAA). Furthermore, an estate agent must not obtain any payment from a person in respect of work done by the agent regarding outgoings incurred by the agent unless the agent holds a written engagement or appointment signed by the vendor. The engagement should contain details of the agreed commission (stated in both percentage and dollar terms) and any outgoings as well featuring a rebate statement in the prescribed form. Such provisions tie into the sentiment of the EAA regarding avoiding conflicts of interest issues or an agent seeking financial gain beyond the agreed commission paid by the vendor through dealings with third parties. It also makes agents and their representatives accountable in terms of maintaining documentation concerning rebates, which ensures a degree of transparency. In addition, if an estate agent takes any money in respect of commission or outgoing from money held in trust by the agent on behalf of the client, the agent must give the person written notice of the amount taken within seven days. This seeks to make agents accountable for their dealings with the vendor's money, which they are holding in trust and thus have a duty of care in terms of practising sound financial management (s.49A, EAA).

If an agreement does not state the end date for an estate agent to act as the sole agent for the sale of any real estate agent it is assumed that the agreement expires thirty days after the date of the auction or in other instances sixty days after the agreement was signed by the vendor (s.54, EAA). This establishes a clear contractual arrangement for a set period and allows both parties to reassess the arrangement following the expiration of this time.

In general terms agency agreements should be free of unfair terms with the Director having the ability to seek an advisory opinion from the Tribunal in this regard (s.32ZD, FTA) and be clearly expressed, legible and free of any false or misleading statements (s.163, FTA).

### **(b) Conflict of interest**

The professional conduct regulations establish that an estate agent must not accept an engagement from, or act for, a person where to do so would place the agent's interests in conflict with that of the person (reg.12).

**(c) Disclosure requirements for agreements**

Section 48 of the EAA contains disclosure requirements in respect of commission sharing.

Any rebates must be disclosed in the prescribed form in a rebate statement as part of the agency agreement (s.49A, EAA).

An estate agent must advise a person that the estate agent has procedures for resolving complaints and disputes before obtaining a signed written engagement or appointment from

## **8. A COMPARATIVE ANALYSIS OF AGENCY AGREEMENT PROVISIONS CONCERNING CONTRACTS REGULATING PROPERTY AGENTS ACROSS AUSTRALIAN JURISDICTIONS**

### **(a) Requirements for agency agreements**

#### **New South Wales**

The NSW Act states that a real estate agent must not enter into an agency agreement with a person for the sale of residential property unless the agent has provided the person with a copy of the approved guide not more than one month before the agreement is signed by or on behalf of the person<sup>15</sup>

## **Western Australia**

The Real Estate and Business Agents Act 1978 (WA Act) establishes that an agent is not entitled to commission unless they are holding a valid appointment to act signed by the vendor which clearly states the services to be rendered as per the agreement, all relevant details and commission to be received (s.60, WA Act). The Property Law Act also requires that instruments be in writing (s.34, Property Law Act 1969 –PLA WA 1969, s.69, Strata Titles Act 1985 –STA WA).

### **(b) Conflicts of interest**

## **New South Wales**

The NSW Regulations state that an agent must not accept an appointment to act, or continue to act, as an agent if doing so would place the agent's interests in conflict with the client's interests (Schedule 1, clause 11, NSW Regulations).

## **Queensland**

The QLD Regulations state that an agent must not accept an engagement if there is a conflict of interest (reg.17) and must disclose any conflict (perceived or actual) regarding any personal or commercial relationship before entering into an agency agreement (reg.26).

## **Tasmania**

An agent is prohibited from entering into an agency agreement for the sale of a property in which they have previously had a direct or indirect interest (s.22, TAS Act).

## **Western Australia**

Section 64 of the WA Act also states that an agent entering into an agency agreement must not have a conflict of interest and must not receive rewards for undertaking estate agency business as per the terms of the agreement.

### **(c) Disclosure requirements for agreements**

## **New South Wales**

The NSW Act establishes that an agent is not entitled to recover any expenses for services performed unless all rebates, discounts or commissions and the specified amount are set out in the agency agreement. This provision does not apply to land intended to be used for commercial, business or industrial purposes (s.57, NSW Act). This conforms to principles found within estate agency legislation regarding declaring rebates in agency agreements.

The NSW Regulations also state that any commercial or personal relationship or rebates must be disclosed to the principal (Schedule 1, clause 12, NSW Regulations).

## **South Australia**

The SA Act also requires that rebates are disclosed in agency agreements establishing a



## **Tasmania**

As is the case in New South Wales and South Australia rebates must be disclosed in agency agreements as per the requirements of the TAS Act. In addition if rebates are not disclosed fees to the agent are not payable or may be recovered by applying to a court or tribunal (s.20, TAS Act).

### **(d) False and misleading statements or representations<sup>16</sup>**

## **New South Wales**

The NSW Act prohibits any person carrying out estate agency business from making any statement, representation or promise that is false, misleading or deceptive, whether intentionally or by concealment of a material

## Agency Agreement Provisions in Other Australian Jurisdictions Legislative Summary

### (a) Requirement for agency agreements

Provision of an approved guide before a person signs an agency agreement (s.56, NSW Act, s.20, SA Act).

Provide an estimated selling price on the agency agreement (s.20, SA Act).

Rebates cannot be retained (s.20, SA Act).

Agency agreements are for ninety days in duration (reg.16A, SA Regulations, s.18, TAS Act, schedule 4, ACT Regulations).

Warning statements regarding sole and exclusive agency agreements (schedule 5, ACT Regulations).

## **9. THE FEASIBILITY OF HARMONISING CONDUCT PROVISIONS**

The statutes of each jurisdiction share some common elements.

While the objective of the legislation is essentially the same in seeking to provide a framework, which enables a well-functioning market place and a level playing field for both vendors and purchasers, there are stylistic differences.

The feasibility of harmonising such conduct provisions in order to enhance the operation of the national licensing scheme is a complex question that this chapter seeks to answer in respect to contracts and agency agreements. It is the intention of this paper to highlight similarities between the various provisions, where there is potential to incorporate various elements into a best practice model and if any impediments to the operation of the national licence are posed by significant differences in provisions that cannot be reconciled.

### **9.1 CONTRACTS**

#### **(a) Form of contracts**

There is common ground in Victoria, the Australian Capital Territory, Tasmania and Northern Territory regarding having a provision in which an estate agent can fill in a standard contract or contract prepared by a legal practitioner without being found guilty of an offence under the Legal Profession Act 2004 or like legislation. Such a provision seems to make sense in terms of increasing business efficiency when filling out such a contract is more of an administrative rather than legal function. It is foreshadowed that there would not be any problem having such a provision replicated in national harmonised conduct provisions.

Victoria is the only jurisdiction with a specific provision requiring that documents must be clear and legible in its fair trading legislation (although there is some discussion in some other Acts about such things as font size). It would be seen as a constructive move if this could be incorporated into a harmonised best practice model of national conduct provisions, as there is potential scope for the use of fine print in contracts to disadvantage consumers if such a section did not exist<sup>17</sup>.

While New South Wales and the Australian Capita

would be problematic if applied to the Melbourne residential auction market<sup>20</sup> and ALPA contended that is impractical for those practising in regional areas<sup>21</sup>.

All States and Territories have provisions regarding contracts for the sale of land being in writing.

SA also has a requirement that contracts should feature a warning statement regarding cooling off periods and that if a consumer has any doubts they should seek independent legal advice before entering into a contractual arrangement. This is not dissimilar to provisions in Victoria and Queensland regarding conspicuous statements regarding cooling off periods. While such a provision poses no particular impediment to national harmonisation, the Council is not convinced that it adds particular value either in terms of it being replicated in other jurisdictions.

Overall, there seems to be considerable scope for harmonisation of conduct provisions regarding forms of contracts.

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<sup>20</sup> Peter Lowenstern, Corporate Solicitor, Real Estate Institute of Victoria, EAC Working Group Consultation Meeting, 23 April 2010.

<sup>21</sup> Shane McIntyre, ALPA Delegation, EAC Working Group Consultation Meeting, 23 April 2010.



**(b) Conflict of interest**

The Council views conflict of interest provisions as important in terms of transparency.

During the consultation process, the REIV contended that while conflict of interest provisions in Victoria are important that the current provisions require improvement to make them clearer and reduce the administrative burden on industry<sup>22</sup>. The REIV suggested that the current anomaly in section 55 whereby conflict of interest disclosure requirements can apply to run of the mill shareholders with no inside corporate knowledge should be abolished. Rather disclosure requirements should apply only to those involved in carrying out estate agency business, sit on relevant corporation boards or their immediate family and associates. As previously stated in its Modernisation Report the Council supports the REIV position regarding this matter<sup>23</sup>. ALPA concurred with the comments of the REIV regarding conflict of interest provisions in Victoria, suggesting that New South Wales provided a more streamlined disclosure model<sup>24</sup>.

The Council would recommend that a best practice model based on a modernised section 55 of the EAA in Victoria be advocated in terms of the harmonisation of conflict of interest conduct provisions. It is not foreshadowed that any significant impediments are posed by this area, as the fundamental principles of good estate agency practice in acting in the interests of

trading principles found in industry specific and fair trading legislation in other states and the Australian Consumer Law<sup>25</sup>.

It was suggested during the Council's consultation process that section 51 of the EAA regarding estate agents offering finance was an outdated provision in need of modernisation. It was argued by the REIV that this practice does not occur anymore and that such an area was already regulated by legislation concerning the financial services sector found in the Corporations Act 2001<sup>26</sup>

PROVISION	VIC	NSW	SA	QLD	TAS	ACT	NT	WA
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<p> blishment of  ated selling price on  ement prescribed  num advertising  . </p>	<p> s.47A-D  EAA </p>		<p> s.21, 24  SA Act </p>					
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<b>PROVISION</b>	<b>VIC</b>	<b>NSW</b>	<b>SA</b>	<b>QLD</b>	<b>TAS</b>	<b>ACT</b>	<b>NT</b>	<b>WA</b>
<b>1. Deposit should not exceed ten per cent.</b>	s.9AA SOLA							
<b>2. Deposit should be paid to legal practitioner, conveyancer, and licensed estate agent acting for the vendor or held in a special purpose account in the joint name of the vendor and purchaser.</b>	s.9AA SOLA							
<b>3. A legal practitioner must not act for both the vendor and purchaser under a terms contract.</b>	Part 1, Division 4, SOLA							
<b>4. Vendor statement must be given to the purchaser before they sign the contract.</b>	s.32 SOLA							

**5. Allows expression of interest deposits**

s.5  
NSW Act

8.2.3  
Agents  
Regs  
2003

### **(e) Cooling off periods**

There is a high potential for harmonisation regarding cooling off periods with Victoria, New South Wales, South Australia, Queensland and Tasmania already having such provisions in place. However, there is variation regarding the duration of the cooling off period ranging from one day in NSW to five days in QLD. There is a consensus that money paid out on the contract must be returned to the purchaser, although this varies from all money returned to the vendor being able to retain \$100 or 0.2-0.25% of the purchase price. Victoria, SA, QLD and Tasmania also have circumstances in which the cooling off period does not apply. In Victoria, South Australia and Tasmania cooling off periods do not apply to property sold at publicly advertised auction or when a similar contract has previously been entered into. A cooling off period also does not apply in Victoria and South Australia when independent legal advice has been sought or when purchased for commercial purposes. In Queensland, cooling off periods can be shortened or waived. The Victorian model incorporates a cooling off period which represents the middle ground in terms of duration and most of the common exemption features and the amount of money to be refunded. It is argued that the Victorian arrangement could be recommended as a best practice model, which presents few impediments in the harmonisation process.

PROVISION	VIC	NSW	SA	QLD	TAS	ACT	NT	WA
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1.

**(f) Termination**

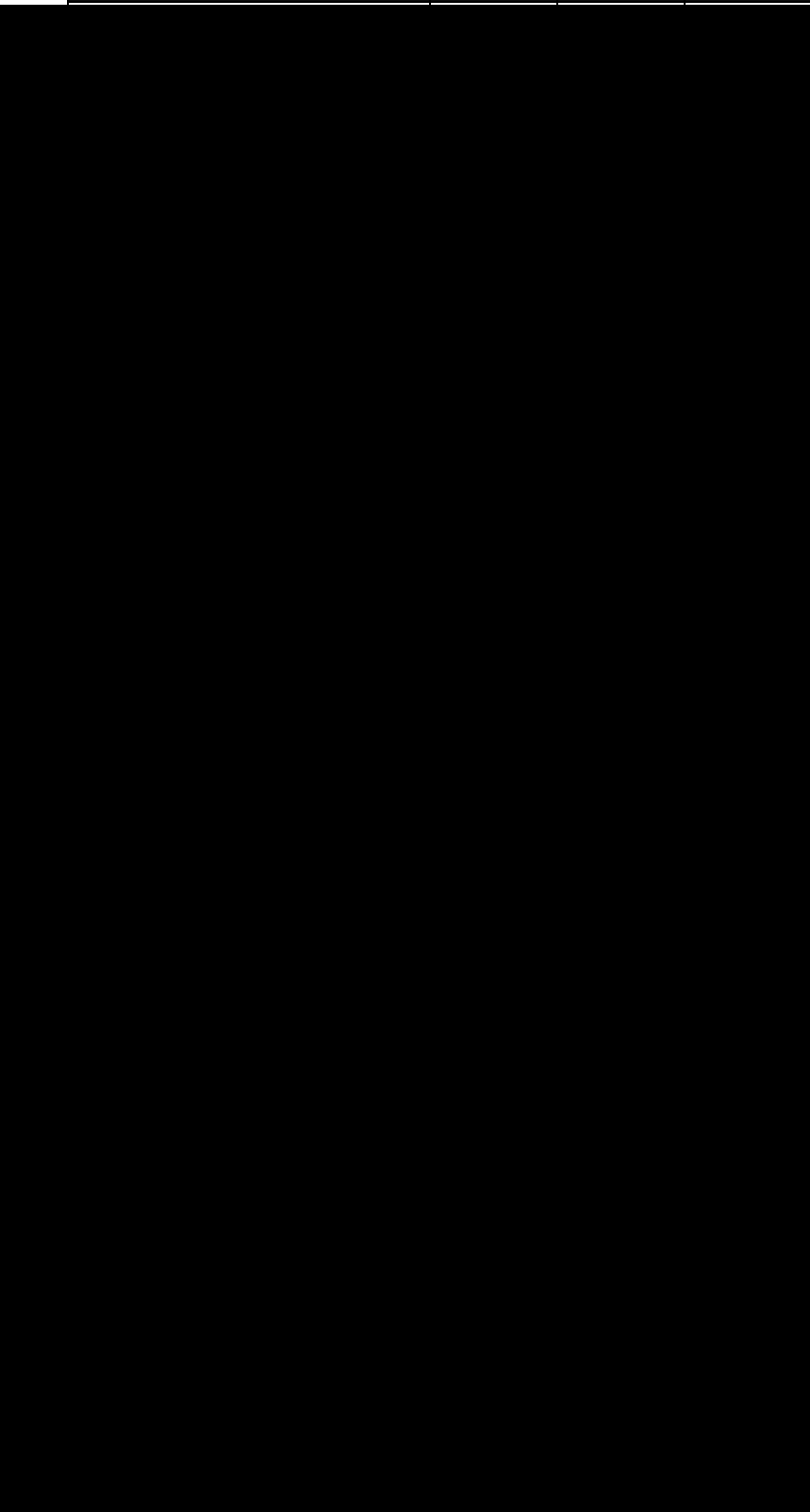
Victoria is the only jurisdiction to feature provisions allowing for a contract to be avoided due to deficiencies in vendor’s statements. New South Wales and South Australia both have provisions regarding agents not retaining commission on rescinded contracts. Queensland features a provision concerning the purchaser being able to rescind the contract in the event of damage to the house (to the extent that is unfit for habitation) before the completion of the contract. In addition, Queensland has guidelines about the amount of notice a vendor must give the purchaser if rescinding the contract and can be required to pay compensation to the purchaser in the event of the termination of a contract. The Council would support the Victorian provisions being incorporated into harmonised conduct provisions dealing with the termination of a contract.

PROVISION	VIC	NSW		QLD	TAS	ACT	NT	WA
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**(g) Void contracts or unfair terms**

The use of unfair contract terms and false and misleading information have been incorporated into the Australian Consumer Law, thus to a certain extent this harmonisation process has already occurred. Such developments at the Commonwealth level are most welcome and replicate existing arrangements in Victoria.

PROVISION	VIC	NSW	SA	QLD	TAS	ACT	NT	WA



PROVISION	VIC	NSW	SA	QLD	TAS	ACT	NT	WA
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1. Disclosure requirements  
via prescribed  
statements.

s.32  
SOLA  
s.51-52  
EAA

<b>PROVISION</b>	<b>VIC</b>	<b>NSW</b>	<b>SA</b>	<b>QLD</b>	<b>TAS</b>	<b>ACT</b>	<b>NT</b>	<b>WA</b>



PROVISION	VIC	NSW	SA	QLD	TAS	ACT	NT	WA
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**1. Able to avoid contract**

s.51-52  
EAA  
s.32  
SOLA  
s.32 ZA,  
s.32ZC-D  
FTA

**(m) Defences**

In South Australia, it is a defence if it shown that a purchaser received independent legal advice prior to entering into a contract; this also excludes cooling off periods from applying in both South Australia and Victoria. Furthermore, it is a defence in SA if a waiver has been signed or the offence was committed unintentionally. Such a provision seeks to offer redress to consumers who have not waived their rights or are equipped with legal advice and penalise agents who have purposely committed an offence not those who have done so inadvertently. The Council has no real problem with such an arrangement given that it seeks to protect vulnerable consumers and focus on penalising agents who have acted wrongly with intent rather than in error.

Victoria and Tasmania also have provisions in which a contract cannot be rescinded if the court finds that the vendor acted honestly and

PROVISION	VIC	NSW	SA	QLD	TAS	ACT	NT	WA
1. Not entitled to commission or expenses		s.55 NSW Act  If services not performed as per agency agreement within 48 hours of being signed.						

2. Defence if independent legal advice received, waiver signed or offence was committed

## 9.2 AGENCY AGREEMENTS

### (a) Requirement for agency agreements

The Victorian provisions stating that an agent cannot receive their commission or recover any outgoings unless a signed agency agreement is in place are useful<sup>30</sup>. Similarly, provisions in place in Tasmania, Western Australia and the Northern Territory are valuable in clarifying that agency agreements must be in writing. No impediment is posed by the addition of such provisions.

The Council would also support provisions that agents must not retain rebates and must pay them to the client such as found in Victoria and South Australia being replicated nationally.

Victoria, South Australia, Tasmania and the Australian Capital Territory all have provisions concerning the period after which an agency agreement expires. All except Victoria have a period of ninety days, with the agreement able to cease if thirty days notice in the ACT. It would appear that Victoria's thirty days after an auction and sixty days in other circumstances is out of step with the national standard.

The Council considers that the Victorian provision concerning vendors being informed of any commissions or outgoings paid using trust money within seven days to be an important provision in terms of transparency, which should be featured in the conduct provisions of other jurisdictions.

The Council is less interested in provisions regarding estimated selling prices found in Victoria and South Australia being replicated as the focus should be on the false and misleading conduct/ representation that can be dealt with through fair trading legislation.

Mandatory provisions such as those found in New South Wales and South Australia, which require an approved guide to be distributed to a person before signing an agency agreement, seem unnecessary given the amount of information available to consumers regarding buying and selling real estate. The Council is also not sure whether there is a need to have regulation about warning statements but as with sentiments expressed above regarding approved guides, this is well meaning enough but perhaps unnecessary. Such provisions do not pose any impediments but would not be recommended as being part of a best practice model.

Overall there is considerable scope for harmonisation despite some jurisdictional differences.

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<sup>30</sup> The REIV applauded the sentiment contained in this statement which represents good estate agency practice but stated that technically an agency agreement only needed to be in place by the time the sales transaction was finalised (Lowenstern, April 2010, opcit).

<b>PROVISION</b>	<b>VIC</b>	<b>NSW</b>	<b>SA</b>	<b>QLD</b>	<b>TAS</b>	<b>ACT</b>	<b>NT</b>	<b>WA</b>

**1. Agent cannot claim**

**(b) Conflicts of interest**

There is consistency regarding agents not entering into an agency agreement whereby there is a conflict of interest or sufficient disclosure occurring around any personal or commercial relationship. This area is not viewed as problematic in terms of harmonisation.

PROVISION	VIC	NSW	SA	QLD	TAS	ACT	NT	WA
<b>2. Agent must not enter into agency agreement if there is a conflict of interest or must disclose any personal/commercial relationship or rebate.</b>	Reg. 12 Profess Conduct Regs	Schedule 1 NSW Regs	t	Reg.17 & 26 QLD Regs	t s.22 TAS Act			s.64 WA Act

**(c) Disclosure requirements**

The Council would recommend that the Victorian provision concerning prescribing the form in which rebates and commission sharing must be disclosed in agency agreements should be included in a best practice model as it encourages transparency. The REIV and ALPA both contended during the consultation process that there was a need to simplify the current Victorian model of disclosing rebates. It was also suggested that there was room for improvement regarding section 48 of the EAA concerning the notification of commission sharing, which is currently an administrative burden for industry practitioners (particularly those working in the regions). The Council would support modernising such provisions in order to reduce the regulatory burden on business provided that adequate disclosure and consumer protection was featured.<sup>31</sup>

Furthermore, it is suggested that provisions stating that rebates cannot be retained such as in New South Wales, South Australia and Tasmania also be replicated in harmonised conduct provisions. There is relative uniformity regarding the principles associated with disclosure in agency agreements.

<sup>31</sup> Lowenstern, REIV and McIntyre, ALPA, opcit.

<b>PROVISION</b>	<b>VIC</b>	<b>NSW</b>	<b>SA</b>	<b>QLD</b>	<b>TAS</b>	<b>ACT</b>	<b>NT</b>

<b>PROVISION</b>	<b>VIC</b>
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The Council thanks the following people for their contribution to this paper through the consultation process:

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Brett Philipp, Licensed Estate Agent/ Auctioneer, Noel Jones (Balwyn)  
Toni Planinsek, Officer in Effective Control, Planinsek Property Group  
Julie Valetic, Broker/Owner, Lets Get Real Estate  
John Walter, Commercial Real Estate Consultant

## **11. Contract and Agency Agreement Conduct Provisions –An Impediment to the Operation of a National Licence?**

### **11.1 Contracts**

In terms of forms of contracts, requirements that contracts should be clear and legible and free of unfair contract terms have been incorporated into the Australian Consumer Law. Differences exist between the states and territories in terms of enabling estate agents to fill in a standard contract and only being able to advertise a property once a contract is available for inspection. While these both have the potential to be impede agents operating across borders to a certain extent, there is enormous potential for harmonisation and thus it is not viewed as so problematic that it would undermine the operation of a national licence.

Victoria and South Australia feature estimated selling prices as part of agency agreements, whereas other states and territories focus more on price requirements in terms of substantiating false or misleading representations. It is expected that the operation of provisions within the ACL relating to false and misleading statements will increasingly address such an area rather than industry specific acts so this is not expected to pose problems.

The size of deposits for the sale of land while regulated differently does not vary much so it is not seen as detrimental in terms of agents operating across borders. It is anticipated that the payment of the deposit to a lawyer, conveyancer, the vendor's agent or paid into a special purpose account in the joint names of the parties will be addressed as part of the broader consideration of trust accounting.

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### **11.3 Conclusion**

The Council's next paper as part of this research project will focus on management, supervision, and behavioural standards within conduct provisions. To a certain extent, this area may expose more significant impediments to the operation of a national licence than an examination of contracts and agency agreement conduct provision, which have similar parameters, and may engage more discussion in terms of the consultation process.

The virtual office is another area that warrants discussion arising out of national licensing and opening up borders. In the area of contract and agency agreement conduct provisions signing parties to agency agreements and contracts, the service of documents, inspection of documents, disclosure and payment of deposits are all worthy of substantial consideration beyond what is possible in this paper.

It is the finding of this paper that while there is a need for the national harmonisation of conduct provisions as part of the national licensing scheme process that there are no significant impediments posed to agents operating across borders in terms of contracts or agency agreements.