



ESTATE AGENTS COUNCIL

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

**REPORT ON
STANDARDS AND BEHAVIOUR
AND
MANAGEMENT AND SUPERVISION**

JULY 2010

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1. EXECUTIVE SUMMARY

This paper considers the areas of standards and behaviour, management and supervision concerning property agents throughout Australia and contains a list of recommendations by the Council in regards to the national harmonisation of conduct provisions.

It is anticipated that the Council's work will be incorporated into the broader work program of harmonising specific conduct provisions for property occupations being undertaken for the Standing Committee of Officials Consumer Affairs (SCOCA) at the request of the Ministerial Council of Consumer Affairs (MCCA).

The criteria used for assessing the feasibility of harmonising conduct provisions have been the implications for consumers and the industry, consideration of jurisdictional differences, whether having such industry specific provisions replicates provision in fair trading legislation and what overall represents best practice.

Standards and Behaviour

The Feasibility of Harmonising Conflict of Interest Conduct Provisions

The Feasibility of Harmonising Conflict of Interest Conduct Provisions

There is some consistency with regard to conduct provisions addressing conflicts of interest in property agent legislation throughout Australia and thus there is potential for harmonisation. All jurisdictions have provisions concerning agents, their employees and relatives not obtaining beneficial interest in a property they are commissioned to sell. Similarly, in all states and territories an offence is not committed if disclosure of the nature of conflict of interest is provided to the client and authorised in written form. However, Victoria and South Australia are the only jurisdictions where approval by the regulator is required before the agent can act in a conflict of interest situation. The Council considers this additional element of conflict of interest disclosure worthy of further consideration as part of the harmonisation process.

Most jurisdictions (except NSW and ACT) do not allow for agents retaining commission in such circumstances with Victoria and the Northern Territory also not allowing for the acceptance of the title. It is recommended that such a provision be incorporated into a best practice model as an agent should not be financially rewarded by the client when they have not acted in the best interests of the principal.

The ACT, NSW and SA are the only jurisdictions to feature a provision specifically prohibiting an agent acting for both the vendor and purchaser. The Council sees merit in such an approach but shares the concerns of the REIV regarding any detrimental impact posed to those operating or using estate agency services in small regional areas by such provisions. The Council would support a model, which enabled the principal to grant permission to waive this protection in certain circumstances, similar to the principle in place regarding section 55 of the EAA. Alternatively, it could be determined that a breach has not occurred if an agent who represents both parties demonstrates that they have acted in accordance with good estate agency practice and the principal is in as good a position as if the provision had been adhered to, which reflects the model applied in section 29W of the SOLA.

there is a need to replicate narrow false and misleading representation provisions in property agent conduct legislation. This seems unnecessary given that such wide fair trading principles are already addressed in the Australian Consumer Law, which applies to all businesses, including estate agencies, and operates nation wide. That being said the Council would welcome any provisions put in place that provided the marketplace with greater clarity regarding price representation and views substantiation clauses as an important mechanism to keep estate agency practitioners accountable for the representations they make to consumers.

Conclusion

The Council concludes that the conduct provisions addressing standards and behaviour, that is conflicts of interest, rebate requirements, ethical conduct, advertising and false representations, contain a degree of consistency throughout the jurisdictions as well as posing some interesting issues worthy of further consideration. An important opportunity exists to adopt the best practice elements of the various jurisdictions and consider whether there is a need to feature provisions in industry specific legislation concerning advertising and false statements, or this would be perhaps be better handled by deferring to such provisions under the Australian Consumer Law.

Management and Supervision

The Feasibility of Harmonising Place of Business/ Office Provisions

There is a high potential for the harmonisation of conduct provisions concerning the establishment of the registered office and management and supervision of the place of business.

The concept of the registered office location, whether the principal or branch office, and need to provide the authority of any change in address details is consistent throughout most jurisdictions. There is also a fair degree of uniformity concerning branch offices having a licensed estate agent in charge of the day-to-day management of the office, although South Australia allows for sales representatives to take on this role under certain circumstances and providing an estate agent is responsible for the maintenance of the trust account. As stated in the Modernising the Estate Agents Act 1980 Final Report (October 2009), the Council considers the establishment of the registered office to be a significant provision in terms of consumer protection, but worthy of further consideration in the context of the virtual office and the operation of national licensing across borders.

The Council would advocate a best practice model incorporating key features of the respective Victorian and Tasmanian Acts. Specifically sections 29B of the EAA in terms of management and supervision of the estate agency office, incorporating proper supervision, adequate processes being in place and ensuring employees comply with the law. Section 7 of the TAS Act also features a useful emphasis on responsibility for the activities of the estate agency office rather than necessarily full time attendance by the licensee. This position was supported by the REIV, ALPA and participants in the consultation meeting.

In summary, the Council views the harmonisation of provision concerning the establishment of the registered office and management and supervision of the place of business to be entirely feasible and of critical importance.

The Feasibility of Harmonising Unlicensed Employees Conduct Provisions

While there is a degree of consistency across jurisdictions regarding provisions about disqualified persons being employed by, licensees and the proper supervision of unlicensed employees key questions must be asked. To an extent, this area is dependent on how agent's representatives or real estate salespersons are classified under the National Licensing Scheme. For example in contrast to other jurisdictions Victoria has a negative licensing scheme for agent's representatives. In addition, conduct provisions about the proper management and supervision of the estate agency office already exist and it must be considered whether thion r

audited. However, thought needs to be given when adopting a best practice model to how keeping documents at the place of business fits with the concept of the virtual office and electronic storage of documents in an environment with estate agents doing business across jurisdictional borders. The Council also views enshrining provisions regarding processes for the maintenance of electronic records to be extremely important as did the REIV, ALPA and other participants at the EAC Working Group Consultation Meeting (23 July 2010). Victoria, Queensland and South Australia have such arrangements in place regarding electronic trust account records requiring regular backing up and retention of such back up material off-site. A best practice model would have to incorporate such provisions addressing electronic documentation, which would also modernise legislation that at times still struggles to come to terms with the emergence of technology in the estate agency office.

There is variation regarding the number of years records are required to be retained, from seven years in Victoria, five years in both the Australian Capital Territory and South Australia to just three years in New South Wales. The Council argues that it may be useful to have a longer timeframe for the retention of documents such as in Victoria because sometimes trust account deficiencies or offences, which become known through the auditing of records, cannot be detected for some time. Seven years is also model applied by the Australian Tax Office regarding the retention of records and thus this should be adopted as an appropriate benchmark¹.

As suggested in the Council's Modernising the Estate Agents Act 1980 Final Report (October 2009), provisions mandating the retention of a log of employee details such as in Victoria, Queensland and Tasmania seem unnecessary. Employee information is provided to the licensing authority, appears on the public register and would presumably be retained as part of general business processes, so it is not immediately clear why there is a need to have such provisions in industry specific legislation. The Council would recommen-4.iTD0.00yvisiprovisionswc
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business and systems need to be put in place to accommodate such periods. It is not clear why an estate agency office requires industry specific regulation to address such a routine

2. RELEVANT LEGISLATION

Commonwealth

Trade Practices Amendment (Australian Consumer Law) Act 2010 (“ACL”)

Australian Capital Territory

Agents Act 2003 (ACT) (“ACT Act”)
Agents Regulations 2008 (ACT) (“ACT Regulations”)
Fair Trading Act 1992 (ACT) (“FTA ACT”)
Fair Trading (Consumer Affairs) Act 1973 (ACT)

New South Wales

Property, Stock and Business Agents Act 2002 (NSW) (“NSW Act”)
Property, Stock and Business Agents Regulations 2003 (NSW) (“NSW Regulations”)
Fair Trading Act 1987 (NSW) (“NSW FTA”)

Northern Territory

Agents Licensing Act (NT) (“NT Act”)
Agents Licensing Regulations 1979 (NT) (“NT Regulations”)
Consumer and Fair Trading Act 2008 (NT) (“FTA NT”)

Queensland

Property Agents and Motor Dealers Act 2000 (QLD) (“QLD Act”)
Property Agents and Motor Dealers Regulations 2001 (QLD) (“QLD Regulations”)
Property Agents and Motor Dealers (Real Estate Agency Practice Code of Conduct) Regulations 2001 (QLD) (“QLD Code of Conduct Regulations”).
Property Law Act 1974 (QLD) (“PLA QLD”)
Land Sales Act 1984 (QLD) (“LSA QLD”).
Fair Trading Act 1989 (QLD) (“FTA QLD”)

South Australia

Estate Agents (Professional Conduct) Regulations 2008 (SA)
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) (“LAA”)
Land Agents Regulations 1995 (SA) (“LAR”)
Law of Property Act 1936 (SA)
Legal Practitioners Regulations 2009 (SA)
Fair Trading Act 1987 (SA) (“FTA SA”)
Fair Trading (General) Regulations 1999 (SA) (“FTA SA Regulations”)

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 (TAS) (“CLPA TAS”)
Fair Trading Act 1990 (TAS) (“FTA 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 (Professional Conducts) Regulations 2008 (VIC) (“VIC PC Regulations”)
Estate Agents (General, Account and Audit) Regulations 2008 (VIC) (“VIC Audit Regulations”)
Fair Trading Act 1999 (VIC) (“FTA”)

Western Australia

Real Estate and Business Agents Act 1978 (WA) (“WA Act”)

Real Estate and Business Agents (General) Regulations 1979 (WA) (“WA Regulations”)

Property Law Act 1969 (WA) (“PLA WA”)

Auction Sales Act 1973 (WA) (“ASA WA”)

Strata Titles Act 1985 (WA) (“STA WA”)

Fair Trading Act 1987 (WA) (“FTA WA”)

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. The commencement of the national licensing scheme for the first wave of occupations including property agents is 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.

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. 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.

5. STANDARDS AND BEHAVIOUR CONDUCT PROVISIONS REGULATING PROPERTY AGENTS THROUGHOUT AUSTRALIA

This paper will consider the following five key elements of conduct provisions, which address standards and behaviour in legislation relevant to estate agency practitioners:

- **Conflict of interest** – preventing agents or their associates from obtaining a beneficial interest in a property that they been commissioned to sell without sufficient disclosure occurring.
- **Ethical behaviour** – requiring agents or representatives to have knowledge of the relevant laws governing estate agency practice, act in the best interests of the client, not disclose confidential information obtained while acting as agent and generally displaying professional standards representing good estate agency practice.
- **Advertising** – requiring the contact details of an agent or representative to be featured on all published material so that practitioners are accountable for claims made in advertising,

6. A SNAPSHOT OF CONFLICT OF INTEREST CONDUCT PROVISIONS REGULATING PROPERTY AGENTS THROUGHOUT AUSTRALIA

Introduction

There are provisions in the legislation of each Australian jurisdiction regulating property agents, which seeks to address the issue of conflicts of interest. This is an important area in terms of preventing estate agency practitioners from using knowledge acquired when conducting their business to gain unfair advantage over consumers. Other consumer protection features addressing conflicts of interest found in such provisions include agent disclosure about any possible beneficial interest, the repaying of commission in such circumstances, the inability of an agent to act for both the vendor and seller and rules concerning rebates. These provisions are also important for the industry in terms of establishing clear guidelines about what constitutes good estate agency practice, such as acting in the best interests of the client, and safeguards for avoiding conflicts of interest that are potentially damaging to the integrity of the profession and most importantly to consumers.

Victoria

The Estate Agents Act 1980 (EAA) features important consumer protection mechanisms regarding any possible conflict of interest by the estate agent, their staff, relatives or any third parties who have a beneficial interest in the sale of land transaction proceeding.

The EAA addresses conflict of interest issues with an agent not permitted to purchase (directly or indirectly) any real estate or business that they have been commissioned to sell. This prevents agents from seeking unfair advantage over the vendor because of their inside knowledge about the property and explains the need to have a vendor approval process for any conflict of interest situation. In addition to any penalties imposed by the court, those found in breach of such provisions can be required to transfer the title or all profits resulting from the purchase to the client. An estate agent cannot charge or will be required to repay the commission paid in the event of contravention of the provision. Provisions also apply to those with a beneficial interest, defined as the estate agent, estate agency employees or alternatively their domestic partner, parent, sibling or child. This ensures that neither the agent, their staff or relatives can seek to gain from conducting themselves in a manner that is not transparent (s.55, EAA).

Conflict of interest provisions do not apply to a person who is a shareholder but not an employee of an estate agency corporation. The rationale being that an average shareholder does not have any knowledge that they could use to commercial advantage when purchasing a property, unless they were for example a company director. However, there is inconsistency in the provision regarding beneficial interest applying to an agent or employee or their close family members who are a member of a corporation, which could be seen to contradict the omission of shareholders⁴. Such provisions do not apply to estate agency employees if they are not licensed estate agents or agent's representatives. This would presumably be in order to exclude clerical staff who are not carrying out estate agency business and therefore do not have any inside knowledge that they could use in the market place.

Provisions regarding beneficial interest also do not apply if the client is informed of the relationship that may be perceived as a conflict of interest in writing and the required

⁴ The REIV has raised this anomaly during the consultation process for the Council's last two papers, Modernising the Estate Agents Act 1980 (October 2009) and Impediments to the Operation of a National Licence Contained in Conduct Provisions –Research Project, Report on Contracts and Agency Agreements (May 2010).

documentation has been submitted to the Director for approval within seven days of being signed. The objective of such a provision is to allow for exceptions to conflict of interest provisions providing that there is full disclosure to the regulator, transparency and no consumer detriment posed by such a transaction proceeding (s.55, EAA). This is an important element of the provision of the EAA dealing with conflict of interests and represents a key difference between arrangements in Victoria and other jurisdictions. Indeed, it could be argued that this represents best practice.

In addition the Estate Agents (Professional Conduct) Regulations 2008 (VIC PC Regulations) state that an estate agent or agent's representative must always act in a client's best interest except where it would be unlawful, unreasonable, improper or contrary to the principal's instructions to do so. An estate agent or agent's representative must not act for a person where to do so would place the agent's interest in conflict and must disclose any personal or commercial relationship when recommending a supplier of goods or services to a client. Such a provision establishes what constitutes appropriate behaviour in accordance with good estate agency practice (r. 12 and r.20, VIC PC Regulations).

Australian Capital Territory

The Agents Act 2003 (ACT) ("ACT Act") prohibits an agent from acting for both the buyer and vendor of a property and in doing so seeks to prevent a rather obvious conflict of interest occurring (s.77, ACT Act). A similar principle exists in the Sale of Land Act 1962 (SOLA) in Victoria concerning a legal practitioner being unable to represent both parties to a contract (s.29W, SOLA).

An agent or salesperson who is acting for either a vendor or buyer of land must disclose precontract information before the principal enters into a contract in relation to the land. The client should provide written acknowledgement that they have received this precontract information (s.84-85, ACT Act). Precontract information is defined as any personal or business relationship that may present a conflict or beneficial interest, including the use of referrals or rebates (s.81, ACT Act).

In addition, an agent commits an offence if the agent or salesperson acts for a vendor of land and intentionally obtains a beneficial interest in the land or is in any way involved in someone else obtaining a beneficial interest in the land. However, the provision does not apply if before the interest is obtained the agent fully discloses to the seller the circumstances surrounding the obtaining of the beneficial interest and the seller agrees in writing in the prescribed form to the obtaining of interest. In such circumstances, the seller does not pay the agent any commission or reward for the sale of land (s.86-87, ACT Act).

The Agents Regulations 2008 (ACT) ("ACT Regulations") also 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 interest (Schedule 8, 8.12, ACT Regulations).

The basic principles of conflicts of interest, beneficial interest, adequate disclosure and the agent acting in the best interests of the client are similar in both the ACT Act and ACT Regulations and provisions found in the EAA and PC Regulations in Victoria. The fundamental difference between the two jurisdictions would be that while the ACT legislation requires disclosure to the seller, such information must be lodged with the regulator in Victoria.

New South Wales⁵

The Property, Stock and Business Agents Act 2002 (NSW) (“NSW Act”) features an identical provision to the ACT Act prohibiting a licensee from acting for both parties to the property transaction (s.48, NSW Act). The Property, Stock and Business Agents Regulations 2003 (NSW) (“NSW Regulations”) also does not permit the agent to recommend the use of the services of a solicitor or licensed conveyancer if they know that they are acting for the other party to the contract (r.13, NSW Regulations).

Under the NSW Act, an agent must disclose to the client for whom they are acting any personal or commercial relationship they have with anyone the agent refers the client to regarding professional services associated with the sale or purchase of a property. The agent must also detail to the client any monetary or other benefit they expect to receive regarding such referrals. The NSW Regulations also prevent an agent from falsely representing that they are independent of a service provider that they have referred the client to if this is not the case (r.12, NSW Regulations). As is the case in both Victoria and the ACT there is the provision for the agent to disclose such conflicts of interest in the prescribed form, which in this instance must also be acknowledged in writing by the client and provided at the time that the referral to such professional services is made (s.47, NSW Act).

An agent or salesperson must not obtain or be involved in obtaining any beneficial interest in a property (which constitutes buying a property or seeking the option to purchase the property). It is not an offence if disclosure has occurred in the prescribed form, the agent or salesperson has acted fairly and honestly, no commission has been sought and the client consent to such arrangements have been obtained. A person with a beneficial interest is defined as a person or close relative⁶ or alternatively such a person or close relative in certain circumstances. Such circumstances would include when they are member of a large corporation⁷, an executive officer of a corporation, the trustee of a discretionary trust of which they are a beneficiary, a member of a firm or partnership or when they are able to participate (directly or indirectly) in the income or profit of a business (s49, NSW Act). Such an arrangement is similar to that in place in Victoria, with the difference that estate agency employees, other than salespersons, are not addressed concerning conflicts of interest as in the case in the EAA.

The NSW Regulations require agents to act in the client’s best interests at all times unless to do so would be unlawful and not to accept an appointment to act if it would place the agent’s interests in conflict with the interests of the client (r.6, r.11, NSW Regulations). This replicates arrangements in place in the regulations in both Victoria and the ACT and reiterates the principles of good estate agency practice.

Northern Territory

The Agents Licensing Act (NT) (“NT Act”) also requires that an interested party must not purchase, directly or indirectly, or be beneficially interested in the purchase of, land or a business from a person who they are acting for as an agent⁸. A person found guilty of such an

⁵ At the EAC Working Group Consultation Meeting, ALPA noted that they viewed the NSW Model as a simpler and more effective model of addressing conflict of interest issues.

⁶ Close relative means current or former spouse or domestic partner, child, grandchild, sibling, parent or grandparent.

⁷ A corporation of not less than a hundred persons.

⁸ An interested party is defined as a licensed real estate or business agent, a registered agent’s representative, an employee of a licensed estate or business agent or a person who holds themselves out

offence must repay the principal all profits (including commission received) and must transfer the title of the land unless there is an agreement to the contrary. Such provisions do not apply if the land is purchased by a shareholder or creditor of a publicly listed or prescribed corporation, the agent acted honestly and reasonably, the principal is in as good a position as if a breach had not occurred or disclosure guidelines have been followed (s.108G, NT Act). . The NT Act requires that an interested party must provide the full details of their intention to buy, sell or acquire a beneficial interest and acknowledge in a statement that by virtue of their relationship with the principal they may have gained information which may place them in a position of advantage (s.108H, NT Act). The importance of full disclosure is also stressed in the Agents Licensing Regulations 1979 (NT) (“NT Regulations”) (r.65, NT Regulations).

Queensland

Under the Property Agents and Motor Dealers Act 2000 (QLD) (“QLD Act”), a residential property agent must disclose any personal or commercial relationship they have with someone that the agent refers a potential buyer to for professional services. A residential property agent is defined as a real estate agent, real estate salesperson acting for the real estate salesperson or a person carrying out estate agency business despite not being a licensed real estate agent or registered real estate salesperson. The agent must also detail the nature and value of the benefit the agent will derive from such a referral. This disclosure must be given to the prospective buyer in the approved form, acknowledged by the prospective buyer in writing on the approved form and provided before entering a contract for the sale of the residential property (s.138, QLD Act).

A real estate agent or salesperson employed by the real estate agent commits an offence if the agent obtains from the client an option to purchase the property in which the agent or salesperson has a beneficial interest. A real estate agent or salesperson is also not permitted to sell a property in which they have a beneficial interest (s.144, QLD Act). However, there are circumstances where an agent or salesperson does not commit an offence in obtaining a beneficial interest in the property. These would include acquiring a client’s written acknowledgment in the approved form that the client is aware of and consents to the person obtaining the interest, vouches that the practitioner has acted fairly and honestly in relation to the sale, no commission has been paid and the client is in as substantially as good position as if the property were sold at fair market value ⁹(s.145, QLD Act). If a commission has not been returned in such circumstances the court must order the person to pay the amount to the client and may determine that an additional penalty will be imposed (s.145A, QLD Act)¹⁰.

South Australia

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

obtaining, or be in any way concerned in obtaining, a beneficial interest in the land or business. Beneficial interest is defined as a person or their associate purchasing land or a business, obtaining an option to purchase land or a business or being granted a general power of appointment in respect of land or a business. An associate means the spouse, relative, employee, a trustee of a trust who the person is the beneficiary of or any other person the agent or sales representative has a notable relationship with (s.24G, SA

Western Australia

Under the Real Estate and Business Agents Act 1978 (WA) (“WA Act”) an agent or sales representative shall not have, directly or indirectly, any interest, other than in their capacity as an agent, in any transaction in which they act as agent, unless the principal has given prior written consent. A court may order a person convicted of such an offence to pay over to agent’s principal any profit made from the transaction (s.64, WA Act). WA features similarities to other jurisdictions regarding the handling of conflict of interest issues, in terms of returning profits to the client and the importance of disclosure.

Conclusion -The Feasibility of Harmonising Conflict of Interest Conduct Provisions

There is some consistency with regard to conduct provisions addressing conflicts of interest in property agent legislation throughout Australia and thus there is potential for harmonisation. All jurisdictions have provisions concerning agents, their employees and relatives not obtaining beneficial interest in a property they are commissioned to sell. Similarly, in all states and territories an offence is not committed if disclosure of the nature of conflict of interest is provided to the client and authorised in written form. However, Victoria and South Australia are the only jurisdictions where approval by the regulator is required before the agent can act in a conflict of interest situation. The Council considers this additional element of conflict of interest disclosure worthy of further consideration as part of the harmonisation process¹².

Most jurisdictions (except NSW and ACT) do not allow for agents retaining commission in such circumstances with Victoria and the Northern Territory also not allowing for the acceptance of the title. It is recommended that such a provision be incorporated into a best practice model as an agent should not be financially rewarded by the client when they have not acted in the best interests of the principal¹³.

The ACT, NSW and SA are the only jurisdictions to feature a provision specifically prohibiting an agent acting for both the vendor and purchaser. The Council sees merit in such an approach but shares the concerns of the REIV regarding any detrimental impact posed to those operating or using estate agency services in small regional areas by such provisions¹⁴. The Council would support a model, which enabled the principal to grant permission to waive this protection in certain circumstances, similar to the principle in place regarding section 55 of the EAA. Alternatively, it could be determined that a breach has not occurred if an agent who represents both parties demonstrates that they have acted in accordance with good estate agency practice¹⁵ and the principal is in as good a position as if the provision had been adhered to, which reflects the model applied in section 29W of the SOLA.

¹² Stephen Morgan, Ray White Echuca, supported the importance of Director approval where there is a beneficial interest rather than just the disclosure model in place in NSW. EAC Working Group Consultation Meeting, 23 July 2010.

¹³ In addition to such financial disincentives, it should be noted that under s.81 of the Crimes Act 1958 it is an offence to obtain property by deception. In 2009 a Victorian estate agent was sentenced to three years in jail for such an offence for deceiving an elderly man as to the value of his house that the agent later purchased aware that the value of the house was twice what the agent paid the vendor.

(<http://www.theage.com.au/national/deceptive-real-estate-agent-wins-jailterm-cut-20091116-ihvz.html>)

¹⁴ Peter Lowenstern, EAC Working Group Consultation Meeting, 23 July 2010.

¹⁵ The Australian Livestock and Property Agents Association (ALPA) stressed the importance of the adherence of good estate agency practice and representing the interests of the principal in such circumstances where an agent represents both parties. Shane McIntyre, EAC Working Group Consultation Meeting, 23 July 2010.

Victoria, NSW, the ACT and Tasmania also feature additional principles in their legislation stating that the agent must act in the best interests of their clients and must not accept an appointment to act when to do so would place the agent's interests in conflict with that of the client. The Council considers such a provision important to replicate nationally as it sums up the essence of good estate agency practice and the agent or salesperson's obligations regarding conflicts of interests. In summary the harmonisation of conduct provisions, concerning conflicts of interest is feasible.

7. A SNAPSHOT OF ETHICAL BEHAVIOUR CONDUCT PROVISIONS REGULATING PROPERTY AGENTS THROUGHOUT AUSTRALIA

Introduction

There are provisions in the legislation of each state and territory regulating property agents, which seek to establish the ethical behaviour expected of estate agency practitioners. This is an important area in terms of consumer protection regulation and ensuring that the industry upholds appropriate standards. Common themes emerge under the banner of ethical behaviour in the various statutes. These would include expecting agents or those conducting estate agency business to have an understanding of the law that regulates their activities, which is a fairly basic professional competency that ensures consumers can have faith that an agent acting on their behalf is complying with the legislative framework. Furthermore, agents are expected to uphold general principles of acting fairly and honestly and professional standards in terms of exercising due care, skill and diligence. Agents are expected to comply with the instructions of their client, communicate all offers, act in the best interests of their principal and not disclose any confidential information acquired. This clearly establishes the relationship between the agent and client and what consumers can expect when they engage the services of an estate agent. Overarching fair trading principles also apply in terms of agents not engaging in misleading or unconscionable conduct, which seek to protect the interests of consumers. In summary fair trading principles, transparency and fundamental professional standards –such as knowledge of the law, confidentiality and representing the interests of the client – govern estate agency practitioners operating throughout Australia.

Victoria

implying that a rebate or commission will be received in return for the contract being made (s.18, FTA). The FTA seeks to protect consumers by establishing ethical conduct by businesses by prohibiting practices that would constitute undesirable estate agency practice and encouraging transparency.

Australian Capital Territory

The Australian Capital Territory is similar to Victoria in requiring licensed estate agents to have knowledge and understanding of the legislation relevant to carrying out their functions as an agent (s.8.2, Schedule 8, ACT Regulations). In addition, the ACT Regulations require that an agent acts honestly, fairly and professionally, must not mislead or deceive any parties in negotiations or a transaction or offer any inducements (s.8.4, 8.15, Schedule 8, ACT Regulations). The agent is also required to exercise reasonable skill, care and diligence, not engage in unconscionable conduct and always act in the best interests of the client unless to do so would be unlawful (s.8.5-7, , Schedule 8, ACT Regulations). The ACT Regulations require that an agent must not disclose any confidential information obtained while acting on behalf of a client, act in accordance with the terms of their authority to act and the instructions of the client and must keep the principal informed of all offers (s.8.8-10, 8.22, Schedule 8, ACT Regulations). Victoria and the ACT have remarkably similar provisions regarding ethical behaviour with an emphasis on agents acting in the best interest of the client and displaying all the characteristics than

acting in the role of agent, induce any breach of contract or engage in unconscionable conduct¹⁶.

Conclusion -The Feasibility of Harmonising Ethical Behaviour Conduct Provisions

There is widespread consistency amongst the provisions addressing ethical behaviour of estate agents and representatives throughout the various jurisdictions, with the exception of South Australia. Provisions in South Australia focus more on issues associated with conflicts of interest rather than the common themes found in the legislation of the other jurisdictions. That being said this difference in approach in South Australia does not pose any significant impediments to the harmonisation of conduct provisions as overall the legislation reflects the broader principles of fair trading and good estate agency practice which are common to all Australian jurisdictions.

Victoria, New South Wales, the Australian Capital Territory and Queensland all have a provision requiring estate agency practitioners to have an understanding and knowledge of the to the law relevant to their business activities, including fair trading principles. The Council views this provision to be of critical importance in any best practice model and does not consider it to be inconsistent with the general sentiments regarding ethical behaviour expressed in other statutes which do not feature a specific provision regarding knowledge of the law. The REIV and Tenants Union of Victoria (TUV) also stress the overall importance of knowledge of law provisions¹⁷.

All jurisdictions except for South Australia and Queensland have provisions prohibiting agents or representative from disclosing confidential information they have acquired while conducting estate agency business on behalf of a client¹⁸. Such a provision ties into arrangements already in place regarding conflict of interest and in terms privacy legislation. It is recommended that such a clause be incorporated into a best practice model proposed under the harmonisation of conduct provisions. However, it must be acknowledged that an agent is also bound by the instructions of the client as well as relevant legislation (for example, a practitioner is not able to make false or misleading representations in responding to enquiries which would require them to disclose confidential information¹⁹).

¹⁶ Real Estate and Business Agents Supervisory Board Code of Conduct -

There is uniformity found amongst the states and territories (with the exception of South Australia) regarding featuring a provision which states that an agent or representative must act in accordance with the instructions of the client and the best interests of the principal. Victoria, the Australian Capital Territory, Queensland and Western Australia also feature a provision directing agents or representatives to communicate all offers to the client²⁰. Both provisions are important in terms of clarifying the obligations of the agent to the client and thus should be featured in a best practice model, it is not envisaged this would pose any impediments to the overall task of harmonising conduct provisions.

The vast majority of jurisdictions feature provisions requiring agents or representatives to act fairly and honestly and exercise due skill, care, diligence and general standards of professional conduct. These are important principles to enshrine in the professional conduct or code of conduct regulations, which should be featured in any best practice model given their value and that they are common to virtually all state and territories²¹.

The Council also recommends that provisions regarding not knowingly inducing a person to breach a contract and not permitting agents or representatives to engage in unconscionable conduct are important safeguards to incorporate into a best practice model. Such provisions already feature in most jurisdictions regarding contractual obligations and ethical behaviour as well as state and territory fair trading legislation, although one could suggest that perhaps this represents legislative duplication.

In summary, the Council finds that there are no impediments posed to the harmonisation of conduct provisions concerning the ethical behaviour of agents and representatives as there is widespread consistency and much value to be gained from adopting a best practice model incorporating knowledge of the law, confidentiality, professional standards and fair trading requirements.

Table – Summary of Ethical Behaviour Conduct Provisions in Estate Agency Legislation in Australia

PROVISION	VIC	ACT	NSW	NT	QLD	SA	TAS	WA
Agent or representative to have knowledge of law.	J r.6 VIC PC Regs	J s.8.2 ACT Regs	J Sched. 1 NSW Act and Regs		J r.5 QLD Code of Conduct			
Agent or representative not to disclose confidential information obtained while acting as agent or representative and ascertain all relevant information.	J r.7, r.15, & r.23 VIC PC Regs	J s.8.8 ACT Regs	J Sched. 1 NSW Act and Regs	J s.65 NT Act			J r.45 TAS Regs	J s.101 WA Act r.13 WA Regs
Agent or representative to act in accordance with lawful instructions and best interests of the client.	J r.10, r.18, r.12 & r.20 VIC PC Regs	J s.8.9, 8.10 & 8.7, ACT Regs	J Sched. 1 NSW Act and Regs	J s.65 NT Act	J r.9-10 QLD Code of Conduct		J r.45 TAS Regs	J s.101 WA Act r.13 WA Regs
Agent or representative to communicate offers to client.	J r.16 & r.24 VIC PC Regs	J s.8.22 ACT Regs		Tc0u-1.153	J r.15 QLD Code of Conduct	TJ002	Tw(8.10 &)	J s.101 WA Act r.13 WA Regs

Agent or representative to act fairly, and honestly.

PROVISION	VIC	ACT	NSW	NT	QLD	SA	TAS	WA
Agent or representative to not knowingly induce a person to breach a contract.	J r.14 & r.22 VIC PC Regs	J 8.15 ACT Regs			J r.28 QLD Code of Conduct			J s.101 WA Act r.13 WA Regs

Agent or representative not to use harassment,

8. SNAPSHOT OF ADVERTISING CONDUCT PROVISIONS REGULATING PROPERTY AGENTS THROUGHOUT AUSTRALIA

Introduction

The provisions of the respective jurisdictions are remarkably similar regarding advertising. There is a requirement that estate agency advertising must feature the contact details of the person publishing the material. This ensures that consumers have a means of identifying the source of such published material and that agents are accountable for statements they make in advertising. Furthermore, there are provisions sometimes in the industry specific legislation

Northern Territory

The NT Act is similar to both Victoria and New South Wales in terms of requiring the name and address details of an estate agent to feature on all published advertising material (s.119, NT Act). The Northern Territory like New South Wales also features a provision in their fair trading legislation, which specifically addressed false and misleading representation with regard to land (s.45, FTA NT). Such provisions provide for transparency in advertising material and maintain fundamental fair trading principles.

Queensland

In Queensland a real estate agent who is a principal licensee must not publish, or permit to be published, in a newspaper or elsewhere an advertisement for the agent's business without stating in the advertisement the particulars that may be prescribed under regulation (s.158, QLD Act)²³. There is also a provision in state fair trading legislation that addresses false and misleading representation regarding land transactions, which would be pertinent to advertising requirements (s.40A, FTA QLD). Again, there is much common ground between the jurisdictions regarding advertising provisions.

South Australia

In South Australia, the Land Agents Act 1994 (LAA SA) requires that an agent must not publish, or cause to be published, an advertisement relating to the sale of land or a business unless the advertisement specifies, alongside the agent's name or contact details, the agent's registration number preceded by the letters "RLA".(s.48A, LAA SA).

The SA Act also establishes a prescribed minimum advertising sales price for residential transactions, which mandates that any price representation featured in advertising, must reflect the range stated as the agents likely selling price (s.24, SA Act).

The LAA states that a person must not make a statement that is false or misleading (s.54, LAA SA), which is also reflected in state fair trading legislation which features a specific provision regarding representation and conduct concerning land (s.59, FTA SA). The FTA SA also grants the Commissioner the power to write to a person requesting that they substantiate claims made in published material concerning the sale or letting of premises (s.42, FTA SA).

South Australian legislation is similar to other jurisdictions in terms of requiring agents to feature information that can identify them on published material, although it is more specific in terms of requiring a registration number but less prescriptive regarding what constitutes the agent's contact detail (which presumably means that a website address could be deemed acceptable). . SA has additional provisions concerning substantiating claims made in advertising and prescribing price representations made in published material.

Tasmania

In Tasmania, a real estate agent who publishes an advertisement in connection with his or her real estate agency business must ensure that the advertisement contains the real estate agent's

²³ Similar provisions also exist in the QLD Act regarding residential letting agents (s.123), pastoral houses (s.195), property developers (s.273) and commercial agents (s.352).

name and the address of his or her authorised place of business (s.27, TAS Act)²⁴. A real estate agent also must not publish information that the agent knows falsely states that a particular property or business is available for sale or lease or generally contains a false or misleading statement or representation (s.29, TAS Act)²⁵. False and misleading representations regarding land are again addressed in state fair trading legislation (s.17, FTA TAS). Again, provisions in Tasmania concerning advertising reflect similar arrangements in place in other Australian jurisdictions.

Western Australia

Under the WA Act, authorised advertising must contain sufficient details to identify the agent or developer in question and failure to feature such information in published material is considered grounds for avoiding a contract (s.62, WA Act). Fair trading legislation in WA also prohibits false representations regarding land (s.13, FTA WA).

Conclusion -The Feasibility of Harmonising Advertising Conduct Provisions

The potential for the national harmonisation of conduct provisions concerning advertising is extremely high. There is widespread consistency because of uniform state and territory fair trading legislation addressing false or misleading representations/statements made in published material, which also manifests itself in similar provisions in estate agency legislation. At the national level the Australian Consumer Law (s.30, Trade Practices Amendment (Australian Consumer Law) Act 2010) addresses false and misleading representations concerning land. Rather than query whether there is the potential for harmonisation of conduct provisions addressing false and misleading conduct in the estate agency specific industry legislation of the various jurisdictions, perhaps the question is whether such provisions are necessary given that such an area is already addressed in the Australian Consumer Law (ACL). The REIV supports this stance contending that the ACL which applies to all businesses should also bind estate agency businesses rather than industry specific legislation²⁶.

Similarly, while there is a high potential for harmonisation regarding conduct provisions requiring that advertisements must feature the contact details of the agent publishing the

Table – Summary of Advertising Conduct Provisions in Estate Agency Legislation in Australia

Provision	VIC	ACT	NSW	NT	QLD	SA	TAS	WA
Advertising material must feature estate agent contact details.	J s.42 EAA s.29 FTA		J s.50 NSW Act	J s.119 NT Act	J s.158 QLD Act	J s.48A LAA SA	J s.27 TAS Act s.23 FTA TAS	J s.62 WA Act
False or misleading representations/statements are prohibited, including in advertising material.	J s.42 EAA s.9, s.12, s.20 FTA	J s.14 FTA ACT	J s.51 NSW Act s.45 FTA NSW	J s.45 FTA NT	J s.40A FTA QLD	J s.54 LAA SA s.59 FTA SA	J s.29 TAS Act s.17 FTA TAS	J s.13 FTA WA

9. A SNAPSHOT OF REBATE REQUIREMENT CONDUCT PROVISIONS REGULATING PROPERTY AGENTS THROUGHOUT AUSTRALIA²⁷

Introduction

The disclosure of rebates obtained by the agent or representative from any party other than the client is important in terms of transparency, which benefits both the consumer and the professional standards of the industry. Estate agents are not permitted to retain any rebates from third parties, which ensures that no additional monetary benefit is derived from a property transaction other than the commission paid by the vendor stated in the agency agreement meaning that the onus is on the agent to act in the client's best interests rather than being motivated by further possible financial gain. However, there is provision for agents disclosing rebates in the prescribed form, except in Victoria, which unilaterally prevents the retention of rebates, which ensures consumer confidence and overall transparency.

Victoria

An estate agent engaged or appointed to do any estate agency work for a client is not entitled to retain any amount the agent receives from another person as a rebate and on receiving, any amount must immediately pay the sum to the client (s.48A, EAA). An estate agent must not seek to obtain an amount for any outgoings from the client that is more than the amount paid, or payable, by the agent for those expenses. If it is not possible to determine the final amount payable for any outgoings, the agent may estimate the amount and must immediately pay any difference between the estimate and the amount paid by the agent to the client (s.48B, EAA). An estate agent must detail any outgoings in the prescribed rebate statement, including the name of the person and amount involved, which must be approved by the Director (s.49A, EAA). A person who on three or more separate occasions within any period of twelve months engages in conduct that constitutes an offence against provisions regarding rebates is guilty of an offence (s.48D, EAA).

New South Wales

The NSW Act states that an agency agreement must disclose rebates, discounts and commissions. Furthermore, a licensee is not entitled to any expenses from a person in connection with services performed by the licensee concerning a real estate transaction unless such expenses are contained in a statement that identifies the source and estimated amount of any rebates, discounts or commissions. This provision does not apply to commercial real estate transactions (s.57, NSW Act).

Northern Territory

The Northern Territory addresses rebates in the broader context of general rules of conduct in terms of requiring agents to disclose all material facts and circumstances and prohibiting the acceptance or demanding of payment for service from anyone other than the principal (s.65, NT Act). Such provisions tie into sentiments regarding avoiding conflict of interest and providing for adequate disclosure to ensure transparency.

²⁷ Comparable provisions for the Australian Capital Territory, Queensland and Western Australia have not been identified regarding rebate requirements.

South Australia

In South Australia an agent must disclose to the client the nature, source and amount of any benefit the agent receives from a third person to whom the agent has referred the client, or with whom the agent has contracted, for the provision of services associated with the sale or

Table – Summary of Rebate Requirement Conduct Provisions in Estate Agency Legislation in Australia

Provision	VIC	ACT	NSW	NT	QLD	SA
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10. A SNAPSHOT OF FALSE AND MISLEADING STATEMENTS OR REPRESENTATION CONDUCT PROVISIONS REGULATING PROPERTY AGENTS THROUGHOUT AUSTRALIA

Introduction

Provisions that do not permit false or misleading representation are a fundamental element of not only estate agency statutes, but also more broadly fair trading legislation, which applies to all businesses operating across Australia. Such provisions are important in terms of ensuring that consumers can have faith in the claims made by estate agency practitioners and are protected from deceptive conduct. They are also critical in terms of maintaining the professional standards of the industry.

Victoria

The EAA, FTA and Sale of Land Act 1962 (SOLA) prescribe ethical conduct and industry standards regarding false and misleading misrepresentation²⁹. The Act addresses this in terms of the estimated selling price stated on the engagement to sell (s.47A, EAA) and any subsequent representations made to buyers and sellers (s.47B, s.47C, EAA), all of which need to be able to be substantiated (s.47D, EAA). In addition, the SOLA prohibits the promise or publication of any statement that is misleading or deceptive with the view of inducing a person to buy land (s.12, SOLA). The FTA outlaws misleading and deceptive conduct generally, in relation to services and false representations made regarding services (s.9, s11, s.12, FTA). The use of bait advertising, accepting payment without supplying the services or misleading representations about certain business activities are specifically prohibited under the FTA (s.17, s.19, s.20, FTA). Consumer documents are required to be clearly expressed, legible and not contain false or misleading statements, while the supplier must provide a purchaser with a document containing the particulars of the services (s.161, s.163, FTA). Such provisions establish fundamental fair trading principles for those specifically working in the estate agency sphere through the industry specific acts and more broadly for all businesses through consumer protection legislation.

Australian Capital Territory

Under the ACT Act agents or representatives are not permitted to make false representations to buyers or sellers about the estimated selling price and must be able to substantiate any-7.3()]

New South Wales

The NSW Act prohibits agents or representatives from making false or misleading representations regarding the estimated selling price to either buyers or sellers during the marketing of a residential property (s.72-73, NSW Act). Agents and representatives can be required to substantiate published price representations (s.74, NSW Act). Estate agency practitioners are also not permitted to use misleading, false or deceptive conduct to induce a person into entering into a contract (s.52, NSW Act). Broad state fair trading legislation also addresses misleading and false representations generally and specifically regarding land (s.42, s.44, s.45, FTA NSW). These NSW provisions are similar to those found in Victoria and the Australian Capital Territory.

Northern Territory

The rules of conduct under the NT Act prohibit an agent or representative from publishing false or misleading statements, which are likely to deceive, or publishing price representations, which are higher or lower than the price authorised by the principal (s.65, NT Act). In the FTA NT addresses misleading and deceptive conduct as well as false and misleading representations regarding land (s.42, s.45, FTA NT). While the NT Act is not as prescriptive as some of the statutes in other jurisdictions it contains the same fair trading principle of outlawing false and misleading representation in both its industry specific and fair trading legislation.

Queensland

Under the QLD Act, a licensee or registered employee must not engage in conduct that is misleading or make a false or misleading representation about the price payable for the property, any aspect of the letting, exchange or sale of property or regarding the promotion of

Again, there are stylistic differences between the various statutes but widespread uniformity regarding the intention of the respective provisions.

Western Australia

In accordance with the Western Australian Code of Conduct, an agent must act fairly and honestly, not knowingly mislead or deceive any parties in negotiations or during a transaction

Table – Summary of False and Misleading Statements or Representation Conduct Provisions in Estate Agency Legislation in Australia

Provision	VIC	ACT
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nominate a manager for each branch office (s.37, WA Act). The board must approve franchising agreements and each party to the agreement is jointly and severally liable for any defalcation by the licensee (s.56, WA Act).

Conclusion -The Feasibility of Harmonising Place of Business/ Office Provisions

There is a high potential for the harmonisation of conduct provisions concerning the establishment of the registered office and management and supervision of the place of business.

The concept of the registered office location, whether the principal or branch office, and need to provide the authority of any change in address details is consistent throughout most jurisdictions. There is also a fair degree of uniformity concerning branch offices having a licensed estate agent in charge of the day-to-day management of the office, although()9 Tc5(y)-ititioncritows

Table – Summary of Place of Business/ Office Conduct Provisions in Estate Agency Legislation in Australia

PROVISION	VIC	ACT	NSW	NT	QLD	SA	TAS	WA
Registered office	J s.35 EAA	J s.68 ACT Act	J s.28 NSW Act	J s.110 NT Act	J s.156 QLD Act		J s.7-8 TAS Act	J s.36 WA Act
Change in office details to be provided to the authority in writing.	J s.35 EAA	J s.68 ACT Act	J s.28 NSW Act	J s.110 NT Act	J s.157 QLD Act			J s.36 WA Act
Licensed estate agent in charge of branch office	J s.30 EAA	J s.69-71 ACT Act	J s.13 NSW Act			J s.8A-9 LAR	J s.7-8 TAS Act	J s.37 WA Act
Estate agency office to be properly managed and supervised	J s.29B EAA					J s.10-11 LAA	J s.7-8 TAS Act	

Australian Capital Territory

Under the ACT Act it is an offence for a licensed estate agent, business agent or stock and station agent to employ an unlicensed or deregistered person to perform estate agency functions, which can only be undertaken by a licensed practitioner (s.75, ACT Act). Employees are also obliged to inform their employer within five days of being notified about any disqualification (s.76, ACT Act).

New South Wales

In NSW, a licensee cannot employ a person in connection without carrying out estate agency business on their behalf if they are disqualified, had their licence or certificate of registration cancelled or suspended or had their application refused on the grounds that they were not considered to be a fit or proper person (s.43, NSW Act). An employee must notify their employer of any disqualification within seven days and the licensee must inform the Director-General in writing within seven days of becoming aware that a person in their employment has been disqualified (s.44-45, NSW Act).

A licensee is responsible for the supervision of the registered salesperson as well as in contract and tort for the activities of their employee within the scope of their authority or functions performed for the benefit of the estate agency business (s.11, s.41, NSW Act).

Queensland

In Queensland, a licensee must not employ an unregistered salesperson (s.164, QLD Act). Furthermore, the principal or licensee must ensure that the salesperson must be properly supervised, complies with the requirements of the Act and acts within their employment authority (s.129, QLD Act)³⁴

Western Australia

A licensee commits an offence if they have in their employment a person who has had their licence or certificate of registration cancelled, unless granted permission by the Board (s.106, WA Act).

Conclusion -The Feasibility of Harmonising Unlicensed Employees Conduct Provisions

While there is a degree of consistency across jurisdictions regarding provisions about disqualified persons being employed by, licensees and the proper supervision of unlicensed employees key questions must be asked. To an extent, this area is dependent on how agent's

15. A SNAPSHOT OF RECORD KEEPING CONDUCT PROVISIONS REGULATING PROPERTY AGENTS THROUGHOUT AUSTRALIA³⁷

Introduction

This section focuses on provisions requiring record keeping as part of the management of an estate agency business, rather than addressing trust account procedures in any detail³⁸. The maintenance of documentation concerning real estate transactions, employees and trust account monies at the place of business that are available for inspection or audit seeks to ensure that appropriate processes are in place and produce transparency and accountability in the estate agency office, which ultimately prevents consumer detriment.

Victoria

A number of record keeping processes must be adhered to as prescribed by the Act. An estate agent must keep any police report obtained in relation to an agent's representative for at least two years after the agent's representative ceases to be employed by the agent in that capacity (s.16 (7)). Estate agents are also required to keep a monthly written log of the name, work, salary and commissions of employees, which can be demanded for inspection and false entries in employee statements will be classified as an offence (s.46). In addition, an estate agent must keep all documents, including trust accounts and records, relating to the business carried on at the office available for inspection or audit (s.70B) and must not destroy, conceal or alter any document required to be retained for the purposes of the Act (s.98A). Records required to be kept by the Act or regulations must be maintained for seven years after the date when they were created (s.98). Finally the Act grants the power to make regulations prescribing the books, accounts, documents and records to be kept by licensed estate agents and agent's representatives and the manner in which they are to be kept and for what time period (s.99 (1) (d)).

Australian Capital Territory

The ACT Act requires that an estate agent must record details of each transaction conducted, maintain any records prescribed by regulation and retain records for five years (s.127, ACT Act). Records must be kept at the place of business unless the Fair Trading Commissioner (s.128, ACT Act) approves an alternative location. Receipts must be given to the person paying trust money, while an agent must retain a copy of the receipt, this provision does not apply to electronic transfers (s.130, ACT Act).

New South Wales

The NSW Act requires that records must be retained for three years and maintained at the licensee's registered office unless the estate agent ceases to trade at which time they must authorise the possession, custody and control of the record to another person (s.104, NSW Act).

³⁷ Specific provisions were not identified for the Northern Territory regarding record keeping.

³⁸ The Council understands that a substantial amount of work has already been done regarding this area by the Working Group reporting to SCOCA, so it does not feel the need to duplicate work in this area.

Queensland

The QLD Act requires that the principal licensee maintain an employee register, specifying each person's role and activities within the estate agency office (s.159, QLD Act). A similar provision applies to pastoral houses (s.196, QLD Act). A principal licensee must also keep a register of trust account receipt forms, trust account deposit forms in duplicate, trust account cash book and trust account journal of consecutively numbered folios (r.38, QLD Regulations). The principal licensee must ensure that if records are kept electronically the computer system has enough capacity and back up capability to record the information required to be kept under the Act, is backed up at least once a month and that back up information is kept at a location other than the principal place of business and is adequately stored (r.56, QLD Regulations).

South Australia

In South Australia, trust accounts must be kept in a state that can be easily audited and agents must provide receipts to persons paying trust money in addition to retaining a duplicate copy (s.21, LAA). If trust account records are maintained electronically copies must be made with twenty four hours of any alteration being made and a back up copy must be completed once a week, which must be stored at a location other than the place of business (r.10A, LAR, r.20, SA Regulations). More generally, the SA Act requires that documents are retained at the place of business for five years and are readily available for inspection (s.37A, SA Act, s.21, LAA).

Tasmania

Under the TAS Act, a real estate agent is required to keep a record of employees, in terms of their contact and employment details and function within the estate agency office (s.13, TAS Act). A similar provision applies to property management employees (s.14, TAS Act).

Western Australia

Under the WA Act, a developer is required to keep records of real estate transactions (s.59, WA Act). A real estate agent must provide a person paying trust money with a receipt in addition to retaining a duplicate copy (s.69, WA Act).

Conclusion -The Feasibility of Harmonising Record Keeping Conduct Provisions

There are jurisdictional differences regarding record keeping, but in general, there is agreement regarding the basic concept that an estate agency must keep the prescribed documentation regarding real estate transactions and trust money, which can be inspected or audited. However, thought needs to be given when adopting a best practice model to how keeping documents at the place of business fits with the concept of the virtual office and electronic storage of documents in an environment with estate agents doing business across jurisdictional borders. The Council also views enshrining provisions regarding processes for the maintenance of electronic records to be extremely important as did the REIV, ALPA and other participants at the EAC Working Group Consultation Meeting (23 July 2010). Victoria, Queensland and South Australia have such arrangements in place regarding electronic trust account records requiring regular backing up and retention of such back up material off-site. A best practice model would have to incorporate such provisions addressing electronic documentation, which would also modernise legislation that at times still struggles to come to terms with the emergence of technology in the estate agency office.

There is variation regarding the number of years records are required to be retained, from seven years in Victoria, five years in both the Australian Capital Territory and South Australia to just three years in New South Wales. The Council argues that it may be useful to have a longer timeframe for the retention of documents such as in Victoria because sometimes trust account deficiencies or offences, which become known through the auditing of records, cannot be detected for some time. Seven years is also model applied by the Australian Tax Office regarding the retention of records and thus this should be adopted as an appropriate benchmark³⁹.

As suggested in the Council's Modernising the Estate Agents Act 1980 Final Report (October 2009), provisions mandating the retention of a log of employee details such as in Victoria, Queensland and Tasmania seem unnecessary. Employee information is provided to the licensing authority, appears on the public register and would presumably be retained as part of general business processes, so it is not immediately clear why there is a need to have such provisions in industry specific legislation. The Council would recommend that such provisions were not incorporated into a best practice model as part of the national harmonisation of record keeping conduct provisions.

In summary, the Council sees potential for harmonisation of record keeping provisions with agreement about the general principle of the retention of documents concerning real estate transactions and trust money for a period of seven years. However, it argues that more work needs to be done to incorporate features like the electronic record keeping and give greater thought to document storage beyond the place of business.

³⁹ The REIV, ALPA and other participants at the EAC Working Group Consultation Meeting, 23 July 2010, supported the retention of records for seven years.

Table – Summary of Record Keeping Conduct Provisions in Estate Agency Legislation in Australia

PROVISION	VIC	ACT	NSW	NT
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16. A SNAPSHOT OF ACTION RE ABSENCE CONDUCT PROVISIONS REGULATING PROPERTY AGENTS THROUGHOUT AUSTRALIA

Introduction

Victoria features a unique provision regarding notifying the authority of the short-ar8gmiber 20.4262 -1.1

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as an unnecessary administrative burden with no real benefits. This position was supported by the REIV, ALPA and other participants in the EAC Working Group Consultation Meeting (23 July 2010).

Table – Summary of Action RE Absence Conduct Provisions in Estate Agency Legislation in Australia

PROVISION	VIC	ACT	NSW	NT	QLD	SA
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18. CONSULTATION PROCESS

In December 2009, the Council wrote to consumer and industry stakeholders and distributed an Estate Agents Council Bulletin to all Officers in Effective Control in Victoria outlining this research project and asking for expressions of interest in participating in the consultation process.

On 23 July 2010, the Council Working Group⁴⁰ met with the Real Estate Institute of Victoria (REIV), Australian Livestock Property Agents Association (ALPA), individual estate agents and other interested parties for feedback regarding a draft version of this paper on standards and behaviour and management and supervision. Overall, those participating in the consultation meeting were supportive of the Council's findings in this paper and welcomed national licensing and harmonisation of conduct provisions.

The majority of feedback received at this forum has been incorporated into the body of this report⁴¹.

The Council thanks the following people for th

