

## ***Regulation of Auctioneers***

### **National Competition Policy Legislation Review *Auctioneers Act***

**This Report has been prepared by the Northern Territory NCP Review Team for the *Auctioneers Act*. Any views or propositions in this Report should not be taken as representing the view of the Northern Territory Department of Justice or the view of any arm of the Northern Territory Government.**

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## **1. Purpose of this Report**

This report has been prepared for the purposes of assessing the merits of any anti-competitive provisions contained in the *Auctioneers Act*. It has been prepared to meet the obligations of the Northern Territory under the Competition Principles Agreement.

## **2. Summary of Findings, Recommendations and Proposed Outcomes**

The Review Team found that:

- The *Auctioneers Act* contains anti-competitive provisions.
- The restrictions pertaining to the licensing system for auctioneers and auctioneers clerks are outdated and can no longer be justified in light of the competition policy.
- The objective of the Act is to ensure that consumers and businesses have, in respect of auctions, appropriate choices, are provided with safe products and services, that they have a right to be heard in respect of auctioneering services, products and regulation and that they have a right to receive appropriate advice in respect of those matters.
- Some objectives of the Act remain relevant and justify the retention of certain restrictions or regulation of Auctioneers with respect to the conduct of auctions and keeping of records which can be set out in a negative licensing system through an Industry Code of Practice (made under Part 13 of the *Consumer Affairs and Fair Trading Act*).
- Consideration needs to be given to imposing some requirements on Auctioneers in relation to the handling of trust moneys and trust accounting.

### **3. Terms of Reference**

The Chief Executive Officer of the Northern Territory Department of Justice has specified the following as being the terms of reference in respect of the National Competition Policy Reviews of legislation affecting auctioneers:

1. The review of the *Auctioneers Act* shall be conducted in accordance with the principles for legislation review set out in the Competition Principles Agreement. The underlying principle for such a review is that legislation should not restrict competition unless it can be demonstrated that:
  - (1) The benefits of the restriction to the community as a whole outweigh the costs; and
  - (2) The objective of the legislation can only be achieved by restricting competition.
2. Without limiting the scope of the review, the review is to:
  - (1) Clarify the objectives of the legislation, their continuing appropriateness and whether the *Auctioneers Act* remain appropriate for securing those objectives;
  - (2) Identify the nature of the restrictive effects on competition;
  - (3) Analyse the likely effect of any identified restriction on the economy generally;
  - (4) Assess and balance the costs and benefits of the restrictions identified; and
  - (5) Consider alternative means for achieving the same results, including non-legislative approaches.
3. When considering the matters referred to in clause 2 of these terms of reference, the review should also:
  - (1) Identify any issues of market failure which need to be, or are being addressed by the legislation; and
  - (2) Consider whether the effects of the legislation contravene the competitive conduct rules in Part IV of the *Trade Practices Act 1974* and the Northern Territory Competition Code.

The Review Team shall consider and take account of relevant regulatory schemes in other Australian jurisdictions and any recent reforms or reform proposals, including those relating to competition policy in those jurisdictions.

This Report has been provided by a Review Team (see Part 4).

#### **Legislative Provisions Covered by this Report**

The Report covers the *Auctioneers Act*.

## **4. Background**

### **4.1 Competition Policy**

#### National Competition Policy Agreements

On 11 April 1995, the Northern Territory Government, with the Commonwealth, State and Australian Capital Territory Governments agreed to adopt the National Competition Policy (NCP) and signed three specific agreements relating to the implementation of the policy. These agreements are:

#### Competition Principles Agreement

This agreement, amongst other things, imposes on all governments (the Commonwealth, the six States and the two self-governing Territories) an obligation to review and, if necessary, reform all legislation, which restricts competition for which they are responsible.

#### Conduct Code Agreement

This agreement creates various controls for the purpose of ensuring that, as a general rule, government businesses are subject to the same competition rules as privately owned businesses. Effectively, government agencies, corporations, professional bodies and natural persons shall be subject to Part IV of the *Trade Practices Act 1974* or its equivalent in place under State or Territory law.

#### Agreement to Implement the National Competition Policy and Related Reforms

The Agreement to Implement the NCP and Related Reforms provides a timetable for reform and for the making of payments by the Commonwealth to the States and the Territories, in respect of appropriate progress in the making of the national competition reforms.

#### Rationale for Competition Policy Reforms

The underlying rationale for the NCP is that of ensuring that markets are free to operate without any unnecessary regulatory restrictions. It is also about improving the efficiency of the public sector. NCP is based on the idea that greater competition will increase the incentive for producers:

- (a) to use their resources more efficiently (thus achieving greater productivity);
- (b) to increase their efforts to constrain costs and thus be in a position to reduce prices; and
- (c) to be in a better position to be more responsive to user's demands.

However, increasing competition is put forward as a mechanism for the improvement of the general standard of living. It is not an end in itself. Increased competition is only to be adopted in so far as it increases public benefit overall.

### **4.2 The National Competition Policy and Competition Principles Agreements**

The purpose of the review of the *Auctioneers Act* has been to identify any anti-competitive provisions contained within the Act make recommendations to Government on whether these restrictions should be retained and whether the objectives of the Act could be achieved in an alternative and less restrictive way.

The presumption of the review has been that competition should not be restricted unless it can be shown that restrictions are necessary to achieve social objectives such as consumer protection, or to correct market failure and those objectives can only be achieved by restricting competition.

The review of the Act stems from the Northern Territory Government's commitment to the National Competition Policy (NCP). This policy addressed the efficacy of regulation of the private sector. In particular, it argued for benefits arising from moving towards a less regulated market system.

Competition in a market encourages the efficient allocation of the economy's productive resources. Competitive markets help provide services at least cost, and are responsive to changes in technology and the demands of consumers. On the other hand, regulation may be justified when markets fail.

NCP requires that all Acts and subordinate legislation that may inhibit competition should be reviewed and where necessary, reformed by the end of the 2001.02 financial year. The guidelines for review are contained in the Competition Principles Agreement.

The guiding principle under Clause 5(1) of the Competition Principles Agreement is that:

“legislation should not restrict competition unless it can be demonstrated that:

- (i) the benefits of restriction to the community as a whole outweigh the costs; and,
- (ii) the objectives of the legislation can only be obtained by restricting competition”.

### **4.3 The Competition Review Processes**

Six main steps have been followed to review the potentially anti-competitive provisions of the Act. They are:

1. to identify the objectives of the *Auctioneers Act*.
2. to identify any current provisions of the *Auctioneers Act* which are anti-competitive, and to identify any proposals for change that may have that effect.
3. to analyse the likely effect of the restrictions on competition and on the economy generally.
4. to apply the public benefit test - assess and balance the costs and the benefits of the restriction.
5. to consider alternative means for achieving the same result including non legislative means.
6. to assess whether there are changes that should be made to the *Auctioneers Act* for the purposes of:
  - (a) reducing any unjustified anti-competitive operation;
  - (b) improving the operational efficiency and effectiveness of the Act.

The review has enquired into whether there is a need to regulate auctioneers and if regulation is necessary, what the requirements of such regulation are.

#### **4.4 Reviewers**

The Review Team responsible for the finalisation<sup>1</sup> of this Report comprised:

##### **Members**

- Robert Bradshaw - Department of Justice
- Joelle Richardson - Northern Territory Treasury
- Philomena Jewell - Department of the Chief Minister

##### **Research and writing**

- Jim Laouris - Department of Justice

Members of the affected industries are not part of the Review Team because they have an interest in the outcome. The industry involvement in the review and the professional expertise for the Review came from the consultation part of the process.

#### **4.5 Nature of Review: Public Review**

In accordance with NCP requirements, members of industry have been consulted throughout the process.

A consultative paper prepared by the Department of Industries and Business was distributed in October 1999, under explanatory letter to all 132 licensed auctioneers and also to the key stakeholder groups, the Real Estate Institute of the NT (REINT), the Motor Trades Association (MTA) and the Consumer Affairs Council (CAC).

Advertisements informing the public of this review and inviting submission were placed in the NT News and regional newspapers. Sufficient time was allocated for consultation and submissions. Late submissions were accepted.

The paper outlined the key issues that had been identified up to the time of its release and suggested the options for legislative reform. All interested stakeholders have had the opportunity to make their views known.

#### **4.6 Summary of Submissions**

A summary of responses grouped under each issue raised in the Paper is at Appendix 1.

It should be noted that the submissions that were received were generally from industry. There were no submissions received from interest groups or consumers other than from the Consumer Affairs Council.

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<sup>1</sup> A different Review Team conducted the great bulk of the preliminary work over the period September 1999 – December 2001. This review Team was organised by the former Department of Industries and Business and was comprised of officers of its Strategic Planning and Policy Division. The final Review Team acknowledges the work of its predecessor.



Generally the submissions favoured:

- the retention of the licensing system;
- separate auctioneers licences not being required for persons who are selling land or motor vehicles by auction and hold a relevant real estate agent or motor vehicle dealer's licence;
- the imposition of trust accounting requirements and standards for auctioneers; and
- abolishing the licensing and regulation of auctioneer's clerks.

#### 4.7 Other National Competition Principles Reviews of Laws Relating to Auctioneers

The Competition Policy Agreement obligates States and Territories to identify anti-competitive legislative provisions and to then conduct a review. The proposed interstate reviews for the purposes of the Competition Policy Agreement and the summary status of them are as set out in the following table:<sup>2</sup>

##### National Competition Policy Reviews Elsewhere in Australia

State/Territory	Legislation	Current position
NSW	<i>Property Stock and Business Agents Act</i>	The final report was completed in mid 2000. The review process is not complete. The Final report and related legislative proposals are awaiting cabinet approval.  It should be noted however that the Act does not establish a licensing regime for auctioneers. The Act imposes some general requirements and standards on auctioneers such as not misrepresenting items to be sold by auction etc.
Victoria	<i>Auction Sales Act</i>	The review is complete but the consequential legislation has not commenced as at 30 April 2002.
Queensland	<i>Auctioneers and Agents Act</i>	The review is complete but legislative amendments have yet to be made to the Act.
Western Australia	<i>Auction Sales Act</i>	The review is complete but has not yet been endorsed by Cabinet.
South Australia	<i>No Act</i>	Auctioneers are not regulated except where regulated under another Act (eg <i>Land Agents Act</i> ).
Tasmania	<i>Auctioneers and Real Estate Agents Act</i>	A draft final report has been released for comment.
Australian Capital Territory	<i>Auctioneers Act</i>	The review is complete, however legislation repealing the Act has not been made as at 30 April 2002.

<sup>2</sup> Some information is taken from *Legislation Review Compendium 3<sup>rd</sup> Edition*, December 1999, National Competition Council.

## 4.8 Overview of other NCP Reviews

### 4.8.1 Victoria

The Victorian review found that there was no valid basis to maintain a licensing system for auctioneers (apart for livestock auctioneers) as set out in their *Auction Sales Act*. Given the very few complaints or problems arising from the industry the review determined that there was no market failure and accordingly regulation was no longer warranted with respect to general auctions. The Victorian Parliament has repealed the Act by the *Auction Sales (Repeal) Act* but to date this has not been commenced. It is understood that commencement has been delayed to ensure that new and appropriate measures are in place with respect to livestock agency.

The review noted that the repeal of the Act will mean that public auctions where motor vehicles or second hand goods are offered for sale will be subject to the relevant warranties, conditions and requirements in the *Motor Car Traders Act* and the *Second Hand Dealers and Pawnbrokers Act*. Both of these Acts are under review and consideration is being given to whether public auctions should be exempted from the operation of these Acts.

### 4.8.2 Australian Capital Territory

In summary the review of the ACT's *Auctioneers Act* found that while the regulatory costs imposed on auctioneers are minor, the benefits appear insufficient to justify the licensing requirements of the Act.

### 4.8.3 Tasmania

The draft Tasmanian review found that there is no case for regulation of the general auctioneering industry. The review found that general auctioneers do not need to be licensed, but should be subject to general trust accounting and record management requirements. The draft report has been circulated for further comment.

### 4.8.4 Queensland

The Queensland review found that the licensing of auctioneers should be retained. The review recommended the relaxation of some regulatory requirements which were found to be anti-competitive, for example the residency requirement and the standard of the business premises. It is understood that the Queensland Government has accepted the recommendations flowing from the review however amendments to the legislation have yet to be made. It should also be noted that the *Property Agents and Motor Dealers Act 2000* has repealed the *Auctioneers and Agents Act*. This act continues to licence auctioneers and in order to obtain a licence a person must be over 18 years of age and has the educational or other qualifications for an auctioneer's licence (ie. competencies from the national real estate curriculum approved under the *Australian National Training Authority Act (Cth)*).

### 4.8.5 Western Australia

The report recommends that:

(a) the *Auction Sales Act* licensing system be retained until a full legislative review of the

Act is completed by the Ministry of Fair Trading in the next 12 months; and

- (b) unless justified by new reasons from a full legislative review of the Act, the licensing system be repealed.

#### *4.8.5 New South Wales*

It is worth noting that the Property, Stock and Business Agents Bill 2001 is currently before the NSW Parliament.

In relation to auctioneers, this Bill proposes reforms in the areas of dummy bidding with respect to auctions of land.

## **5. Historical Summary and Scope of the Act and Related Law**

### **5.1 Auctioneers Generally**

Auctioneers are a class of licensed agents employed to sell goods or land in a particular manner as required by the *Auctioneers Act* between the hours of 11 o'clock after noon and 8 o'clock before noon.

In general an auction is a sale of property in public by calling for bids, the property being usually sold to the highest bidder. A bid, is in effect, an offer of a price for the property being sold, and the fall of the auctioneer's hammer the acceptance (thus forming an enforceable contract). Accordingly a bid can be retracted at any time before the fall of the hammer.

Once the auctioneer's hammer has fallen, the auctioneers has by implication the authority of the highest bidder to sign any memorandum on the bidder's behalf embodying the conditions of sale, such memorandum being sufficient to satisfy the requirements of the *Law of Property Act*<sup>1</sup> and the *Sale of Goods Act*.

The extent of authority of an auctioneer depends upon the contract with the auctioneer's principal but a number of powers are implied by law. An auctioneer has the authority to sell the good subject to all the usual conditions governing sales by auction unless expressly negated. The auctioneer has the authority to deal with the goods customary amongst auctioneers and to prepare conditions of sale.

A sale by auction may be with or without reserve. The usual manner of providing for a reserve price is to specify that the vendor shall be entitled to one bid. If there is a reserve price, or a bid is allowed to the vendor, that fact should be notified before the sale<sup>4</sup>. However, if a sale is not announced to be the subject of a reserve the auctioneer is bound to accept the bid of the highest bidder.

An auctioneer's authority is to make a contract of sale by auctions, and once this is made the auctioneer has no authority to vary or rescind it.

When the auction is one of goods, an auctioneer has implied authority to receive the purchase money on behalf of the vendor and to hand over the goods when the full price is paid.

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<sup>1</sup> Section 10 of the *Law of Property Act* 2000 provides-

(1) Subject to this Act –

(a) no interest in land can be created or disposed of except –

(i) by writing signed by the person creating or conveying the interest or by the person's agent lawfully authorised in writing.

<sup>4</sup> Section 63 of the *Law of Property Act* 2000 provides-

(1) In the case of a sale of land by auction –

(a) a right to bid may be expressly reserved by or on behalf of the vendor and, if so, the vendor or a person on behalf of the vendor may, subject to paragraph (b), bid at the auction;

(b) if the sale is not notified in the conditions of sale to be subject to a right to bid on behalf of the vendor, the vendor is not entitled to bid or to employ a person to bid at the sale and the auctioneer is not entitled to take a bid from the vendor or the person;

(c) a sale that contravenes or does not comply with paragraph (b) may be treated as fraudulent by the purchaser; and

(d) a sale may be notified in the conditions of sale to be subject to a reserved or upset price.

Where the auction is one of land, the auctioneer has the authority to receive a deposit only.

It can be said that the duties of an auctioneer are as follows:

- (a) to act in person;
- (b) to sell for money only;
- (c) to sell to a 3<sup>rd</sup> person;
- (d) to accept the highest bona fide bid (where the auction is without reserve);
- (e) to account for the proceeds of goods sold;
- (f) not to deliver goods until paid for;
- (g) to keep full records of sales.

Where an auctioneer sells goods, he or she impliedly gives the following warranties:

- (a) he or she has the authority to sell;
- (b) that he or she knows of no defect in the vendor's title;
- (c) to give possession against the price paid;
- (d) that such possession will not be disturbed by the vendor or auctioneer.

## 5.2 The Act

The *Auctioneers Act* comprises the *Auctioneers Ordinance 1935*<sup>5</sup> as amended by numerous ordinances and Acts up to 1996. The policy intent of the Act has largely remained unaltered.

The Act is directed to two main areas.

The first is a licensing system with licences being granted to those who wish to carry on the business of auctioneers, but with licences being denied to those who are not:

- of good character;
- 18 years or over;
- a fit and proper person;
- annulled of a bankrupt adjudication.

This creates a barrier to entry, and therefore restricts competition.

Persons who conduct auctions without being licensed commit an offence<sup>6</sup>.

The second area relates to the restrictions placed on the conduct of licensees in respect of the time auctions can be conducted<sup>7</sup>, keeping of records<sup>8</sup> and prohibition of misrepresentation of property<sup>9</sup> and of bidding by sellers<sup>10</sup>.

The Act does not:

- prescribe any qualifications or competencies necessary to obtain a licence;

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<sup>5</sup> Section 49(1)(c) of the *Interpretation Act* provides that such Ordinances may be cited as if they are Acts

<sup>6</sup> Section 4 of the *Auctioneers Act* (NT).

<sup>7</sup> Section 16 of the *Auctioneers Act* (NT).

<sup>8</sup> Section 14 of the *Auctioneers Act* (NT).

<sup>9</sup> Section 13 of the *Auctioneers Act* (NT).

<sup>10</sup> Section 15 of the *Auctioneers Act* (NT).

- prescribe any requirements to hold in trust, or in any other way, deposits or payment made by vendors;
- prescribe or refer to any rules or code of conduct auctioneers should follow;
- set or regulate fees charged by auctioneers in any way;
- provide any guidelines as to the protocols auctioneers should follow or define the parameters of an auction;
- contain any enforcement or disciplinary framework under which complaints could be addressed; or
- provide remedies under consumer protection principles

The Act applies to 'sales by auction'. Section 4 of the Act defines 'sell by auction' as follows:

“ ‘Sell by auction’ means sell any property by outcry, knocking down of hammer, candle, lot, parcel, instrument, machine, or any other mode of sale whereby the highest or the lowest bidder is the purchaser, or whereby the first person who claims the property submitted for sale at a certain price named by the person acting as auctioneer is the purchaser, or whereby there is a competition for the purchase of any property in any way commonly known and understood to be by way of auction.”

There has been some growth in recent times in the area of auction sales over the Internet. There is some uncertainty as to whether this method of sale is in fact an auction within the meaning of the *Auctioneers Act*. There are, for example, questions about where the auction is being conducted from.

Generally it is understood that where an auction is conducted from a website established on a server within the Northern Territory then the transaction takes place in the Northern Territory and accordingly Northern Territory law applies. The general framework of the *Electronic Transactions (Northern Territory) Act 2000* enables on line auctions to take place because under this Act a transaction is not invalid because it took place wholly or partly by means of one or more electronic communications. This means that where the parties agree, they can conduct an online transaction such as an auction.

The Act specifically exempts only certain persons or property from the application of the *Auctioneers Act* such as public officers of the Crown. Other pieces of legislation however, have relevant provisions which exclude matters spelled out in those Acts from applying to 'licensed auctioneer's'. For example:

- Section 169 of the *Consumer Affairs and Fair Trading Act* excludes the warranty provisions that apply to motor vehicle dealers selling second hand motor vehicles from applying to 'licensed auctioneers' that sell motor vehicles by way of public auction; and
- Section 245 of the *Consumer Affairs and Fair Trading Act* provides that the second hand dealer and pawnbroker provisions contained in Part 14 do not apply to things sold by public auction by a licensed auctioneer.

The regulatory scheme requires real estate agents conducting auctions of real property to hold an auctioneers licence as well as a real estate agents licence. In most other states real estate agents are exempted from holding auctioneers licences when auctioning real property.

The situation is less clear with respect to the auction of motor vehicles. As stated above section 169 of the *Consumer Affairs and Fair Trading Act* excludes the relevant warranty provisions, however section 129 of that Act provides that:

*“a person other than licensed dealer shall not carry on the business of a dealer; or hold himself out as a dealer”.*

“Dealer” is defined as –

*“a person who buys, sells, offers for sale or exchanges motor vehicles as a business (whether alone or in partnership, and whether or not as the person's sole business) but does not include -*

- (a) a person whose business consists exclusively of buying motor vehicles for the purpose of demolishing or dismantling them;*
- (b) a financier; or*
- (c) an exempt trader”*

It is therefore arguable that auctioneers who sell motor vehicles by auction as a standard part of their business also require a motor vehicle dealer’s licence.

It is understood however that a number of auctioneers who sell motor vehicles by auction as a standard part of their business do not possess motor vehicle dealer’s licences. It is also understood that the Acts have been administered on the basis that in this kind of situation no licence has been required under Part 10 of the *Consumer Affairs and Fair Trading Act*.

### **5.3 Sale of Goods Act**

The *Sale of Goods Act* impacts on the conduct of auctions, specifically section 60 which provides as follows:

#### **“60. Auction sales**

*In the case of a sale by auction -*

*(a) where goods are put up for sale by auction in lots, each lot is prima facie to be the subject of a separate contract of sale;*

*(b) the sale is complete when the auctioneer announces its completion by the fall of the hammer or in other customary manner, and until such announcement is made any bidder may retract his bid;*

*(c) where the sale is not notified in the conditions of sale to be subject to a right to bid on behalf of the seller, it is not lawful for the seller to bid himself or to employ any person to bid at the sale, or for the auctioneer knowingly to take a bid from the seller or any such person, and, if the sale contravenes this rule, the sale may be treated as fraudulent by the buyer;*

*(d) the sale may be notified in the conditions of sale to be subject to a reserved price, and a right to bid may also be reserved expressly by or on behalf of the seller; and*

*(e) where a right to bid is expressly reserved, but not otherwise, the seller, or any one person on his behalf, may bid at the auction.”*



## 5.4 Law of Property Act

The *Law of Property Act* impacts on the conduct of auctions for the sale of land, specifically section 63 which provides as follows:

**“63. Sales of land by auction**

- (1) *In the case of a sale of land by auction –*
- (a) *a right to bid may be expressly reserved by or on behalf of the vendor and, if so, the vendor or a person on behalf of the vendor may, subject to paragraph (b), bid at the auction;*
  - (b) *if the sale is not notified in the conditions of sale to be subject to a right to bid on behalf of the vendor, the vendor is not entitled to bid or to employ a person to bid at the sale and the auctioneer is not entitled to take a bid from the vendor or the person;*
  - (c) *a sale that contravenes or does not comply with paragraph (b) may be treated as fraudulent by the purchaser; and*
  - (d) *a sale may be notified in the conditions of sale to be subject to a reserved or upset price.*
- (2) *Subsection (1) applies to sales of land by auction effected after the commencement of this Act.”*

## 5.5 Licences

The Act establishes a licensing regime for persons who act as auctioneers for the sale of property within the Northern Territory. If they hold an auctioneer’s licence under the Act they are entitled to act as an auctioneer within the Northern Territory.

An applicant for an auctioneer’s licence is required to:

- fill out an application form;
- pay a \$20 application fee;
- undergo a criminal history check;
- is the subject of a bankruptcy search conducted by the licensing authority; and
- must provide 3 personal references.

When all the relevant information is available, the Minister (but in practice his or her delegate) makes a decision to either grant or refuse the licence.

## **6. Size of the Territory Industry**

Licensing data suggests that the overall number of licensed Auctioneers in the Northern Territory remains relatively constant. However, anecdotal evidence suggests that the role of "Clerk" has become defunct.

<b>Year</b>	<b>No. of Total Auctioneers Licences</b>	<b>No. of Auctioneers Licences Granted for that Year</b>	<b>No of Auctioneers Clerk</b>
1995	125	11	4
1996	136	13	9
1997	145	9	0
1998	163	18	0
1999	172	19	0
2000	174	24	0
2001	160	25	0
2002	161		0

There is no evidence of licences being suspended, cancelled, revoked, refused, or, renewal of licences being refused within the last 10 years. Also, few formal complaints have been lodged under the *Auctioneers Act* and there does not appear to be any incidents of an Auctioneer failing to pass on to vendors any monies paid to him or her by purchasers.

Complaints have been lodged against people who hold both Auctioneers licences and Real Estate Agent licences in respect of auction sales. These matters have been addressed under the *Agents Licensing Act*. The *Agents Licensing Act* contains a disciplinary and enforcement framework which includes reference to the Real Estate Industry Code of Conduct.

The information necessary to calculate the monetary size of the NT auction market has not been available. However, by way of reference, one of the large auction houses advised in its submission that it accounts for approximately \$2M turnover per annum in the area of vehicle sales and approximately \$50 000 turnover per annum in the area of general goods.

## **7. Objectives of the Legislation**

The preamble to the Act states the legislation is “*to regulate sales by auction*”. Preambles to Acts however do not state the purpose or object of the Act.

There are no stated objectives in the Act. The main objective of the Act would however appear to be consumer protection.

It can be argued that the Act establishes a licensing scheme so that:

- the entry of persons with prior criminal convictions into the market is prevented;
- a degree of competence and knowledge of the legal obligations and responsibilities of practitioners is established;
- appropriate persons are handling trust funds; and
- consumer awareness and confidence in the relation to the industry is raised.

It can also be argued that a secondary purpose of the Act is to give Police access to the records of auctioneers as part of their investigations into matters concerning stolen property.

For the purposes of this report the Review Team has concluded that the objective of the Act is:

“To ensure that consumers and businesses have, in respect of auctions, appropriate choices, are provided with safe products and services, that they have a right to be heard in respect of auctioneering services, products and regulation and that they have a right to receive appropriate advice in respect of those matters.”

The Review Team found that this objective in part remains valid and further that the Act has a secondary purpose in requiring auctioneers to make records available to police (to assist with stolen property investigations).

## 8. Anti-Competitive Provisions

### 8.1 Anti-Competitive Provisions

The National Competition Council has identified that legislation may limit competition if it:

1. Governs the entry or exit of firms or individuals into or out of markets;<sup>1</sup>
2. Controls prices or production levels;
3. Restricts the quality, level or location of goods and services available;<sup>2</sup>
4. Restricts advertising and promotional opportunities;
5. Restricts price or type of input used in the production process;
6. Is likely to confer significant costs on business;<sup>3</sup> or
7. Provides advantages to some firms over others by, for example, shielding some activities from pressures of competition.

The overall relevance of the Act was reviewed against the NCP principles together with a specific examination of the following provisions in that they may have the effect of restricting competition. These provisions either - govern the entry or exit of auctioneers into or out of markets; or confer compliance costs on business.

The following table<sup>11</sup> contains a description of the possibly anti-competitive restrictions in the *Auctioneers Act* and an assessment of their impacts and significance.

Description of the restriction	Competition or economic effects	Severity of the restriction. <sup>12</sup>	Any other problems or comments
Section 4 – Requirement for Auctioneers to Hold Licences	Restricts entry into the market place.	Significant. The provision is a barrier to entry to the market although the requirements for licensing are not overly onerous.	Persons licensed as Real Estate Agents or Real Estate Agents' Representatives under the <i>Agents Licensing Act</i> are required to also be licensed under the <i>Auctioneers Act</i> in order to auction Real Property. There is no exemption. Such

<sup>11</sup> The table is set out in a form recommended by the Northern Territory Treasury.

<sup>12</sup> These terms, "trivial", "minor" and "substantial" are taken to have the following meanings:

Term	Meaning
Trivial	A trivial restriction is one that may look as if it could have some impact on competition but, for all practical purposes, appears to have no actual impact. Such trivial restrictions will not be analysed in detail.
Minor	A minor restriction is one that may have some actual minor impact on competition. Such restrictions will be analysed.
Significant	A substantial restriction is one that may have a major impact on competition. Even if the actual impact appears minimal such restrictions will, nonetheless, be subjected to analysis

Description of the restriction	Competition or economic effects	Severity of the restriction. <sup>12</sup>	Any other problems or comments
			persons have satisfied educational requirements under the former Act not required under the latter and probity and character tests under the former Act to a higher standard compared to the latter.
Section 5 – Requirement for Auctioneers to Apply for Auctioneer’s Licence	Is likely to confer costs on business.	Minor, in that aside from any time delay in processing the application the process is simple and largely based on criminal history tests. The fee is \$20.	The revenue raised does not cover the costs of administering the Act. The estimated cost of processing an application is \$35 which exceeds the revenue raised (approx \$3,240pa).
Section 6 – Requirement for Auctioneer’s to Renew Licences	Is likely to confer costs on industry.	Minor if the application to renew is done within the period set down. The fee is just \$20, the application form used is simple in design and criminal history checks are not required. But the restriction may be assessed as significant if not complied with, in that the Auctioneers has to lodge a fresh application for a licence.	This requirement has little benefit other than it provides an opportunity for the Minister or his delegate the opportunity to not renew a licence by exercising powers under Section 7. Criminal history checks are not done in respect of renewals. These would add additional administrative costs but would be the means of applying the intention of the Act.

Section 8E – Requirement for Auctioneers to apply for Licences for their Clerks:	This Restricts entry into the market.  Is likely to confer costs on business.	Trivial, but only in so far as this provision has become redundant. No clerk's licences are in effect. Those individuals who wish to conduct auctions whether under supervision or not obtain an auctioneer's licence.	
Section 8F – Power of Minister to Grant or Refuse Clerk's Licence:	Restricts entry into the market.	Minor - but only in so far as this provision has become redundant. No clerks' licences are in effect. Those individuals who wish to conduct auctions whether under supervision or not obtain an auctioneer's licence.	
Section 8H – Limitation on Period of Clerk's Licence:	Is likely to confer costs on business.	Trivial, but only in so far as no clerks' licences are in effect. Those individuals who wish to conduct auctions whether under supervision or not obtain an auctioneer's licence.	
Section 8J – Power of Minister to Cancel or Suspend Licences:	Governs the entry or exit of firms or individuals into or out of the marketplace.	Significant in so far as loss of earnings, credibility and cost of appeal to regain licence. However, this restriction exercised correctly is a just way of correcting marketplace failure.	
Section 9 – Non-Eligibility of Bankrupts:	Governs the entry or exit of firms or individuals into or out of the marketplace.	Minor. Consistent with general bankruptcy laws.	

Section 14 – Requirement for Records to be Kept:	Is likely to confer costs on business.	Minor. The type of records required would ordinarily be kept by businesses as a form of good business practice.	
Section 15 – Restriction on Bidding by Seller:	Governs the entry or exit of firms or individuals into or out of the marketplace.	Minor. This section places a barrier to sellers entering the market in respect of their own goods and artificially inflating their costs. It assists in stopping misleading or deceptive conduct or conduct which is likely to mislead or deceive by requiring full disclosure.	This provision replicates S.60 of the <i>Sale Of Goods Act</i> .
Section 16 – Restriction on Time of Auctions (certain public holidays and between 11pm and 8am):	Restricts the quality, level or location of goods and services available	Significant to the extent that Internet transactions occur at various times around the globe. Also as a policy decision, the NT Government has previously repealed the <i>Early Closing Act</i> with the intent of lifting control and restrictions on the times of general retailing.	The Act does not prescribe when an Auction commences and when it concludes. This gives rise to uncertainty in some circumstances as to whether goods were sold by way of auction or private treaty and whether there are any implied rights to warranty. This could be resolved by a statutory expression of the parameters of an auction.
Section 18 – Power of Courts to Cancel or Suspend Licences:	Governs the entry or exit of firms or individuals into or out of the marketplace.	Significant in so far as loss of earnings, credibility and cost of appeal to regain licence. However, this restriction exercised correctly is a just way of correcting marketplace failure.	

## 8.2 Discussion and Assessment of Anti-Competitive Provisions

This part of the Report contains an analysis of the provisions identified as being anti-competitive.

### 8.2.1 *The Licensing System for Auctioneers (Sections 4 to 12 and 18)*

#### Discussion – what is the licensing scheme intended to achieve?

The licensing scheme has been described in part 8.1.

The intention of the licensing system appears to be to prevent people with a history of dishonesty, demonstrated unworthiness or inability to handle their finances from entering an industry which involves the handling of large amounts of other people's money. Preventing such persons from entering the industry may reduce the risk of fiduciary default, as those who have shown a predilection for a particular kind of vice are considered more likely to repeat that vice. It is arguable that the provisions of the Act, at least potentially, underwrite these benefits to consumers.

These barriers are however not great. In particular, it can be noted that:

- no specific qualifications are required;
- the licence fee is not substantial and currently Government subsidises elements of the application eg. the bankruptcy searches which cost \$21.78 per search. In addition to this the licence fee is not sufficient to meet the costs of Government administering the licensing system.

As in other schemes these barriers to entry limit the number of auctioneers in the market, thereby restricting competition. This may not be as pronounced in this market. The number of licensed auctioneers has not fluctuated greatly over the last 7 years. In fact it has remained virtually at the same level with a number of licensed auctioneers not renewing but a similar number applying for a new licence.

It should be noted that a large number of licensed auctioneers are also licensed real estate agents which would appear to impose additional costs of duplication of licences on this part of the industry.

The Act also affects market behaviour by requiring records to be kept and by regulating the times at which auctions may be conducted.

While the Act attempts to achieve its overarching objective through the licensing of auctioneers there are conversely costs to consumers stemming from the licensing system. For example:

- Restricted competition and limited choice because those not holding a licence are denied the opportunity to conduct auction sales.
- Possible incompetence due to no obligation for auctioneers to be trained.
- Additional costs of compliance passed on to vendors by auctioneers (eg record keeping, licence fees).
- No guarantee that a licence will result in ethical behaviour by an auctioneer. (this however can be said about any occupational regulation).
- Monetary and indirect costs relating to obtaining and renewing licences (eg obtaining and lodging certificates of character, licence fees, delays in waiting for licence application/renewal to be processed etc).



The licensing system also represents a cost to Government in that:

- The small amount of revenue raised from licence fees that can be applied to public services amounts to around \$3,240 per annum;
- The costs to government (and ultimately taxpayers) of administering the regulatory system exceed the revenue collected.
- The current licence fee is \$20. The estimated cost of processing a new licence application exceeds this amount. All licences have to be renewed each year and the revenue raised through this process does not meet the costs of administering the provisions.

The Review Team considers that the licensing system only in part achieves some of the objectives of the Act.

#### What harm might be being prevented?

Generally then the real possibility of harm to vendors and consumers is where an auctioneer:

- (a) after taking possession of property given to them by a vendor, steals, damages or sells (other than by way of auction) the relevant property thus causing loss to the vendor;
- (b) after the auction of the relevant property has taken place and the auctioneer has received the purchase price for the goods, the auctioneer misappropriates those moneys;
- (c) misrepresents the property being auctioned; or
- (d) does not conduct the auction fairly eg. colludes with a bidder or with the vendor.

It is in these limited circumstances where loss can be caused to a vendor and consumer and it is most likely for this reason that the licensing of auctioneers was put in place.

Licensing which involves a police check and a bankruptcy check may not be a particularly useful check on the suitability of a person for an occupation. Although there have been very few complaints regarding inappropriate actions of auctioneers and no known instances of misappropriation of moneys in the Territory, experience in other jurisdictions has been that licensed persons who have no previous criminal or bankruptcy history are also susceptible to inappropriate behaviour of this nature. The fit and proper person test is an indirect and weak screen since it does not and cannot, directly assess a person's intent. Accordingly it is considered to be an imperfect test.

In any event under the current scheme if an auctioneer does misappropriate trust moneys the vendor has no recourse to a fidelity fund because no such fund exists. All that a vendor can do is complain to the licensing authority which may result in cancellation of a licence and pursue other legal remedies under the common law and the NT *Criminal Code*.

The Review Team could not find any evidence to support the claim that licensing has raised consumer awareness or reduced the incidence of unscrupulous operators. Several of the submissions by industry to the review stated that licensing protects the consumer and almost all of the submissions supported the retention of the licensing system. One of the difficulties with this is that the Act establishes a licensing system to screen people who seek to enter the industry but does little in terms of regulating the behaviour of auctioneers.

The Review Team considered that the marketplace, and in particular the hiring policies of auctioneers, is the ultimate arbiter of character and professional competence. Also for most auctions, the auctioneer is not selected by the consumer – the auctioneer is mainly picked by some intermediary such as a real estate agent or an auction house. Accordingly this minimises information asymmetry between the client and the auctioneer which in itself does not require regulatory intervention to bring the parties to a more equal position.

Although licensing has some benefits it does not of itself satisfy the overall objective of the Act. Licensing involves a cost to businesses but produces few discernible positive outcomes other than ensuring that persons with a certain type of criminal and financial history are not allowed into the industry.

It is arguable that market forces are generally paramount in deciding what is good practice in the auctioneers industry. Whether businesses are regulated or not, except when markets are monopolised, the decisions of consumers dictate which businesses will prosper and those that will fail. In short, those that supply the sorts of products that consumers wish to buy, whilst meeting the requirements of whatever laws and regulations apply, are those that succeed. In seeking the services of a suitable auctioneer of general goods or motorcars, it can be argued that the reputations of the businesses that conduct auctions are the key indicators of competence.

The Review Team does not however consider that a completely deregulated auctioneers industry is the best alternative to the current licensing scheme. The Review Team noted that jurisdictions such as South Australia and New South Wales which have removed licensing schemes for auctioneers still regulate particular types of auctioneer conduct to protect consumers.

The Review Team notes that the licensing of auctioneers may promote confidence in the auction system. Such confidence as exists in the auction system is because of the reputations of auctioneers and the businesses that employ them, rather than the fact that they are licensed. For this reason the Review Team is persuaded that the licensing of auctioneers produces little appreciable benefit to the community. Licensing involves, however, an annual licence fee borne by auctioneers and an application procedure for entrants into the auctioning profession. The Review Team believes that whilst these costs (of the fit and proper person test) may not be great they nevertheless outweigh any benefits and accordingly cannot be completely justified.

It seems uncertain that the Act goes very far in assisting consumers of auctioneers services to identify competent auctioneers and providing them with information about prices and the quality of those services. The Act prescribes no qualifications for auctioneers. Some submissions to the review in fact supported the introduction of training requirements being prescribed for this occupation. However, the issue of whether additional competency/training requirements should be imposed is outside the scope of this NCP Review.

The Review Team considers that the licensing scheme does not, in a cost effective way, assist in achieving the objectives of the Act.

### *Mutual Recognition Act*

Currently, an auctioneer who is licensed as an auctioneer in the Northern Territory is entitled, by virtue of that licence, to obtain an equivalent licence in New Zealand, in the ACT and in any Australian State where such licensing is required. This occurs because of the *Mutual*

*Recognition Acts.* However, these Acts only operate in respect of positive licensing schemes. Thus abolishing licensing (and replacing it with no licensing or negative licensing) will actually diminish the rights of Northern Territory auctioneers to operate nationally or to shift business to any of those parts of Australia where auctioneers are subjected to a positive licensing system.

### Alternatives

The Review Team formed the view that the current objectives of the Act could be more efficiently achieved in other ways.

A more detailed list of alternatives is set out at paragraph 12.

The Review Team considered that there were a range of more useful alternatives such as negative licensing scheme through a code of practice under the *Consumer Affairs and Fair Trading Act* which prohibits unfair trading practices and sets a base on which an occupation or business may be conducted. Under this scheme auctioneers would be able to operate without being licensed, but could be prohibited from conducting sales if they failed to comply with prescribed standards. As an example in the Northern Territory a negative licensing scheme applies to credit providers under the *Consumer Affairs and Fair Trading Act*.

This option (which involves elements of co-regulation) was favoured by some stakeholders but not favoured by a number of licensees or the Consumer Affairs Council and the licensing authority. These entities favoured the continuity of a positive licensing regime for at least those Auctioneers not licensed under the *Agents Licensing Act*.

The Review Team considered that the costs of processing of licences which are not sufficiently met by licensing fees could be better used by actively monitoring and investigating the conduct of auctioneers which is currently and historically not occurring.

The one area however which the Review Team considered required careful consideration was the area of trust moneys.

When an auctioneer sells property by auction and receives the proceeds of sale he or she effectively holds those moneys on trust for the vendor of the property. Unlike other legislative schemes such as the *Agents Licensing Act*, the *Auctioneers Act* does not require auctioneers to hold those moneys in a specific trust account and furthermore does not impose any rules in relation to the management of those moneys. The *Auctioneers Act* also does not establish any type of fidelity fund to meet claims by vendors of property who have had money owing to them misappropriated by an auctioneer.

The Review Team considered that the requirement for trust accounts does not necessarily need to be linked to a licensing arrangement. The Review Team recommends that consideration is given to requiring persons in the auctioneering industry to comply with trust accounting and record keeping requirements.

In relation to the issue raised in some of the submissions regarding the need for training for auctioneers and for relevant experience, the Review Team acknowledged that a poorly performed auction could be costly to a seller of property. On the other hand, an auctioneer who cannot perform is unlikely to continue in business. It is not unreasonable, and in fact is sensible, that an employer would require that employed auctioneering staff would have the necessary qualifications and experience to carry out the functions of an auctioneer. The Review Team considered that further consideration should be given to this issue if a Code of Practice is developed.

Conceivably a Code of Practice could contain a provision of the following effect:

“A person must not conduct an auction of reward unless he or she has appropriate experience or training or a person must not hold himself or herself out as an auctioneer unless she or he has the training and experience necessary to competently and honestly conduct an auction”.

The Review Team found that:

- (a) there are less regulatory alternatives than the licensing system that would be effective and ensure consumer and vendor protection ie. negative licensing scheme via a code of practice made under the *Consumer Affairs and Fair Trading Act*;
- (b) there is no net benefit to the community with respect to the licensing system under the *Auctioneers Act*;
- (c) consideration be given to the establishment of trust accounting requirements and rules; and
- (d) in the event that a negative licensing scheme is implemented consideration is given to amending sections 169 and 245 of the *Consumer Affairs and Fair Trading Act* as to whether to continue those exemptions with respect to anyone conducting an auction.

### 8.2.2 *Conduct of Auctions and of Auctioneers (Sections 14, 15 and 16)*

#### Section 14 – Record to be kept

Section 14 requires auctioneers to keep records showing the particulars of all property sold by the auctioneers at auction. Section 14 goes on to provide that these records are to be made available at all reasonable times to the Police.

This requirement is aimed at the concerns surrounding the disposal of stolen personal household goods.

This section allows Police to check the records of auctioneers, no doubt as part of their investigations into matters concerning stolen property.

The requirement in any event is good business practice and is useful to Police. The Review Team considers that the anti-competitive effect of this restriction is trivial and that, in any event, the benefits are greater than the costs.

In the event that the earlier recommendations concerning a negative licensing scheme for auctioneers is accepted, consideration will need to be given to factoring this provision into the *Consumer Affairs and Fair Trading Act* to preserve this Police power. It is also recommended that consideration is given to extending the scope of the provisions so that ‘Authorised Officers’ under the *Consumer Affairs and Fair Trading Act* may also inspect the records.

#### Section 15 – Bidding by Seller

Section 15 overlaps with section 60(c) of the *Sale of Goods Act* and section 63 of the *Law of Property Act*. It is therefore considered by the Review Team to be unnecessary duplication.

The provision in itself however is considered by the Review Team to be justified in that it provides a consumer protection benefit that outweighs its anti-competitive effect.

Specifically the section places a barrier to sellers entering the market in respect of their own goods and artificially inflating their costs. It assists in stopping misleading or deceptive conduct or conduct which is likely to mislead or deceive.

As stated in paragraph 4.8.5 it is worth noting that some jurisdictions such as NSW have taken legislative action to eradicate dummy bidding from auctions.

The Review Team feels that similar regulation could be considered through the process of establishing a code of practice under the *Consumer Affairs and Fair Trading Act*.

### Section 16 – Times for auction

Section 16 provides that auctions may only be conducted – between the hours of 8am and 11pm and not on Good Friday or Christmas Day

In relation to the express restriction on conducting auctions on Good Friday and Christmas Day it is highly unlikely that in the absence of this restriction in the Act that an auctioneer would conduct an auction on either of these days. The demand for an auctioneers services on Good Friday or Christmas Day would be extremely low. Accordingly market forces would operate so that auctions would not be conducted on either of these days and therefore the review Team finds that this restriction should be removed.

In relation to the times for auctions it is essential that auctions are conducted during a finite period of time. Quite clearly an auction should not last for a number of days.

It also needs to be clear when an auction is completed ie. when property is passed in, because this has an effect on whether warranty provisions (under the *Consumer Affairs and Fair Training Act*) apply. It is understood by the Review Team that currently some auctioneers when for example selling motor vehicles by auction, pass the property in because a reserve price bid is not achieved, may offer the motor vehicle for sale for a short period of time after the auction. This may also occur when land is being sold. Often this occurs without any actual intention to diminish consumer rights. However, there can be confusion about what law or regulation scheme is applicable.

All of the other states and Territories that regulate auctions do not have any provisions that deal with this issue.

The Review Team however considers that the intent of the provision is justified but requires further consideration in consultation with industry to determine appropriate standards. The Review Team feels that this could be achieved through the process of establishing a code of practice under the *Consumer Affairs and Fair Trading Act*.

## **9. Market Failure**

The review is required by its terms of reference to identify any issues of market failure, which need to be, or are being addressed by the legislation.

The potential market failure is that the market may fail because consumers may not have enough awareness in picking auctioneers who are sufficiently skilful or honest to conduct an auction. It is however noted that this information asymmetry is limited because many consumers often have an intermediary (such as a real estate agent) choose an auctioneer for them.

Another area of potential market failure is possible incompetence due to no obligation for auctioneers to be trained. There was insufficient evidence available to the Review Team to determine if actual market failure did exist in this regard. The Review Team however recommends that further investigation is warranted and considered.

No actual market failures have been identified other than the issues discussed in Part 8.

## **10. Part IV of the Trade Practices Act 1974 and Northern Territory Competition Code**

### **10.1 Relevance of the Trade Practices Act 1974**

The review is also required to consider whether any of the provisions might breach Part IV of the *Trade Practices Act 1974* (Commonwealth) or permit activities that might breach Part IV

Part IV of the *Trade Practices Act* prohibits a corporation and, in the Northern Territory, individuals, from engaging in certain anti-competitive practices. The Competition Code is in substantially the same terms as Part IV of the *Trade Practices Act*.

Part IV of the *Trade Practices Act* includes the following provisions: Section 45 prohibits the enforcement of exclusionary provisions, whether or not they are anti-competitive, and arrangements that have the effect of substantially lessening competition. Section 45A deems horizontal price fixing to be anti-competitive, subject to some exemptions. Section 45B proscribes covenants that have the effect of substantially lessening competition.

Northern Territory and State laws may permit breaches of the *Trade Practices Act 1974*. However, any such law must specifically refer to section 51 of the *Trade Practices Act 1974*

### **10.2 Potential Breaches of the Trade Practices Act 1974**

There is nothing in the *Auctioneers Act* authorising a breach of the *Trade Practices Act 1974*.

That is, there is no reference to section 51. Additionally, there is nothing in the *Auctioneers Act*, which appears to authorise unfair behaviour. Even the provisions dealing with dummy bidding don't appear to relate to behaviour prohibited by Part IV of the *Trade Practices Act 1974*.

## **11. Public Benefits Test - Costs and benefits of legislation**

### **11.1 General Costs of Regulation**

Regulation must be assessed for the costs it imposes for administration compliance and enforcement and costs associated with detrimental effects of regulation on competition and hence on economic efficiency.<sup>13</sup>

### **11.2 Costs and Benefits of Regulation – General Discussion**

The terms of reference for this review require the review to assess and balance the costs and benefits of the restrictions identified.

For the *Auctioneers Act* to be justified in this context, it must be shown that:

- a) the restrictions on competition provide consumers with benefits that would not exist without those barriers; and
- b) the benefits outweigh any costs that flow from the restrictions.

The anti-competitive provisions of the legislation have been identified in paragraph 8.1 and subsequently discussed in paragraph 8.2.

The Review Team has concluded that:

- (a) the licensing system only achieves part of the Act's objectives and that there are few net benefits; and
- (b) better, less regulatory alternatives exist which can achieve the same outcomes as licensing and also achieve some of the other objectives of the Act.

In other jurisdictions, legislation dealing with auctioneers has been repealed. In NSW, licensing requirements for auctioneers were removed in 1992 and today, when a real estate agent acts as an auctioneer, they remain subject to their ordinary agent obligation to keep a trust account. Likewise, in Victoria, auctioneers dealing with real estate are required to hold an estate agent's licence and to keep a trust account.

The repeal of the *Auctioneers Act* would remove the requirement for auctioneers to be licensed under that Act. However, those who conduct auctions may be required to comply with other regulatory legislation:

- in dealings as a real estate agent or business agent - the *Agents Licensing Act*; and
- in dealings with second-hand goods - the Second-hand Dealers Provisions contained in Part 14 of the *Consumer Affairs and Fair Trading Act*<sup>14</sup>.

The case for licensing for auctioneers can be argued on consumer protection grounds.

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<sup>13</sup> Freehills Regulatory Group, Issues Paper for the Department of Justice (Vic) on the NCP Review of Private Agents Legislation, at page 12.

<sup>14</sup> Section 245 of CAFTA currently excludes the operation of the Part 14 provisions with respect to licensed auctioneers.

The Review Team considered that the cost of resources being utilised for the processing of licences which are not sufficiently met by licensing fees could be better used by actively monitoring and investigating the conduct of auctioneers which is currently and historically not occurring.



## 12. Alternatives to the Current Scheme of Regulation

National Competition Policy requires the review to consider whether the objectives of the Act could be achieved by non-regulatory or less regulatory means. Even if the regulatory restrictions contained in the *Auctioneers Act* can be justified in the public interest as producing a net public benefit, there is an expectation that they will be removed if the policy objectives could be achieved by other less intrusive means. There are a number of alternative approaches that could be considered:

- **Limit Scope of Act.** The Act could be amended so that the licensing provisions apply only to a person who acted as an auctioneer in respect of prescribed property; for instance, auction of chattels. This would recognise that a more proficient scheme of regulation of auctioneers of real property operates under the *Agents Licensing Act*. An amendment to Part 10 of the *Consumer Affairs and Fair Trading Act* could be made to require persons who auction motor vehicles to be licensed as motor vehicle dealers and thereby be subject to character tests and a possible licensing condition to hold trust monies in trust accounts.

**Comment:** This would reduce duplication of licensing for the same purpose but would keep alive a separate Act and scheme of regulation for a relatively small number of licensees.

- **Registration.** The Act could be reformed to allow anybody to be able to obtain “registration” as an auctioneer without having to go through the formalities of a licensing system. They could still be subject to the requirements imposed on auctioneers under the current Act (record keeping etc). Persons who did not register could be prohibited from carrying on the activities of an auctioneer.

**Comment:** This was not favoured by many stakeholders. Also, it does not satisfy the main objective of the current law, which is to keep criminals out of the industry and be able to excise licensees from the market in situations where they no longer met the fit and proper test.

- **Certification.** The Act could be reformed to allow auctioneers to obtain certificates that would attest to their qualifications and experience. However, non-certified auctioneers could be able to conduct auctions and vendors would be able to choose between certified and non-certified auctioneers. This would depend, in part, on members of the industry having access to competency based training. Other than the competency based training for auctioneers provided as part of the Real Estate course, this is not currently available in the NT.

**Comment:** This was not favoured by many stakeholders. It is evident that little value is placed on competency standards associated with auctioning property other than real property. The current Act does not have any competency-based requirements.

- **Negative Licensing.** The Act could be replaced by a negative licensing law whereby auctioneers could be allowed to operate without having to obtain a licence, but could be prohibited from carrying on the activity of an auctioneer if they failed to comply with prescribed standards. Such a standard could be a Code of Conduct approved under Part 13 of the *Consumer Affairs and Fair Trading Act*.

**Comment:** This option could apply to the occupation and regulatory scheme subject of this review whilst noting that stakeholders would prefer a positive licensing scheme rather than a negative one. The net benefit would be that industry would not have to pay licence fees or incur compliance costs.

- **Industry Self-Regulation.** The Act could be repealed and replaced by an industry Code of Conduct and dispute resolution mechanism, enforced by the industry or particular segments of the industry. This would depend on an active and professional industry association operating in the Northern Territory.

**Comment:** This is not a viable option for the industry at present. There is no occupational association or peak body, which would have sufficient coverage of the industry in its entirety, and there is some doubt that self-regulatory mechanisms could be established and applied to achieve the current objectives of the Act.

- **Deregulation and Reliance on general Laws.** The Act could be repealed and reliance placed upon current fair-trading and consumer protection legislation, which prohibit fraud, secret commissions and deceptive and misleading conduct. These include the *Trade Practices Act*, Part 5 of the *Consumer Affairs and Fair Trading Act*, the *Agents Licensing Act* and the *Criminal Code Act*.

**Comment:** This was not favoured by most stakeholders. It would not provide the guaranteed means of ensuring an unfit person could be barred from carrying on the business of an auctioneer in the NT.

- **Co-Regulation.** The Act could be repealed and replaced by a mandatory Code of Practice under Part 13 of the *Consumer Affairs and Fair Trading Act* which would address such matters as professional standards, competency, holding of trust monies and registration. Such a Code could be established and administered in a co-regulatory way by Government and industry. This option would place a reliance on the *Agents Licensing Act* in respect of regulation of auctioneers who auction real property, a reliance on the Acts mentioned above to prohibit unfair or deceptive conduct generally and a reliance on an amended Part 13 of the *Consumer Affairs and Fair Trading Act* to regulate auctioneers of motor vehicles.

**Comment:** This option was favoured by some stakeholders but not favoured by a number of licensees or the Consumer Affairs Council and the licensing authority. These entities favoured the continuity of a positive licensing regime for at least those Auctioneers not licensed under the *Agents Licensing Act*.

## **Appendix 1**

There were twenty (20) submissions received. Of this total fifteen (15) were from licensees and nine (9) submissions were made by licensees also licensed under the *Agents Licensing Act*. Three (3) submissions were from the key stakeholder groups of the Real Estate Institute of the NT (REINT) the Motor Trades Association (MTA) and the Consumer Affairs Council (CAC). One (1) submission was made by the Property Agents Licensing area of the former Department of Industries and Business and one submission was received from Buyeasy, an organisation intending to operate on-line auctions.

In general terms stakeholders provided support for the key propositions made in the consultative paper such as removing the restrictions that require duplicate licensing. However, suggestions were also made resulting in a proposal to retain the restrictions that require persons who auction property other than real property to continue to be licensed.

As part of the required guidelines of the National Competition Policy review of the *Auctioneers Act*, public submissions commenting on the content of the NCP consultative paper were sampled. The following summarises the main points and views expressed in the submissions received.

The Paper invited comment on key questions relating to the restrictive provisions in the *Auctioneers Act*.

### **1. "If a person is licensed under the *Agents Licensing Act*, should they also be required to hold a licence under the *Auctioneers Act* in order to be permitted to auction real property?"**

Responses to this question were mixed with the majority of submissions stating that it should not be necessary to acquire two separate licenses, when real estate agents (motor vehicle dealers as well) that auction in their respective fields, would have already completed appropriate training to conduct auctions effectively. (As long as the auctions conducted are in their respective fields.) Submissions from real estate agents suggest that the above response is supported, with five out of six real estate agents saying dual licences should not be necessary. Out of the four responses from auctioneers, half supported the 'no' response and three out of four submissions from other industries also said 'no'.

The submissions generally supported the view that a separate licence for the sole purpose of auctioning is not necessary if a person already holds a real estate agent's/motor vehicle dealer's licence and conducts auctions in their respective fields.

**2. “Should a person who conducts auctions of chattels, livestock, motor vehicles or any other general goods be required to hold in trust (or other prescribed way) moneys paid to them on behalf of vendors in order to better protect the interests of vendors?”**

Submissions generally favoured persons who conduct auctions to hold in some form of trust, moneys paid to them on behalf of vendors. All submissions received from real estate agents suggested this, due to the lack of current protection to owners. Submissions received from auctioneers suggest that this specialised industry contains mixed opinions, as only three out of five auctioneers say ‘yes, - auctioneers should hold vendors’ money in trust for the purpose of protecting their interests.’ However, all submissions received from other industries support the notion of a trust being utilised for vendors’ protection.

Overall, the submissions lent support to the concept of a trust account to be used by auctioneers to hold moneys paid to them on behalf of vendors in order to better protect the interests of vendors.

**3. “Should auctioneers not licensed under the *Agents Licensing Act* (ie those usually involved in the auction of motor vehicles, chattels etc) be required to undertake competency based training to carry on the business of an auctioneer?”**

Four out of six real estate agents suggested that it is not necessary to conduct formal training for auctioneers not licensed under the *Agents Licensing Act*, as they believe the profession is self-regulatory and the marketplace will determine who is and who is not competent as an auctioneer. However, the two ‘yes votes’ were concerned with the implications to the protection of the public, if an auctioneer has not received competency based training. Comments received from auctioneers regarding this subject, indicated an absence of a clear majority of support/dissent, to the requirement of auctioneers not licensed under the *Agents Licensing Act*, to undertake competency based training, to carry on the business of an auctioneer. However, both the two submissions from other industries that commented on this subject were ‘no votes’.

Generally, responses in relation to this matter were mixed, with no clear indication of a majority support/dissent to the competency based training of auctioneers not licensed under the *Agents Licensing Act*.

**4. “Should any regulatory scheme clearly prescribe the parameters of an auction (by definition)? And, clarify that when goods sold post auction by the Auctioneer (for instance a day or so after the goods were “passed in”) they are subject to laws relating to warranty and quiet enjoyment?”**

In regards to the first question, overwhelming majorities exist in each separate industry. All but one submission received from real estate agents support a regulatory scheme prescribing the parameters of an auction to be implemented. However, an identical description of responses from auctioneers did not support the implementation of a regulatory scheme. Submissions from other industries complemented those from real estate agents with three out of three responses supporting the implementation of a regulatory scheme. The additional question did not reflect a clear majority from each industry.

Responses indicated that each industry is divided in its opinion regarding whether goods sold ‘post auction’ should be subject to laws relating to warranty and quiet enjoyment. There was one ‘no’ vote and one ‘yes’ vote from each industry except for real estate agents. (This industry responded with two ‘yes’ votes.)

It is clear that this subject will be exposed to further discussion and debate due to the

overwhelming contradiction in opinions between real estate agents/other industries and auctioneers.

**5. “Given that there is no evidence of consumer detriment or of formal complaints being lodged in relation to this conduct, should a general exemption from the requirement to be licensed apply in respect of charitable auctions?”**

Responses to this question from real estate agents favoured the support of a general exemption from the required licensing of an auctioneer in respect of charitable auctions. This approval was subject to the provision that the ‘auctioneer’ does not charge a fee at the charity auction. Three out of four real estate agents were in favour of this aforementioned exemption. However, three out of four auctioneers were against the exemption, believing that all auctioneers regardless, should be licensed as such. Two out of three responses from other industries also indicated support to the exemption. Again, there is a contradiction of opinions on this matter between real estate agents/other industries and auctioneers.

This will be a point for further discussion.

**6. “Should Auctioneers be made more accountable in relation to property sold via auction if sold by private treaty? Should vendors be required to comply with some sort of vendor disclosure obligation (particularly in relation to property of considerable value)?”**

Both real estate agents and auctioneers expressed their dissent at auctioneers being made more accountable in relation to property sold via auction if sold by private treaty, believing that caveat emptor should remain, to maintain an auction’s credibility. Six out of six real estate agents shared this view, while four out of five auctioneers did as well. Two out of three responses from other industries supported this subject, commenting that accountability will protect the consumer from misrepresented goods.

Submissions responding to the second question in this subject entailed three out of four real estate agents being against the requirement for vendors to comply with a form of vendor disclosure obligation. Only one auctioneer responded to this part of the subject, expressing dissent also at the question and one out of two submissions from other industries additionally shared this view.

**7. “Should the NT regulate either auctioneers or bidders who wish to conduct or participate in an on-line auction based outside the NT? Should the NT enable on-line auctions to be conducted from the NT?”**

Opinions from real estate agents in regards to this subject were divided equally. Two out of four submissions expressed support for some form of regulation to auctioneers and/or bidders who wish to conduct or participate in on-line auctions based outside the NT, in order to protect the public. Those that disagreed commented on the natural lack of control of the internet in general. Responses from auctioneers were strongly against any form of regulation, with four out of five suggesting so. Only two submissions from other industries responded to this subject, with each one having conflicting views.

Every submission received that responded to the second question, supported the notion that the NT should enable on-line auctions to be conducted from the NT.

**8. “Should the times at which auctions can be conducted be restricted? And if so, to what extent and what form should the restriction take?”**

Responses to the initial question were generally against a restriction on times at which auctions can be conducted. Three out of five real estate agents were against it outright, commenting that public and market requirements are responsible for regulating auction times. However the remaining two submissions favoured the current restrictions only. Auctioneers expressed a divided opinion, with two out of four being against any restriction. One auctioneer supported the current restrictions only and the last submission opted for an eight o'clock in the morning to nine o'clock in the evening timeframe, Monday to Saturday, for auctions. There was only two responses received from other industries, one being against a restriction and the other in favour of regulating the times auctions can be conducted by zoning and planning regulations, in relation to noise pollution and general annoyance created by auctions.

**9. "Should Auctioneer's clerical employees be required to be licensed or regulated in any way?"**

Responses generally favoured the 'no vote'. Four of five submissions received from real estate agents and all submissions received from auctioneers commented that licences for clerks is not necessary. One out of the two submissions received from other industries supported the requirement for auctioneer's clerical employees to be licensed. Comments received in this submission included the possible future labeling of auctioneer's clerical employees as 'apprentice auctioneers'.

Overall, the consensus is that the licensing of auctioneer's clerical employees is not necessary.

The following paragraphs summarise the comments received as part of submissions, in relation to the alternatives and options that are available in conjunction with the review.

➤ *Limit Scope of Act.*

Two real estate agents provided comments. One thought this option impractical in clearance sales and the other preferred this option.

Two auctioneers provided comments. Both agreed this to be a workable option.

Two comments from other industries were received. One agreed with this option, but the other thought it impractical as some auctioneers auction all types of property.

➤ *Registration.*

One real estate agent provided comments, which outlined that the consumer would not benefit from this option.

Two auctioneers provided comments. Both expressed that this would be a viable option.

One comment from other industries was received. This comment expressed dissent as there needs to be a requirement for education/training and experience.

➤ *Certification.*

One real estate agent provided comments, which outlined that the consumer would not be aware of differences between certified and non-certified auctioneers.

Two auctioneers provided comments. Both contradicted each other with one expressing this

option as a possibility and the other commenting on its lack of justifiability.

One comment from other industries was received. This comment expressed that the consumer must be aware of the implications this option provides.

➤ *Negative Licensing.*

One real estate agent provided comments, which outlined the removal of licensing as a negative impact on consumers. The licence exists for the consumer's protection.

Two auctioneers provided comments. Both disagreed with this option.

One comment from other industries was received. This comment expressed dissent, as there needs to be a requirement for education/training and experience.

➤ *Industry Self-Regulation.*

One real estate agent provided comments, which outlined that due to the size and remoteness of the Northern Territory, this option is easily susceptible to abuse.

Two auctioneers provided comments. Both contradicted each other with one expressing that this option is a possibility and the other stating the industry in the Northern Territory is not big enough.

One comment was received from other industries, which stated that there is no specific industry body for auctioneers. Therefore this option would not be viable.

➤ *Deregulation and Reliance on Existing Laws.*

Two real estate agents provided comments. Both contradicted each other with one preferring this option above all others and the other expressing regulation as an important safeguard that protects consumers.

Two auctioneers provided comments. Both disagreed to this option.

One comment was received from other industries in which it stated that education and experience is a requirement for auctioneers. Therefore this option would not be viable.

➤ *Co-Regulation.*

One real estate agent provided comments, which stated that this would be a preferred option, on the provision that the administrators held substantial punitive powers.

Two auctioneers provided comments. Both disagreed to this option.

Two comments from other industries were received. Both expressed agreement that this option would work.

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<sup>1</sup> This includes restrictions on the types of business structure, form or ownership and size of a business.

<sup>2</sup> This would include restricting certain forms of conduct and provisions that inhibit innovation and differentiation of products and services.

<sup>3</sup> This would include costs that are greater in the Northern Territory than on competitors outside of the Northern Territory and also include unjustifiable administrative burdens.