Competition Policy Review - Northern Territory

Report to the Attorney-General for the Northern Territory

Debt Collectors, Private Inquiry Agents, Process Servers and Private Bailiffs - Commercial and Private Agents Licensing Act (NT)

Northern Territory Attorney-General's Department

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1.1 REPORT - NATIONAL COMPETITION POLICY REVIEW - DEBT COLLECTORS, PRIVATE INQUIRY AGENTS, PROCESS SERVERS AND PRIVATE BAILIFFS

Darwin NT 0801 **November 1999**

National Competition Policy and other matters - Legislation Review of the *Commercial and Private Agents Licensing Act*

Report to the Northern Territory Attorney-General

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1.1 REPORT - NATIONAL COMPETITION POLICY REVIEW - DEBT COLLECTORS, PRIVATE INQUIRY AGENTS, PROCESS SERVERS AND PRIVATE BAILIFFS

1. SUMMARY

1.1 NATURE OF THIS DOCUMENT

This document is a report prepared for the purpose of assessing the merits of any anti-competitive provisions contained in the *Commercial and Private Agents Licensing Act.* It will be used to enable the Northern Territory Government to meet its obligations under the Competition Principles Agreement[1].

Additionally, the document deals with other issues that exist concerning the *Commercial and Private Agents Licensing Act.*

1.2 FINDINGS AND RECOMMENDATIONS CONCERNING COMPETITION POLICY REVIEW

1. The *Commercial and Private Agents Licensing Act* contains anti-competitive provisions.
2. Some of the objectives for the initial enactment of the *Commercial and Private Agents Licensing Act* continue to be relevant. The main objective is that of maximising the protection of the interests of the community, by keeping unsuitable persons out of the occupations relating to debt collection, private investigation work, process serving and enforcement of court decisions.
3. The value of the benefits in achieving the objectives referred to in Proposition 2 is greater than the cost of achieving the benefits of the objectives.
4. A licensing scheme is the only practical option for achieving the objectives referred to in Proposition 2.

1.3 RECOMMENDATIONS CONCERNING THE GENERAL REVIEW OF THE COMMERCIAL AND PRIVATE AGENTS LICENSING ACT

1. The definition of 'commercial agent' should be simplified to mean:
   "any person (whether or not he or she carries on any other business) who exercises or carries out any of the following functions:
   a) ascertaining the whereabouts of, or repossessing, any goods the subject of a lease, hire-purchase agreement or bill of sale;
   b) collecting, or requesting or demanding the payment of debts, on behalf of any person and for or in consideration of any payment or other remuneration (whether monetary or otherwise), but does not include any employee or a sub-agent of a licensed commercial agent".
2. There should be an exemption from positive licensing for all persons who perform agent roles that are incidental to prescribed types of occupations. These occupations would be those within an industry or occupation that is either regulated by Government or which is effectively self regulated. There is a need to ensure that the definition of what occupations are "incidental" is drawn with as much precision as is possible.
3. There should be continuing licensing of employees and sub-agents. However, there is no demonstrated present need to impose formal training requirements on commercial agents, inquiry agents and private bailiffs as a pre-condition of licensing of commercial agents, private agents and private inquiry agents. The

[1] See Part 3 of this Discussion Paper

fees for such licensing should refkect the cost of administering the legislation and ensuring that the fee level is not a significant barrier to entry.

4. There should be a negative licensing scheme for exempted persons.
5. That:
   a) all current licences be given a fixed period to run - eg 12 months from the date of the relevant amending Act;
   b) all new licences be for a fixed term with renewal to be determined by reference to compliance with the Act, the general law and with reporting mechanisms; and
   c) the new fixed term be developed by the Department of Industries and Business in conjunction with the relevant occupational groups, however the suggested period is two years.
6. That responsibility for the regulation of the *Commercial and Private Agents Licensing Act* be transferred from the Attorney-General to the Minister for Industries and Business and that the licensing roles performed by the Local Court, the Registrars of the Local Court and the Solicitor for the Northern Territory be transferred to licensing authorities and officers operating under the auspices of the Department of Industries and Business.
7. That there be a review for the purpose of implementing modern best practice licensing processes under the *Commercial and Private Agents Licensing Act.*
8. There be a retention of the right of judicial review of licensing decisions. Such reviews should be exercised by the Local Court and should be based on an error in the licensing process - eg, lack of procedural fairness, breach of a statutory provision, perceived or actual bias, failure to give an applicant the right to be heard, decision wrong in law, decision against the weight of evidence, improper exercise of a discretion.
9. That final consideration of issues concerning bonds and indemnity insurance be deferred until later in the year 2000 pending the resolution of general competition issues relating to those kinds of issues (this is expected to occur in respect of the competition policy review for legal practitioners).
10. That trust monies be held in interest bearing accounts with the interest being payable into a fidelity fund and to be used for the purpose of the administration of the Act.
11. There should be duty for a licensee to ensure that the regulated activities of the business are supervised by a licensed person. However, the *Commercial and Private Agents Licensing Act* should make it mandatory that there be an office in the Northern Territory or that there be a branch manager resident in the Northern Territory.
12. There should be a requirement for an annual independent inspection of commercial agents' trust accounts. The regulatory authority should select the inspector but responsibility for paying the inspector should, on pain of losing the licence, rest with the agent. The responsible authority should have power to direct an independent audit to be taken if it suspects that a commercial agent is in breach of the requirements relating to the maintenance of a trust account. However, there should be a power to exempt from this requirement licensed agents who hold minimal amounts of money or property in trust.
13. Commercial agents must issue receipts for payments made or goods seized.

14. The *Summary Offences Act* should be amended so that harassment of debtors by agents and creditors ought to be an offence whose maximum penalty is six months imprisonment and or a fine of $10,000 (100 penalty units).
15. That section 43 of the *Commercial and Private Agents Licensing Act* be retained.
16. It appears appropriate to remove the obsolete references from the Act.

2. THE REFERENCE

2.1 FORMAL TERMS OF REFERENCE

The following are the terms of reference:

1. The review of the *Commercial and Private Agents Licensing 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 *Commercial and Private Agents Licensing Act* remains appropriate for securing those objectives;
    (2) Identify the nature of the restrictive effects on competition; and
    (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;
    (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.

4. The review should consider whether the regulatory authority should continue to be the Local Court.

5. The review 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.

6. The review shall consult with, and take submissions from, those organisations currently involved with the occupations of commercial and private agents (namely the Office of Courts Administration, the Chief Magistrate, the Solicitor for the Northern Territory and the Commissioner of Police), other Territory and Commonwealth Government organisations (such as the Department of the Treasury, Department of Industries and Development and the Australian Competition and Consumer Commission), other State and Territory regulatory and competition review authorities, [and] with affected members of the occupations and their representative organisations, and with consumers and the wider community.

3. BACKGROUND

3.1 COMPETITION POLICY

3.1.1 Competition Principles 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 and signed three specific agreements to implement this, namely:

(i) the 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. Any required reforms are to be in place by the year 2000.

(ii) the 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[2];

(iii) the Agreement to Implement the National Competition Policy and Related Reforms - this 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.

Under clause 5(1) of the Competition Principles Agreement, the guiding principle is that:

> "Legislation should not restrict competition unless it can be demonstrated that:

[2] *Competition Reform (Northern Territory) Act 1995*

(a) the benefits of the restriction to the community as a whole outweigh the costs; and
(b) the objectives of the legislation can only be obtained by restricting competition."

The review process under the Competition Principles Agreement involves:

(i) clarification of the Legislature's objectives for the legislation
(ii) identification of restrictions on competition
(iii) ascertaining the effects of the restrictions
(iv) assessment of the costs and the benefit of the restrictions.

3.1.2 Rationale for competition policy reforms[3]

The underlying rationale for the National Competition Policy 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;
(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].

For more on the "market" that may be effected by the *Commercial and Private Agents Licensing Act*, see discussion of the industry [Part 6].

3.1.3 Competition review processes

There are six main steps for this review of the potentially anti-competitive provisions of the Act. They are:

1. To identify the objectives of the *Commercial and Private Agents Licensing Act* [see Part 8]
2. To identify any current provisions of the *Commercial and Private Agents Licensing Act* which are anti-competitive, and to identify any proposals for change that may have that effect [see Part 7]
3. To analyse the likely effect of the restrictions on competition and on the economy generally [see Part 7]

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[3] The material under this heading is a precis of a discussion contained in *National Competition Policy - Review of the Security and Investigation Agents Act 1995*, Issues Paper March 1999, South Australian Office of Consumer and Business Affairs, pages 1-2, 4

[4] See *Guidelines for the Review of Professional Regulation*, page 12

4. To apply the public benefit test - assess and balance the costs and the benefits of the restriction [see Parts 9-10, and 15]
5. To consider alternative means for achieving the same result including non legislative means [see Part 16]
6. To assess whether there are changes that should be made to the *Commercial and Private Agents Licensing Act* for the purposes of:
   (a) reducing any unjustified anti-competitive operation;
   (b) improving the operational efficiency and effectiveness of the Act [see Part 17]

3.2 GENERAL REVIEW OF THE COMMERCIAL AND PRIVATE AGENTS LICENSING ACT

The *Commercial and Private Agents Licensing Act* was enacted in 1979 as part of a burst of legislative activity in the Northern Territory following the grant of self government on 1 July 1978.

The Act has been the subject of several Departmental reviews since 1982. Generally, these resulted in proposals for minor amendments to the Act for the purpose of improving its effectiveness and operation.

The last public review of the Act occurred in 1992. The details of this are outlined in Appendix 1. However, the main proposals contained in that review were not actioned at that time as the issues raised were overtaken by national developments such as mutual recognition,[5] the proposals for the de-regulation of all partially regulated occupations[6] and, finally, the implementation of the National Competition Policy.

Part of the current review will focus on the options for improving the operation of the *Commercial and Private Agents Licensing Act* – (subject to a decision to retain a licensing system following the NCP assessment of the law).

4. REVIEW PROCESS

4.1 REVIEWERS

This review has been conducted by a review team established by the Northern Territory Attorney-General's Department.

In accordance with the national understanding concerning the conduct of such reviews all members were chosen because they could bring independence of view to the process.

The members of the Review Team are

Robert Bradshaw - Northern Territory Attorney-General's Department
Christopher Cox - Office of Courts Administration

[5] This is the scheme, as contained in State, Territory, Commonwealth and New Zealand Mutual Recognition Acts, which gives persons licensed in one jurisdiction the right to be licensed in other jurisdictions.

[6] It was agreed amongst the Australian governments that lack of regulation of an occupation in one jurisdiction suggested that there was no need for regulation in the other jurisdictions. There was an agreement that regulation of such "partially regulated" occupations should only be continued on the grounds of public health and safety.

Stephen Taaffe - Chief Minister's Department
Tony Clark - Department of Industries & Business.

Members of the industry are not part of the Review Team because they have an interest in the outcome. Industry involvement in the review and the required industry expertise for the Review was expected to be provided as part of the consultation part of the process.

4.2 DISCUSSION PAPER AND CONSULTATION

On 30 August 1999, the Review Team released a discussion paper that was stated as having the objective of subjecting the current law and proposals for change to scrutiny in accordance with the National Competition Policy. The objective was said to be that of determining whether the benefits of the legal framework outweigh any costs that are incurred by government, business and the community in complying with it.

In releasing the discussion paper the Review Team noted that neither the Northern Territory Attorney-General's Department or the Government of the Northern Territory had decided positions on the issues raised in the discussion paper.

In particular, the Review Team noted that it recognised the benefits to be gained from public consultation within the review process and invited comments from members of the occupations specifically regulated by the legislation. Additionally, comments were sought from members of the public, businesses and the professions who use the services of commercial and private agents.

Comments were sought in relation to any issue concerning the regulation of commercial and private agents. Commentators were advised that they should not limit themselves to any issues specifically raised in this paper.

The availability of the paper was advertised in the *NT News* and in the Alice Springs *Centralian*. Copies of the paper were distributed to industry and to organisations considered to have an interest. Details are set out in Appendix 3.

4.3 SUMMARY OR COMMENTS

Details of comments regarding the discussion paper are set out in Appendix 4. In general terms:

(a) the commentators have supported the propositions in the paper;
(b) the commentators have made suggestions that have led to amendments of the paper.

It was disappointing that neither the local or the national industry bodies were able to make a written comment. However, it is understood that industry supports formal training requirements for some agents. The Working Party was not able to support this position.

5. OPERATION OF THE COMMERCIAL AND PRIVATE AGENTS LICENSING ACT

5.1 HISTORICAL OVERVIEW

The current system for the regulation of commercial and private agents in the Northern Territory dates from 12 September 1980 - being the day of commencement of the *Commercial and Private Agents Licensing Act 1979*. Prior to that time, controls over this area of activity were to be found in general laws dealing with the behavioural aspects of the occupations, coupled with the jurisdiction of the courts over processes relating to the enforcement of court orders.

Elsewhere in Australia one or more of the occupations covered by the *Commercial and Private Agents Licensing Act* became regulated commencing in the 1920s.[7]

However, the bulk of the laws were developed in the 1950's under the auspices of the Police/Justice portfolios of the various jurisdictions, with the main occupations sought to be regulated being those of debt collecting and private investigation (particularly concerning divorce disputes).

The focus for licensing was to determine that the applicant was a fit and proper person. Subsequently, some jurisdictions have required the completion of certain training or educational requirements as a pre-condition for a licence.

5.2 PROCESSES IN PLACE UNDER THE COMMERCIAL AND PRIVATE AGENTS LICENSING ACT

The *Commercial and Private Agents Licensing Act* provides that a person cannot act as a commercial agent, inquiry agent, process server or as a private bailiff unless he or she has an appropriate licence granted by the Local Court.[8]

Persons seeking a licence must apply to the Court. A person is entitled to the grant of a licence if he or she is over 18 years of age, is a resident of the Territory, is a fit and proper person to hold a licence and has not been found guilty of an offence which warrants the refusal of the licence[9]. Corporations may also be granted licences if the persons controlling the corporation meet the requirements that apply to individuals.[10]

Details of the application must be published in the Northern Territory Government Gazette and copies must be provided[11] to the Commissioner of Police and to the Solicitor for the Northern Territory.[12] Objections to the grant of a licence may be made

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[7] *Private Inquiry Agents Act 1955* (NSW), *Commercial Agents and Private Inquiry Agents Act 1963* (NSW), *Private Agents Act 1966* (Vic), *Debt Collectors Licensing Act 1964* (WA), *Commercial and Inquiry Agents Act 1974* (Tas), *Auctioneers and Agents Act 1971* (Qld) and *Commercial and Private Agents Licensing Act* 1972 (SA).

[8] S.6 *Commercial and Private Agents Licensing Act*

[9] S. 8(1) *Commercial and Private Agents Licensing Act*

[10] S. 8(2) *Commercial and Private Agents Licensing Act*

[11] S. 9 *Commercial and Private Agents Licensing Act*

[12] The Solicitor for the Northern Territory is the Northern Territory Government Lawyer as established by section 8 of the *Law Officers Act*

by any person. The objection can be made on "any reasonable grounds[13]". However, some of the specific grounds for objection include that the applicant or the corporation nominee:

(i) is not of good character;
(ii) is not over the age of 18 years;
(iii) is bankrupt;
(iv) has been engaging in harassing tactics;
(v) has been guilty of conduct which renders him or her unfit to hold a licence of the category for which he or she has applied;
(vi) has contravened or failed to comply with a provision of the *Commercial and Private Agents Licensing Act* and the contravention or failure warrants a refusal of a licence;
(vii) has been found guilty of an offence which warrants the refusal of a licence;
(viii) is not capable of carrying out the duties of a licence holder[14].

Once granted, the licence is, subject to any disciplinary proceedings, in force forever. There is no requirement for renewal or for the payment of annual fees. A one-off licence fee is paid at the time of the grant of the licence. This fee is $70 for commercial agents and $35 for other agents.[15] The scale of licensing fees has not been altered since 1980.

However, the Local Court may on the basis of a complaint made by the Commissioner of Police or the Solicitor for the Northern Territory conduct disciplinary proceedings against an agent.[16] Such disciplinary proceedings can lead to a reprimand, cancellation of licence, disqualification from making further application suspension[17]. Disciplinary proceedings can be taken on the following grounds:

(i) the licence was improperly obtained;
(ii) the agent has been found guilty of an offence against the *Commercial and Private Agents Licensing Act* or an offence against a law in force in any part of Australia, including the Territory, which finding of guilt justifies the cancellation or suspension of his or her licence;
(iii) the agent has been engaging in harassing tactics;
(iv) the agent failed, without reasonable excuse, to obey an order of the Local Court or the Supreme Court;
(v) the agent wilfully failed to comply with a provision of the *Commercial and Private Agents Licensing Act* or of the *Local Courts Act*;

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[13] S.11(4) *Commercial and Private Agents Licensing Act*

[14] S. 11(4) *Commercial and Private Agents Licensing Act*

[15] S.15 *Commercial and Private Agents Licensing Act*, regulation 6, Commercial and Private Agents Regulations

[16] S.16 *Commercial and Private Agents Licensing Act*

[17] S.16(3) *Commercial and Private Agents Licensing Act*. There is no clear power to impose a disciplinary fine.

(vi) the agent failed to comply with a direction given under section 33(5) of the *Commercial and Private Agents Licensing Act* by the Clerk of the Court.[18]

In addition, the Minister administering the *Commercial and Private Agents Licensing Act* may apply for the suspension of a licence if satisfied that an agent has not properly accounted for trust monies.

Commercial agents and private bailiffs must, during the currency of the licence and whilst carrying on business on their own behalf, provide to the Registrar of the Local Court[19] a bond[20]. The form of the bond is set out in Appendix 2. The bond is $2000 for a corporation, $1500 for partners in a business and $1000 in all other cases[21]. These amounts have not been increased since the commencement of the legislation[22]. However, the court may order that additional security be given if it determines that the "bond required by this Act is not adequately secured"[23].

The bonds are worded so that certain monies are payable to the Territory on the demand of the Territory. The Territory cannot make a demand under the bond if the agent is complying with the provisions of the Act. If a client of an agent suffers monetary loss following a breach of the Act by an agent, the client advises the Minister who takes action to have the licence suspended. When the licence is suspended the Registrar of the Local Court or some other person appointed by the Minister divides up the available trust monies between the clients and then calls upon the agent to make good any deficiency. If the agent fails to pay the amount outstanding the Minister can call up the bond.

Monies held by an agent must be held in a trust account[s][24]. Such monies are not liable for attachment[25]. The Act is silent on the treatment of any interest payable on monies held in the trust accounts.

There are other provisions in the *Commercial and Private Agents Licensing Act* dealing with prescribed records[26], inspection of premises[27] and investigation of trust accounts[28].

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[18] S. 16(1) *Commercial and Private Agents Licensing Act*

[19] Clerks of Court are no longer appointed. S.38(4) of the *Local Court Act* provides that references in other Acts to Clerks of Court are read as being references to Registrars appointed under the *Local Court Act*.

[20] S. 18 *Commercial and Private Agents Licensing Act*

[21] S.19 *Commercial and Private Agents Licensing Act*

[22] The day of commencement was 12 September 1980

[23] S. 20 *Commercial and Private Agents Licensing Act*

[24] S. 23 *Commercial and Private Agents Licensing Act*

[25] S. 24 *Commercial and Private Agents Licensing Act.* This means that the monies cannot be taken in satisfaction of debts owed by the agent to creditors.

[26] S. 25 *Commercial and Private Agents Licensing Act*, regulation 8 of the Commercial and Private Agents Regulations

[27] S. 26 *Commercial and Private Agents Licensing Act*

[28] S. 28 *Commercial and Private Agents Licensing Act*

Under the Act licensees are required to have a nominee and a branch manager resident in the Northern Territory. However, these requirements have been modified by Regulations 35, 1999. These provide that an interstate licensed agent is not required to have a nominee and branch manager in the Northern Territory. This only applies if there is a person resident interstate, who is licensed in that state, who is responsible for the Northern Territory.

Part 7 of the *Commercial and Private Agents Licensing Act* contains rules which apply to the employment of private bailiffs.

Part 8 provides that licences are not transferable[29] and imposes reporting duties on commercial agents when they repossess vehicles.[30]

6. THE INDUSTRY

6.1 WHAT DO AGENTS DO[31]?

6.1.1 Commercial agents

The activities of commercial agents consist of:

- serving a writ, summons or other legal process
- ascertaining the whereabouts and/or repossession of goods subject to lease, hire purchase or mortgage; and
- collecting debts.

The activities also include the functions described below for private inquiry agents, bailiffs and process servers.

6.1.2 Private Inquiry agents

The activities of private inquiry agents consist of:

- obtaining/furnishing information about the personal character or actions of someone, or about the character or nature of the business or occupation
- searching for a missing person

These activities of private inquiry agents usually relate to insurance fraud/investigation, workers compensation, domestic matters, missing persons, business matters (eg corporate fraud, detection of listening devices, risk management, secret commissions, security surveys, theft of time in the workplace, theft of trade secrets, copyright, patents) and litigation (eg collecting evidence).

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[29] S. 37 *Commercial and Private Agents Licensing Act*

[30] S. 43 *Commercial and Private Agents Licensing Act*

[31] This plain language description of the activities of agents is taken from *Review of Private Investigation Industry, Discussion paper* NSW Department of Consumer Affairs, September 1963, page 14

6.1.3 Process servers

Process servers serve documents and provide evidence as to such service.

6.1.4 Private Bailiffs

Private bailiffs were created as a class of persons who could be used by the Local Court and parties for the purpose of the service and execution of the formal processes of the Local Court. The formality of this relationship has ceased following the commencement of the *Local Court Act 1989*[32]. See also Part 18.

6.2 THE MARKET

Restrictive legislative provisions affect the level of competition. To accurately assess the level of competition and the impact of any restrictions, it is helpful to define the market affecting the provision of these services. Restrictive provisions do not operate in a vacuum. They are only worth worrying about if they affect a market.

An often-cited definition of a "market" is:

> *"...the area of close competition between firms or... the field of rivalry between them.... Within the bounds of the market there is substitution - substitution between one product and another, and between one source of supply and another - in response to changes in prices. So a market is the field of actual and potential transactions between buyers and sellers amongst whom there can be strong substitution, at least in the long run, if given sufficient price incentive."* (See Re QCMA and Defiance Holdings (1976) ATPR 40-012.)

Hence, a "market" is the area of trade or traffic in a commodity or service. The competitiveness of a market will vary according to how different the offered products are from one another in character or use, and the degree of substitution of products that may occur if a sufficient price incentive is present.

Substitution may occur on the supply side, where producers will switch to the production of different products in response to changing prices, and may occur on the demand side, where consumers may change to the consumption of different products as a result of a change in price.

It is also possible to define the boundaries of a market by reference to:-

(1) the nature of the product;
(2) the geographical "reach" of supply;
(3) where the product appears in the chain of production; and
(4) the levels of actual and potential competition - the latter requiring an estimation of what may occur in the future.

In the case of the *Commercial and Private Agents Licensing Act* the market appears to be those consumers and businesses that use the services of commercial agents, private

[32] On 1 January 1991

inquiry agents, process servers and private bailiffs. They include many persons in the Territory who require debts to be recovered, many persons who require the service of documents, others who require bailiffs and others who require private inquiry agents.

One of the effects of the mutual recognition legislation[33] is a licensing decision for a natural person taken in the Northern Territory may also be the main licensing decision for that person for the whole of Australia and New Zealand. This means that the potential market extends outside of the Northern Territory.

In general, the market for commercial and private inquiry agents' services is geographically defined, and is restricted to the Northern Territory. The market is not overly robust in terms of changes in the price structure, with limited substitution being available between possible providers due to the requirement to hold appropriate licences.

Additionally, the current structure of the Act (and its equivalents elsewhere) is such as to make it difficult for businesses based outside of the Northern Territory to operate in the Northern Territory. This arises from the need to have a manager and office located in the Northern Territory.

6.3 THE SIZE OF THE INDUSTRY

It appears that there are 10 businesses with some 85 individuals operating within the Darwin area.

The number of licences granted for each of the past five years is as follows:

Category	1994	1995	1996	1997	1998	1999	Total
Commercial agents	9	9	20	12	12	NA	62
Inquiry agents	9	10	22	14	22	NA	77
Process servers	8	12	20	14	15	NA	69
Private bailiffs	7	12	20	14	15	NA	68
Total number of persons who were issued with licences from the Local Court, Darwin	10	12	22	14	22	NA	80

There are two points to note about this table. They are:

(a) it is not possible, from information held by the licensing authority, to say how many persons are currently operating under their licences. This is because licences are perpetual. There are no renewal or reporting requirements;
(b) it appears that most applicants successfully seek licences for all of the licence categories.

[33] *Mutual Recognition Act 1992* (Cth), *Mutual Recognition (Northern Territory) Act*, *Trans-Tasman Mutual Recognition Act 1998* and the authorising Acts of the other Australian jurisdictions

For places outside of Darwin complete details are not available. However, it would appear that there are three commercial agents in Katherine, five in Alice Springs and a partnership in Nhulunbuy. It would also appear that most of these licensees hold licences for all categories.

7. ANTI-COMPETITIVE PROVISIONS IN THE COMMERCIAL AND PRIVATE AGENTS LICENSING ACT.

7.1 COMPETITION PRINCIPLES AGREEMENT

The Competition Principles Agreement sets out the general principle that legislation needs to be reviewed if it is anti-competitive.

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;
2. Controls prices or production levels;
3. Restricts the quality, level or location of goods and services available;
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; or
7. Provides advantages to some firms over others by, for example, shielding some activities from pressures of competition.

7.2 IDENTIFICATION OF THE ANTI-COMPETITIVE PROVISIONS CONTAINED IN THE *COMMERCIAL AND PRIVATE AGENTS LICENSING ACT*

The following table[34] contains a description of the restrictions in the *Commercial and Private Agents Licensing Act* and an assessment of their impacts and significance.

Description of the restriction	Competition or economic effects	Severity of the restriction	Any other problems or comments
S4. This provides a list of classes of persons who are exempted from the operation of the Act. These classes of persons include Police and employees of most government agencies, employees of various occupational, business or professional groups acting in the course of their business (eg lawyers, accountants, financial institutions) and agents of the Power and Water Authority when dealing with aboriginal communities.	Provides advantages to some firms over others by, for example, shielding some activities from pressures of competition.	Minor. Most of the persons in the exempted classes of persons would not be agents and thus do not need s.4 in order to avoid the licensing requirements. However, this section discriminates against agents whose roles are not incidental to other occupations. Furthermore it provides an incentive for agent to re-classify their operations to avoid the need for a licence (and the need to comply with other	The Act contains prohibitions on conduct which lead to the cancellation of a licence - eg using harassing tactics or refusing to obey an order of the court. Whilst there may not be a need for the people in these classes to be licensed there seems to be little reason why they should not be subject in some way to the rules relating to prohibited conduct.

[34] The table is set out in a form recommended by the Northern Territory Treasury

1.1 REPORT - NATIONAL COMPETITION POLICY REVIEW - DEBT COLLECTORS, PRIVATE INQUIRY AGENTS, PROCESS SERVERS AND PRIVATE BAILIFFS

Description of the restriction	Competition or economic effects	Severity of the restriction	Any other problems or comments
		requirements such as a bond. This may make it more difficult for customers to make an informed selection of agent. Nevertheless, applying the full licensing regime to those performing incidental agent roles may impose costs that are higher than the benefits.	
s. 6 creates an offence for a person to act or hold him or her self out as a commercial agent, inquiry agent, process server or private bailiff unless licensed. Should be read with s.8 which sets out the licensing requirements.	Governs the entry or exit of firms or individuals into or out of markets.	Minor. The licensing requirements are not onerous. They do not contain any requirement for any training. The fee is small (currently $70 for a commercial agent licence and $35 for other licences). The bond required under s18 for commercial agents and bailiffs ranges between $1,000 and $2,000.	There is the problem that one of the conditions for a licence is that the person be a fit and proper person. This is a vague concept. It is generally desirable that the legislation specify the disqualifying convictions and make it plainer whether some level of provable competency is required. Additionally, the Act is uncertain as to whether the Court has the power to grant a licence where a person does have all of the qualities which provide for an entitlement to a licence.
s.8(1)(b) provides that a person must be a resident of the Territory in order to be entitled to a licence.	Governs the entry or exit of firms or individuals into or out of markets. Provides advantages to some firms over others by, for example, shielding some activities from pressures of competition.	Minor practical impact in so far as there are few businesses that would employ persons who would want to operate in the Territory and in another jurisdiction. It is not apparent why somebody who complies with the legislation and is deemed to be a fit and proper person should also have to be a Territory resident.	This has the effect of preventing someone who lives in an adjoining jurisdiction from being entitled to a Northern Territory licence. It is not clear how this section works with the *Mutual Recognition Act 1992*. However, Regulations 35, 1999, exempt an interstate licensed operator from the need to duplicate officers and managers in the Northern Territory[35].
s.8(1)(c) provides that a person is not entitled to the grant of a licence if bankrupt.	Provides advantages to some firms over others by, for example, shielding some activities from	Minor.	Some bankruptcies can occur for reasons unrelated to the conduct of an occupation or the honesty or competency of the individual. Aside from those agents who may hold

[35] These regulations commenced operation on 10 November 1999.

1.1 Report - National Competition Policy Review - Debt Collectors, Private Inquiry Agents, Process Servers and Private Bailiffs

Description of the restriction	Competition or economic effects	Severity of the restriction	Any other problems or comments
	pressures of competition.		trust monies (eg commercial agents) there is little obvious reason why a bankrupt person is necessarily disqualified from being employed as an agent under the Act.
s.10 requires that corporations must have a nominee who is an officer of the company resident in the Territory. The officer must have bona fide control of the business in the Northern Territory.	Is likely to confer significant costs on business. Provides advantages to some firms over others by, for example, shielding some activities from pressures of competition.	Minor in terms of likely overall impact. However, for individual firms the impact can be relatively large because the effect is that operations must be jurisdictionally based when there may be no operational need for such a way of operating.	See above comment on s.8(1)(b).
s.11 provides that objections to the grant of a licence can be lodged.	Is likely to confer significant costs on business.	Minor in terms of overall impact. However, for individual firms the impact can be relatively large because the effect is to permit rivals to lodge objections. This could lead to delay and expensive court proceedings.	There is no requirement to advertise the intention to apply for a licence. This makes it difficult to see how persons others than those involved[36] in the process would ever be in a position to lodge an objection.
s.12 provides that applications must be heard in open court.	Is likely to confer significant costs on business.	Court proceedings are an unnecessarily expensive method for issuing occupational licences - especially where there is no contest concerning the grant of a licence. The process is expensive for both the Territory Government and the applicant.	It is usual in occupational licensing to provide for an administrative process for the issuing of licences. There is usually only reference to a court or tribunal process where there is a contest about the grant of a licence.
s.13 provides for the renewal of a licence.	NA	The existence of this section suggests an oversight in the development of the original legislation in 1979. However, if the objective of the legislation is to monitor the behaviour of market operators, then the lack of any effective renewal or reporting requirements inhibits this.	As licences do not expire the concept of renewal is not relevant in terms of competition policy analysis of the current Act. However, the issue is of relevance to the general review of the Act (and the accompanying competition policy analysis that must be taken in respect of any proposals arising from that review).
s. 16 provides the Court with the power to conduct disciplinary proceedings.	Is likely to confer significant costs on business.	This is a necessary consequence of imposing disciplinary controls on the	It is questionable as to whether this disciplinary role should be performed

[36] Namely the Commissioner of Police and the Solicitor for the Northern Territory

1.1 REPORT - NATIONAL COMPETITION POLICY REVIEW - DEBT COLLECTORS, PRIVATE INQUIRY AGENTS, PROCESS SERVERS AND PRIVATE BAILIFFS

Description of the restriction	Competition or economic effects	Severity of the restriction	Any other problems or comments
		members of an occupation or profession.	by a court or by administrative agency.
S17 provides that appeals can be made to the Supreme Court against decisions made by the Local Court in its capacities as a licensing and disciplinary authority.	Is likely to confer significant costs on business.	Minor practical significance.	But for the fact that the Local Court is the licensing authority it would appear that the Local Court is a more appropriate appeals body than the Supreme Court.
S18 provides that commercial agents and private bailiffs must lodge a bond accompanied by the prescribed security. The content of the bond is to be as set out in the Commercial and Private Agents Licensing Regulations. The amount of the bond is to be $2000 for corporations, $1500 for persons in business as a partnership and $1000 for sole traders.	Is likely to confer significant costs on business. Governs the entry or exit of firms or individuals into or out of markets.	The actual impact is minimal because of the small size of the bond amount. This amount has not varied since the commencement of the legislation on 12 September 1980. Conceptually, the need to provide a security could be a major impediment to entry into business as a commercial or private agent.	The need to obtain the bond effectively introduces financial institutions and/or insurers into the licensing process. If the bond is to be retained there would be a need to make sure that the amount secured has some relevance to what is being secured. However, other options, such as fidelity insurance, should be investigated.
S.23 provides that monies received on behalf of another person must be held in trust in a manner prescribed in the section.	Restricts price or type of input used in the production process.	Negligible impact. It may be a common law requirement that such monies be held in trust. In any event it is common for legislation to ensure that these kinds of monies are considered to be trust monies. This is limited but it does prevent agents and clients reaching agreement as to how money collected is to be used pending the payment of it to the client.	In other occupational legislation (eg real estate agents, legal practitioners) it is common to prescribe that these kinds of monies be held in special kinds of trust accounts with the interest being paid into a Fund which supports the administration of the Act. The rate of interest is as agreed or prescribed between the financial institutions and the licensing authority.
S24 provides that monies in an agents trust account shall not be liable to be taken in execution of a claim by a creditor of the agent.	NA	NA	This is a standard provision concerning the holding of these kinds of monies.
S26 requires agents to maintain prescribed records and documents for five years. The details and documents are prescribed in regulation 8. The information required to be kept includes details of the client, details of the actions taken and detail of the fees charged.	Is likely to confer significant costs on business.	The retention of these records for this length of time would not appear to impose costs greater than would be expected to exist if there were no regulation.	
S26 provides for the inspection of records.	Is likely to confer significant costs on business.	Minimal. There is no evidence that the records are inspected other than in the course of an	

1.1 Report - National Competition Policy Review - Debt Collectors, Private Inquiry Agents, Process Servers and Private Bailiffs

Description of the restriction	Competition or economic effects	Severity of the restriction	Any other problems or comments
		investigation.	
S27 provides that the Minister may freeze monies held in trust.	Is likely to confer significant costs on business.	Minimal. There is no evidence that this occurs other than for the purpose of an emergency measure designed to protect the interests of clients. It is, however, arguable that this power should be exercised by the statutory licensing authority or by a Court on application by the licensing authority.	There may be a case for nominating an administrative officail to perform this role.
S29 provides, on an application by the Minister, for the suspension of licences by the Court, for the Court to call for claims and for the Minister to call on the bond.	Is likely to confer significant costs on business.	Not relevant to competition policy.	Consider whether the role of applying for suspensions should be shifted from the Minister to a statutory body (such as a licensing authority) or to a statutory officer (such as the Commissioner of Consumer Affairs or the Chief Executive Officer of the relevant Department). Also consider whether the Court ought to be the body which considers such applications. Other licensing Acts often give the role to an administrative body with a right of review by a Court.
S30 provides for the role of private bailiffs. It says that the Clerk of the Local Court shall issue private warrants.			This provision does not appear to be operative. This section, along with sections 31, 32, 33 and 33A should be repealed by way of a Statute Law Revision Bill.
S31 provides that the Clerk of the Local Court may require a person to nominate a private bailiff for the execution of a warrant.	NA		This provision does not appear to be operative. See comment on s.30.
S32 provides that it is an offence for a private bailiff not to accept a warrant of execution from the Local Court.			This provision does not appear to be operative. See comment on s.30.
S33 provides for the rights and powers of private bailiffs. This includes setting out basic rules about fees. Must be as agreed or, in cases where the Clerk of Court has issued instructions, be in accordance with the rules prescribed by the *Local Court Act*.			S33 contains cross references to provisions in a repealed Act and in repealed Rules of Court. Check reference to the repealed Compensation (Australian Government Employees) Act 1971 (Cth). See comment on s.30.
S33A provides for the recovery of costs for the execution of a warrant.			The section relates to a repealed Local Court Rule. See comment on s.30.

1.1 REPORT - NATIONAL COMPETITION POLICY REVIEW - DEBT COLLECTORS, PRIVATE INQUIRY AGENTS, PROCESS SERVERS AND PRIVATE BAILIFFS

Description of the restriction	Competition or economic effects	Severity of the restriction	Any other problems or comments
S36 provides that the manager of a corporate licensee must be licensed. This manager must be resident in the Northern Territory.	Governs the entry or exit of firms or individuals into or out of markets. Is likely to confer significant costs on business. Provides advantages to some firms over others by, for example, shielding some activities from pressures of competition	Potentially major in the case of operators whose principal place of business is outside the Northern Territory.	See comment on ss 8 and 10. However, Regulations 35, 1999, exempt an interstate licensed operator from the need to duplicate officers and managers in the Northern Territory[37].
S39 provides that an agent must not employ a person to act as an agent unless that person is also licensed.	Governs the entry or exit of firms or individuals into or out of markets. Is likely to confer significant costs on business.	Minor additional restriction	
S43 provides that a commercial agent, when repossessing a motor vehicle, must inform the police.	Is likely to confer significant costs on business.	Minor	

In general terms:

1. The list of exemptions in the Act potentially benefit the persons in the exempted businesses over those that need to comply with the full rigours of the Act. On its face, this section appears to be contrary to the intent to regulate private bailiffs and the other agents specified in the Act.
2. The licensing provisions may operate to exclude certain persons from entering or remaining in the market. The "market" includes the pool of people working as agents pursuant to the Act. This has the potential for competition in the market to be diminished and may have a flow-on effect on the economy in terms of unemployment and higher fees.
3. The costs of compliance are very low. There is a low one off licensing fee and the costs of obtaining the licence. After that costs should be minimal excepting where some disciplinary action is taken.
4. In general terms compliance expenses ought to be able to be used more effectively if the licensing role of the Court were taken over by an administrative agency.

[37] These regulations commenced operation on 10 November 1999.

8. OBJECTIVES OF THE COMMERCIAL AND PRIVATE AGENTS LICENSING ACT

8.1 NATURE OF THE WORK OF AGENTS

The various agents licensed under the *Commercial and Private Agents Licensing Act* carry out sensitive and important functions. Some involve private detective work. More significantly they are involved as tools of the courts in executing judgments and in serving court documents. These functions may involve intrusions into the personal lives of citizens. In the course of their work, agents may come into possession of much confidential information and they may have large sums of other people's money entrusted to them.

8.2 OBJECTIVES STATED AT TIME OF ENACTMENT OF THE *COMMERCIAL AND PRIVATE AGENTS LICENSING ACT*

At the time of its enactment in 1979 the *Commercial and Private Agents Licensing Act* was stated by the then Attorney-General as having two main objectives[38]. They were:

1. To open up the categories of persons who may effect the service of court documents. It did this by establishing a licence for "private bailiffs". These private bailiffs were then recognised in other legislation such as the *Local Courts Act*. Section 23 of that Act provided that private bailiffs under *Commercial and Private Agents Licensing Act* could execute warrants and serve summonses and notices.
2. To licence and control a business whose less responsible practitioners have often been criticised. In stating this purpose the then Attorney-General noted that agents in the Territory had escaped that kind of criticism but that this was not the case in the rest of Australia where agents were reported to have engaged in unreasonable intrusion or having been deceptive[39].

It appears that objective 1 may no longer be relevant.

The *Local Court Act 1989* repealed the *Local Courts Act 1930 (as amended).* The current *Local Court Act* contains no recognition of the status of private bailiffs as licensed under the *Commercial and Private Agents Licensing Act.* Instead bailiffs of the Local Court are appointed by the Chief Magistrate[40]. It is not clear whether the Chief Magistrate can (or does) appoint persons who are not employees of the Territory.

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[38] As described in the Second Reading Speech given by the Attorney-General, the Hon Paul Everingham MLA, Hansard, 29 November 1978, page 603

[39] In support of the Bill, the Attorney-General quoted the following from the Commission of Inquiry into Poverty:

"In the course of encouraging the debtor to pay his debts, either the creditor or his collection agent may be tempted to indulge in practices which constitute an unreasonable intrusion upon the debtor and his family or which involved deception of a type which ought not to be tolerated. While there is little evidence of widespread use by debt collectors of oppressive practices for obtaining payment from debtors in Australia, there can be little doubt that such practices have existed in the past and that some of them persist today" (page 131)

[40] S.10A, *Local Court Act*

A similar position exists in relation to the Supreme Court. For the purposes of serving or executing legal documents issued by that Court the *Sheriff Act* provides for the appointment by the Attorney-General of bailiffs[41]. Additionally, the Sheriff may appoint Deputy Sheriffs for specified proceedings or for specified lengths of time[42]. In fact, it is the latter means of appointment that is most common for persons performing bailiff-like functions for the Supreme Court.

8.3 OBJECTIVES OF SUCH LEGISLATION ELSEWHERE IN AUSTRALIA

The *Commercial and Private Agents Licensing Act* was enacted in 1979 as part of the broad policy approach to have in place in the then recently created self-governing Territory an equivalent body of legislation to that usually operating in the other Australian jurisdictions.

Therefore, it is useful to look at the reasons advanced elsewhere in Australia for the enactment of laws such as the *Commercial and Private Agents Licensing Act*. Summaries of some of the relevant debates are set out in Appendix 1. However, in very broad terms the key factors appear to have been as follows:

- There were complaints about the unscrupulous activities of some private inquiry agents and process servers. The complaints were about quality of the service, exorbitant fees, lack of honesty of the agents, harassment and invasion of privacy.
- Inquiry agents were compared with police officers. Process servers were compared with court officials. Thus the people in the industry were characterised as people who, as agents, are occupied in the private prevention of criminal acts and the private enforcement of civil rights. On the basis of those comparisons it was concluded that the same kinds of controls should exist for these private operatives as for those in government service.

These remained the main articulated objectives for these kinds of Acts through until the early 1990s. At that time some Governments and some of their officials began to articulate a new rationale for such Acts in terms of the lifting of educational and competency standards - as though they were ends in themselves. See, for example, the 1996 South Australian Act[43].

Other possible objectives include:

The remedying of a market failure[44]. The only likely market failure is that known as asymmetric information. This occurs where the purchaser of the service has insufficient knowledge to be able to work out which service provider to choose. Such persons may seek third party assurances about the qualifications of service providers, ethical conduct assurances and/or service standards guarantees. Government

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[41] S. 5 *Sheriff Act*

[42] S. 6 *Sheriff Act*

[43] Hon S J Baker, Deputy Premier, South Australian House of Assembly, 21 November 1995, page 621

[44] This paragraph summarises paragraph 5.19-5.25 of the *Guidelines for the review of Professional Regulation*

intervention was seen as a means of ensuring a minimum standard of competency and behaviour. It has been suggested that legally enforceable minimum standards can reduce average cost and raise the average quality of such services though at the expense of excluding low quality supplies and customers.

The avoidance of tragic risk. On one view the risks of removing licensing controls may be regarded as low because most members of the occupations will conduct their affairs in a competent and honest way. However, a few members of society may suffer at the hands of charlatans who can practise notwithstanding criminal records, lack of compliance with consumer protection laws, lack of indemnity insurance and so on.

Encouragement of "more professionalism". It has been argued by the Australian Council of Professions that:

> *"there is a significant public benefit in the maintenance of the highest levels of professional practice in this country and the concept and pursuit of 'professionalism' is essential to meeting the needs and aspirations of each and every citizen, thus contributing to the preservation of the social fabric*[45]*"*

In this context professionalism in respect of an occupation means an occupation that has the attributes of:

1. A requirement for special knowledge and skills
2. A high requirement that practitioners exercise their knowledge and skills in the interests of others
3. Standards of competence and conduct that are established and enforced by an association which represents the profession as a whole and which operates under a charter or articles of association which defines its gatekeeper role
4. Adherence of practitioners to a code of practice which includes requirements that practitioners place the health, safety and welfare of the wider community ahead of loyalties to client, colleagues or the professions, and that they practice only within their area of competence[46]

8.4 CURRENT NORTHERN TERRITORY OBJECTIVES

Despite the South Australian developments and despite the other three aims referred to in the previous subparagraph, it would still appear that the main objectives of the legislation in the Northern Territory remain those of:

(a) public health and safety (in respect of potential violence and crime in executing process, collecting debts and finding information);
(b) consumer protection (in respect of the rights of individuals privacy and the right to ensure that property held in trust is safe from misappropriation).

9. BENEFITS OF THE RESTRICTIVE PROVISIONS OF THE *COMMERCIAL AND*

[45] See quoted, page 24, *Guidelines for the Review of Professional Regulation*

[46] See quoted, page 22, *Guidelines for the Review of Professional Regulation*

PRIVATE AGENTS LICENSING ACT

9.1 KEEPING CRIMINALS OUT OF THE OCCUPATIONS

The main clear benefit of the restrictive provisions of the *Commercial and Private Agents Licensing Act* is that they provide a mechanism for keeping persons with known criminal bents out of the industry. It also provides avenues to be followed for removing from the industry licensed persons who subsequently become known as failing to meet the expected standards of personal probity.

A licensing system provides a pro-active means of minimising the risk of harm, and an effective remedy to remove inappropriate persons from the industry where necessary.

9.2 PROVISION OF INFORMATION TO THE COMMUNITY AND EMPLOYEES CONCERNING PERSONS SEEKING TO ENTER THE OCCUPATIONS

Requiring some degree of prior assessment (as demonstrated by the issue of a licence) helps provide a regulatory reference point for the proper administration of this activity. Commercial and private inquiry agents are able to be advised of the minimum regulatory requirements and are able to structure their affairs accordingly.

This is to be compared with a "reactive" style of regulation, where action is only taken on complaint. In these cases, it may be difficult to provide an adequate remedy within a short time. There is also the risk that inappropriate persons are able to continue to work within the industry while court cases are on foot. Complaints of improper practice may take some time to resolve.

9.3 LACK OF DATA OF ANY HARM CAUSED BY THE MEMBERS OF THESE OCCUPATIONS

It may be argued that a lack of data on harm caused in this area shows the merits of a "pro-active" approach.

9.4 EXEMPTIONS

The exclusion of various groups of people from the provisions of the Act has been argued as promoting competition as it gives consumers of agents' services the added choice (in certain cases) to pursue the issue themselves, rather than requiring them to engage an agent. At the same time, those who wish to be professional bailiffs (and other agents) are appropriately regulated.

9.5 INDIRECT DETERRENCE

The requirement to be licensed and undergo some form of personal assessment may deter some unscrupulous would be applicants even if they do not have a criminal record that can be accessed by the Local Court in its licensing capacity.

9.6 EXISTENCE OF A BOND

Finally, the Act, by requiring the lodgement of some form of bond may operate to ameliorate loss that might occur if an agent steal's money. Similarly, if the requirement for a bond was to be replaced by insurance requirements, the insurance money could be used to offset losses to clients.

9.7 PREVENTION OF INCOMPETENT PERSONS ENTERING THE OCCUPATIONS

It is somewhat less clear whether the Act operates in such a way to ensure that incompetent persons do not obtain licences. The formal structure of the legislation has only limited utility in guaranteeing the prevention of such persons entering the industry.

In fact, it is likely that competency is judged by the market. In this regard the Act has only limited success in providing a common benefit of licensing - namely that the licensed person has some independently assessed level of competence and/or formal training. However, this may not be a significant local factor in the Northern Territory's small market where word of mouth assessments amongst clients are probably still an effective self regulating mechanism.

10. COSTS OF THE RESTRICTIVE PROVISIONS OF THE *COMMERCIAL AND PRIVATE AGENTS LICENSING ACT*

The direct costs are slight. The actual costs of entry to this market are minimal. It is very unlikely that the amount of the direct costs would keep out of the industry anyone with a genuine interest in setting up in business.

The indirect costs incurred in complying with the licensing regime are also regarded as minimal.

The only substantial costs likely to be faced are those which might occur if an agent were forced to defend him or herself in a prosecution or disciplinary matter. However, there is no reason to think that such costs to either industry or government under this Act would be any greater than under any other legislative scheme for dealing with such matters. This is said assuming that the bare minimum of legislative involvement for these occupations will involve:

(a) conduct rules; and
(b) negative licensing (ie the power of a court or an administrative body to ban a person from acting as an agent).

11. OTHER NATIONAL COMPETITION PRINCIPLES REVIEWS OF LAW RELATING TO COMMERCIAL AGENTS, PRIVATE AGENTS, PROCESS SERVERS AND PRIVATE BAILIFFS

11.1 NATIONAL COMPETITION POLICY REVIEWS

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:

1.1 Report - National Competition Policy Review - Debt Collectors, Private Inquiry Agents, Process Servers and Private Bailiffs

State/Territory	Legislation	Description	Current position
NSW	*Commercial Agents and Private Inquiry Agents Act 1963*[47]	Provides for the licensing and control of commercial agents, private inquiry agents and their subagents.	[Dec 1997] Underway. Dealt with under Licence Reduction Program, but awaiting further consideration following Industrial Relations Commission inquiry.
Victoria	*Private Agents Act 1966*[48]	Act deals with commercial agents, bailiffs and inquiry agents. Also deals with occupations such as crowd controllers.	An issues paper was released in June 1999 by the Victorian Justice Department with comments due by 9 August 1999.
Queensland	*Security Providers Act* 1993 [private investigators] *Auctioneers and Agents Act 1971*	*Auctioneers and Agents Act* 1971 provides for the licensing of debt collectors and for their regulation by the same body that regulates real estate agents, motor vehicle dealers and auctioneers. Section 232 of the *Supreme Court Act 1995* deals with the appointment by the Governor of bailiffs. The Supreme Court may also appoint bailiffs.	The NCP for the *Auctioneers and Agents Act* 1971, had been reported as being complete for commercial agents and debt collectors. A Bill for new legislation had been introduced. However, it now appears that the legislation is being reconsidered with a new Bill, together with an NCP analysis, to be finalised by the end of 1999. It appears that there may be a greater use of mandatory codes of practice to replace prescriptive legislation.
WA	*Debt Collectors Licensing Act 1964*	*Debt Collectors Licensing Act 1964* regulates collectors of debts. The Local Court is the licensing authority. There is a	The Ministry of Fair Trading is to conduct a review of the *Debt Collectors Licensing Act 1964* by 30 June 2000.

[47] Amended by the *Regulatory Reduction Act 1996*

[48] Amendments made by *Public Sector Reform (Miscellaneous Amendments) Act 1998*

1.1 REPORT - NATIONAL COMPETITION POLICY REVIEW - DEBT COLLECTORS, PRIVATE INQUIRY AGENTS, PROCESS SERVERS AND PRIVATE BAILIFFS

State/Territory	Legislation	Description	Current position
		long list of exemptions (section 4).	
	Securities and Related Activities (Control) Act 1996	*Securities and Related Activities (Control) Act* 1996 relates to, amongst other occupations, inquiry agents.	The WA Police service is to review by the end of 1999 the *Securities and Related Activities (Control) Act 1996*
SA	*Security and Investigation Agents Act 1995*[49]	Deals with investigation agents and process servers. Also deals with security agents.	Issues paper released by the Office of Consumer and Business Affairs during March 1999. Draft report issued in July 1999.
Tasmania	*Commercial and Inquiry Agents Act 1974*	Deals with commercial agents and inquiry agents.	[April 1998]
ACT	No review listed	No review listed. These occupations do not appear to be regulated in the ACT.	[August 1998]

11.2 OVERVIEW OF OTHER REVIEWS

The table in part 11.1 suggests that not all States and Territories consider the regulation of commercial agents, inquiry agents, private bailiffs to be anti-competitive. Of those that have concluded that the relevant legislation may be anti competitive:

- South Australia has released an issues paper followed by a draft report.
- Victoria has released a paper.
- Queensland had stated[50] that it has completed the review (regarding commercial agents and debt collectors) and that the Agents and Motor Dealers Bill 1998 deals with the issues. However, it appears that this Bill has lapsed (with the changes in Government) and that all issues, including NCP issues, are being reconsidered.

[49] Amendments made by *Statutes Amendment (Consumer Affairs) Act 1998*

[50] National Competition Council Compendium of Reviews 1998.

1.1 REPORT - NATIONAL COMPETITION POLICY REVIEW - DEBT COLLECTORS, PRIVATE INQUIRY AGENTS, PROCESS SERVERS AND PRIVATE BAILIFFS

South Australian Issues Paper

The South Australian Issues paper[51] deals with investigation agents - with that term being defined so as to include, in Northern Territory terminology, the roles of inquiry agents, commercial agents and private bailiffs.

In respect of this group of occupations the South Australian issues paper poses a series of propositions or discussion points. Those discussion points of relevance to the Northern Territory legislative scheme include:

- whether it is correct to say that the objectives of the Act are (1) to ensure that only appropriate persons are able to hold a licence and (2) that persons licensed under the Act are adequately and appropriately trained. Elsewhere in the paper it is oft stated that the rationale for the licensing of contractors is that of regulating contractual relations between a contractor and a consumer and to protect consumers from the risk of financial loss through provider failure and criminal activity;
- whether it is correct to say the disciplinary provisions in the Act do not distort competitive conduct in the market. Disciplinary proceedings are initiated by the Commissioner of Consumer Affairs and are dealt with by the Administrative and Disciplinary Division of the District Court (noting that assessor may assist the Court in such matters);
- whether the technical requirements are too onerous and therefore unnecessarily restrictive;
- whether the requirement that a licensee (contractor) hold technical qualifications creates a restriction on entry to the market that is unnecessarily restrictive. That is, the requirement prevents business persons (with business skills) from operating a business which might be able to employ persons with the relevant skills;
- whether prescribing a list of offences is an appropriate mechanism for determining whether a person is fit and proper to hold a licence;
- whether reputation (financial and personal) should be a factor;
- whether the scale of fees is a barrier to entry. In this case the paper suggested that the fees, which range from $155 (application fees) to $390 being the annual fee for a business are satisfactory;
- are training prescriptions overly restrictive on training providers;
- do trust account requirements increase the cost of operating a business;
- are the restrictions on the use of trust monies warranted;
- what are the costs and benefits in prescribing the minimum content of advertising (eg the requirement that the advertisement contain the registered/licence name of the agent);
- whether the crown exemptions offend against the principles of competitive neutrality;
- whether other exemptions are justifiable;
- whether process servers should continue to be negatively licensed.

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[51] *National Competition Policy - Review of Security and Investigation Agents Act 1995*, March 1999, Office of Consumer and Business Affairs [South Australia],

1.1 REPORT - NATIONAL COMPETITION POLICY REVIEW - DEBT COLLECTORS, PRIVATE INQUIRY AGENTS, PROCESS SERVERS AND PRIVATE BAILIFFS

South Australian Draft Report[52]

The South Australian draft report concerning investigation agents contains the following preliminary conclusions[53] on issues of some relevance to the Northern Territory:

A. The Act has the following objectives:
   1. To promote the safety of the public; and
   2. To promote the proper maintenance of appropriate standards of those engaged in the provision of investigation functions.

B. There is a continuing need to pursue the objectives referred to in paragraph A.

C. The Act seeks to achieve the objectives by:
   1. Ensuring that only appropriate persons are able to hold a licence issued under the Act;
   2. Ensuring that persons licensed under the Act are adequately and appropriately trained.

D. In respect of other regulatory options[54], the conclusion is that less restrictive models of regulation are inappropriate. More specifically:
   1. Reliance on market forces is an inappropriate means of regulating these industries;
   2. Reliance on existing general laws to alleviate risks which exist or potentially exist is inappropriate - rather, these general laws when combined with a licensing or registration system provide an effective framework for regulation of these markets;
   3. That the option for greater co-regulation or self-regulation is not feasible at this time;
   4. That negative licensing is not a reasonable alternative to the current system of regulation [but noting that process servers are currently negatively licensed in South Australia].

E. That there is a need for an investigation agent (contractor) licence. A person holding such a licence could contract for the performance of the functions. This appears to be a business licence which permits the holder of the licence to employ others to perform the licensed activities notwithstanding that the holder may not be personally qualified. However, it appears that such a person must be in partnership with someone who is technically qualified.

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[52] *National Competition Policy - Review of Security and Investigation Agents Act 1995*, June 1999, Office of Consumer and Business Affairs [South Australia]

[53] The draft report deals with occupations in addition to investigation agents and commercial agents. This summary of recommendations has been modified as to only summarise the preliminary recommendation in so far as they relate to occupations regulated by the NT's *Commercial and Private Agents Licensing Act.*

[54] For example, reliance on market forces, reliance on general laws such as the *Fair Trading Act 1987, Trade Practices Act 1975* (Cth), industry self regulation or negative licensing.

F. That there be an investigation (worker) licence. A person holding this licence can personally perform all of the functions identified in the legislation.

G. That there be a common fee for contractor and for workers.

H. That there be a trainee licence. Such a licence would permit an unqualified person to perform work so long as under the direct (within sight and sound) supervision of a person holding a worker's licence. The trainee would be required, on pain of financial penalty, to complete a training course within a specified period of time.

I. That the scope of work for investigation agents should be:
   1. Obtaining or providing (without the written consent of a person) information as to the personal character or actions of the person or as to the business or occupation of the person
   2. Searching for missing persons
   3. Obtaining evidence for the purposes of legal proceedings

J. That the scope of work for collection agents be:
   1. Ascertaining the whereabouts of or repossessing goods that are subject to a security interest
   2. Collecting or requesting the payment of debts
   3. Where permitted by law, executing legal process for the enforcement of a judgment or order of a court
   4. Executing distress for the recovery of rates, taxes or money

K. Business competencies are relevant only where it is an objective to protect consumers in a contractual sense. This will usually only occur in circumstances in which a consumer will pay for goods or services in advance of their receipt, or where there are likely to be warranty requirements to be fulfilled. In this context it was recommended that there be business competencies specified for (collection) investigation agents.

L. Technical competencies should be required for:
   1. Investigation agents (workers)
   2. Commercial agents (workers).

M. That the requirement that a person has sufficient financial resources to carry on the business is a justified barrier to entry in those circumstances in which consumers are at risk from contractor failure - collection agents. The level of financial resources should be reviewed.

N. That there should be list of convictions which mean that a person is unable to obtain a licence. For major indictable offences the disqualification should be permanent. For minor indictable offences the period should be 10 years.

O. There should be a retention of current provisions relating to financial reputation and financial status. Matters such as not having been an undischarged bankrupt, not having been subject to a composition or deed or scheme of arrangement with

creditors, not having being involved during past five years as a director of a corporation wound up for the benefit of creditors.

P. The retention (and amplification) of a provision which means that a business cannot, for its own purposes, engage a person to perform a regulated activity unless the person so engaged holds the relevant licence.

Q. That the supervisory requirements of the technically qualified supervisor of the activities of the business not extend to the contractual aspects (which are the responsibility of the owner of the business).

R. That there continue to be exemptions for Police, Sheriff and other Court officers.

S. That the exemption for employees of the Crown be modified so as to permit unlicensed Crown employees to perform their ordinary jobs relating to enforcement or prosecution of legislation.

T. That there continue to be exemptions for real estate agents, architects, accountants, legal practitioners, financial and insurance institutions, cooperatives, and trustee companies.

U. That there continue to be an exemption for persons who act as an agent only as an incidental part of their employment.

V. That there be a continuation of the exemption from the Act for persons employed by a licensed investigation agent to request, by telephone, the payment of debts[55].

W. That the negative licensing provisions for process servers be retained.

Victorian issues paper[56]

The main focus of this paper appears to be security agents. However it does cover commercial agents and inquiry agents. The paper deals with the generality of regulatory issues and competition policy. It raises 14 points of areas for discussion and seeks comment. Little indication is given as to what might be the outcome of the review.

12. 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.

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[55] This is said to be replacing letter writing. It is said to be (a) adequately covered by laws such as section 43 of the *Fair Trading Act 1987*, (b) covered by the *Privacy Act 1990* (Cth) and that the employer may be responsible for harassing activities. See pages 67-68 of *National Competition Policy - Review of Security and Investigation Agents Act 1995*, June 1999, Office of Consumer and Business Affairs [South Australia]

[56] *National Competition Policy Review of Private Agents Legislation* - Freehills Regulatory Group/Department of Justice, June 1999

The main potential market failure is that relating to the information asymmetry regarding the inability of some consumers to choose an appropriate agent. This issue is covered elsewhere in this Report.

13. PART IV OF THE *TRADE PRACTICES ACT 1974* AND NORTHERN TERRITORY COMPETITION CODE

13.1 RELEVANCE OF THE *TRADE PRACTICES ACT* 1974

The review is also required to consider whether any of the proposals might breach the *Trade Practices Act* 1974 (Commonwealth).

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 which 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 which have the effect of substantially lessening competition.

13.2 POTENTIAL BREACHES OF THE *TRADE PRACTICES ACT* 1974

There is nothing in the Act or in the proposed variations to it authorising a breach of the *Trade Practices Act 1974.*

14. OTHER REVIEWS OF THE OCCUPATIONS OF COMMERCIAL AGENTS, PRIVATE INVESTIGATORS, BAILIFFS AND PROCESS SERVERS

The occupations discussed in this paper have been the subject of a number of reviews in various parts of Australia over the past 20 years. Most of these reviews are summarised in Appendix 1. Additionally, Appendix 1 contains summaries of various Second Reading Speeches given in explanation of major changes of enactments made since the 1940s.

From these reviews and Second Reading Speeches it is reasonably apparent that the legislative schemes elsewhere in Australia have been either:

1. Responses to various ructions within the local occupations; or
2. Responses to the then pertaining trend in occupational regulation.

Aside from the 1993 NSW Issues Paper there is only limited data available about the actual problems that have arisen with this area of business activity. In the absence of detailed research, it is possible for different conclusions to be drawn on the merits of the current regulation paradigm. One conclusion in 1991 was to the effect that the occupations required a low level of regulation because of the responsibility of its

members and of the low risk posed to vulnerable consumers. By contrast, a review conducted by another agency in the same jurisdiction in 1992 concluded that the regulatory controls should be both strengthened and more actively enforced because of apparent widespread lack of responsibility and lack of concern for the law shown by senior members of the occupations.

The 1993 NSW Issues Paper attempted to obtain some quantitative information about the size of occupations and how they were operating. It found some information. However, it also revealed that there was a fairly low level of reliable information maintained by either the licensing authority (Police) or by Consumer Affairs (regarding complaint levels). There is no comprehensive information in the Northern Territory as to complaints about commercial agents, process servers, inquiry agents and private bailiffs.

In very broad terms there appear to be tensions as to whether the future of the regulation of these occupations should be:

1. To impose stricter controls (eg. more thorough criminal history checks, tougher training/competency requirements) for the purpose of eliminating from the occupations those persons who are incompetent or about whom there are concerns about their personal probity.
2. To impose stricter controls at the point of entry and after entry for the purpose of raising the 'professionalism' of the industry.
3. To create business licences where the focus is on the person responsible for the business being able to run the business efficiently and effectively. There would be an assumption that such a person would, as a prudent business decision, only employ persons who are competent and to be trusted.
4. To remove at least some of the occupations (eg process servers) from the licensing regime and, for those occupations, create offences and negative licensing (disqualification) powers.

15. APPLICATION OF THE PUBLIC BENEFIT TEST - ASSESSMENT OF THE CONSEQUENCES OF THE RESTRICTIONS ON COMPETITION

15.1 PUBLIC BENEFIT TEST

The public benefit test identifies the nature and incidence of the costs and benefits to the community of restricting competition. If the net effects from deregulation are negative, there is a net public benefit for retaining the existing arrangements.

The costs and the benefits have been outlined in Parts 9 and 10 of this paper. It is not possible to quantify in monetary terms the value of these costs and benefits. It is noted that other competition policy reviews for similar occupations have similarly not attempted such a quantification.

However, the analysis of the costs shows that the costs to both most of the members of the affected occupations and to the community as a whole are negligible. This suggests that the main effect of any substantial deregulation will be that of removing the barrier that prevents persons known to be unsuitable for these occupations from entering the occupations. These are occupations that, in an unregulated state or in a

moderately regulated state, have attracted unsavoury persons who misbehave to the detriment of the community and the justice system. This means that the only likely effect of deregulation is that of persons entering the occupations who breach the conduct rules contained in the Act.

15.2 CLAUSE 1(3) OF THE COMPETITION PRINCIPLES AGREEMENT

Additionally, as a tool in the application of clause 5(2) of the Competition Principles Agreement, clause 1(3) provides as follows:

> *"Without limiting the matters that may be taken into account, where this Agreement calls:*
>
> *(a) for the benefits of a particular policy or course of action to be balanced against the costs of the policy or course of action; or*
> *(b) for the merits or appropriateness of a particular policy or course of action to be determined; or*
> *(c) for an assessment of the most effective means of achieving a policy objective;*
>
> *the following matters shall, where relevant, be taken into account:*
>
> *(d) government legislation and policies relating to ecologically sustainable development;*
> *(e) social welfare and equity consideration, including community service obligations;*
> *(f) government legislation and policies relating to matters such as occupational health and safety, industrial relations and access and equity;*
> *(g) economic and regional development, including employment and investment growth;*
> *(h) the interest of consumers generally or of a class of consumers;*
> *(i) the competitiveness of Australian businesses; and*
> *(j) the efficient allocation of resources".*

Of these factors the one with the most apparent application is (h) namely whether the interest of consumers generally or of a class of consumers is promoted or served by the restriction.

In this case there are three distinct classes of consumers, namely:

1. The client who pays for the service provided by the agent - that is, the person who wants information, the person who wants court orders to be activated, the person who wants debt collected. The legislation attempts to protect the interests of these people by ensuring that the agent is a fit and proper person and thus is someone who is likely to perform his or her functions with due attention and honesty.
2. The person who is the subject of the agents work. That is, the debtor, the person under investigation, the person upon whom court process is being served. The legislation aims to protect these people by imposing conduct rules onto agents.

Thus agents are at risk of losing the relevant licence (and livelihood) if they breach rules relating to privacy, harassment and misleading conduct.

3. The courts which rely on the work of the agents for ensuring that the process of the court is properly implemented.

Of these classes of persons, it could be argued that the first and third classes (namely the person paying the agent and the courts) are able to adequately look after their own interests. The persons paying agents can pick and choose their own agent. The courts appear to have the power to select persons who may carry out the formal processes of the court. In respect of these two classes the licensing system merely operates to provide additional information about the agents.

It is for the second class of person that the Act may have special reference. It is for these people that this kind of legislation was, in the main, enacted. For them the issue is whether, in terms of the agent's misbehaviour, there is any difference between the following situations:

(a) misbehaviour leading to possible loss of licence or livelihood by way of a decision of a court and/or administrative tribunal;
(b) misbehaviour leading to a criminal law penalty;
(c) misbehaviour leading to the possibility of the person being disqualified from practising as an agent.

15.3 ASSESSMENT OF THE COSTS AND BENEFITS IN TERMS OF THE OBJECTIVES OF THE LEGISLATION.

On balance it appears that:

(a) there is sufficient need for there to be mechanisms to ensure that persons who act as agents in any of these fields are:
    (i) not criminals; and
    (ii) are able to be removed from the industry if they are shown to be either incompetent or criminal;
(b) there is no real evidence justifying the imposition of more stringent entry requirements than those which currently exist - excepting that there may be a need to revise the scale of licensing fees which has not been reviewed since 1979;
(c) the Act needs amendment to improve its operational efficacy (these amendments are spelt out in Part 17).

The strategy of the Act is in line with the Territory's policy to regulate no further than is required in a particular case. Thus individual business people seeking to recover monies have the choice to engage an agent or to pursue the issue via their own organisation.

In considering the level of regulation, regard needs to be had to developments elsewhere in Australia. For example, the affirmation in the draft South Australian Competition Policy Report is that there is an ongoing justification for licensed agents to have adequate training and financial resources.

Based on the evidence available for the Northern Territory there appears to be no present need for such additional licensing requirements. A possible explanation as to why these requirements may be needed for jurisdictions such as South Australia but not required for the Northern Territory may stem from the size of the local market. Small markets for the occupations and professions are self regulating because of the relative effectiveness of word of mouth information being spread within the occupation and between clients.

In summary the Review Team has concluded that there is a continuing need to provide a minimum level of oversight and control over persons who, as agents of some third party, can perform the functions which intrude into the lives of ordinary citizens.

16. ASSESSMENT OF ALTERNATIVES

Even if the regulatory (licensing) restrictions in the *Commercial and Private Agents Licensing 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 various other options that may be available. They include:

1. Self regulation. This involves the affected occupation formulating rules and codes of conduct, with industry being responsible for enforcement.

   Comment: This option does not appear to be currently available for any of the occupations under review. There is an absence of occupational associations or peak industry bodies that have sufficient coverage of participants in this market. Furthermore, there is doubt as to range and adequacy of the sanctions able to be imposed by such a body.

2. Quasi-regulation. This involves government supported or endorsed codes of practice. Such codes are possible under sections 238-243 of the *Consumer Affairs and Fair Trading Act*. In essence, under those provisions, industry has a code of practice endorsed by Government. Breaches of the Code can be dealt with by injunction-like action taken by the Commissioner of Consumer Affairs. Other codes may not have the same legislative support.

   Comment: This kind of quasi-regulation does not appear appropriate for these occupations because the industry has an inadequate infrastructure to be able to effectively develop, administer and enforce such a code. Also, see below.

3. Co-regulation. Effectively this is a regulatory system whereby legislatively based controls are given to industry organisations (with some degree of government and/or client/consumer participation).

   Comment: This option does not appear to be a practical possibility for these occupations in the Northern Territory because the memberships are too small to either provide sufficient independence between the regulatory authority and those

being regulated. Additionally, it might be considered to be unsound policy for the members of the occupation to be responsible for controlling the entry of others.

4. Explicit Government rule based regulation/negative licensing. This involves the legislation containing prescriptive rules with the breaches of the rules constituting offences that can be subject to prosecution in the courts. These rules can include rules which might be that the practitioners have to notify a government agency or industry association of the fact that they are practising the occupation. Equally a rule could be that a person may not practise unless he or she has a particular qualification. One of the penalties for breach could be disqualification.

   Comment: This option could apply to the occupations being considered. Arguably the current scheme is very close to this option.

None of these options meet the objective (as described in Proposition 2, Part 1 and in Part 8) that persons with certain types of criminal backgrounds should not be entitled to work in these occupations. Only a licensing scheme can aim to effectively limit entry to the market by persons who are not fit and proper to undertake the activities.

17. OTHER MATTERS CONCERNING THE COMMERCIAL AND PRIVATE AGENTS LICENSING ACT

Most of the matters discussed in the following issues were considered in the 1992 Northern Territory papers and in the various other discussion papers and reports referred to in Appendix 1. It is beyond the scope of this paper to set out in detail the issues and arguments contained in those papers. The following are general assessments and recommendations.

Issue 1 - clarification of functions of a commercial agent

The definition of "commercial agent" in the *Commercial and Private Agents Licensing Act* is such as to include debt collectors, process servers and bailiffs. It appears preferable that the terms be defined so that they are mutually exclusive unless it is considered that one licence should cover all of the occupations. Accordingly, for the purpose of considering issues relating to commercial agents the following is recommended as the suggested definition:

Recommendation 1:

The definition of 'commercial agent' should be simplified to mean:

> "any person (whether or not he or she carries on any other business) who exercises or carries out any of the following functions:
>
> (a) ascertaining the whereabouts of, or repossessing, any goods the subject of a lease, hire-purchase agreement or bill of sale;
> (b) collecting, or requesting or demanding the payment of debts, on behalf of any person and for or in consideration of any payment or other remuneration (whether monetary or otherwise), but does not include any employee or a sub-agent of a licensed commercial agent".

Issue 2 - exemptions

There appears to be no reason why the current exemptions from licensing should be removed. These relate to legal practitioners, clerks of legal practitioners, accountants, officers of the court, trustee companies, financial institutions, insurance brokers, insurance adjustment, Public Trustee, liquidator official and receiver trustee in bankruptcy.

There is a case for the list to be expanded so as to generally cover all persons who perform agent functions as an incidental part of some other occupation or profession. However, such a change would discriminate against agents whose roles are not incidental to other occupations. Furthermore it would provide an incentive for agents to re-classify their operations to avoid the need for a licence (and the need to comply with other requirements such as a bond. This may make it more difficult for customers to make an informed selection of agent. Nevertheless, applying the full licensing regime to those performing incidental agent roles may impose costs that are higher than the benefits

Recommendation 2

The recommendation is that there be an exemption from positive licensing for all persons who perform agent roles that are incidental to prescribed types of occupations. These occupations would be those within an industry or occupation that is either regulated by Government or which is effectively self regulated.

If persons performing agents roles that are incidental to other occupations are not to be subject to positive licence requirements (and fees) this may lead to some people inappropriately reclassifying agent operations as incidental. If this were to occur it may lower the standard of agent services available to consumers, and make it harder for customers to make an informed choice of agent. Both effects may compromise the objective of the Act - the protection of consumer welfare. One way of reducing these potential negative impacts would be to clearly define and publicise the boundary between incidental and not incidental.

Issue 3 - regulation of subagents and employees

In the 1992 review the recommendation was that there be no licensing of subagents and employees of an agent. Instead it was recommended that licensing agents should be strictly liable for wrongful conduct by persons (except other licensed commercial agents) engaged by them, whether as employees or as sub-agents.

However, the occupations covered by this legislation are solitary in nature. Employees and subagents work without close personal supervision. The aim of the legislation includes the aim of regulating the conduct of agents when dealing with members of the public. It appears appropriate to maintain basic licensing requirements in respect of these front line employees and subagents.

However, there is no demonstrated present need to impose formal training requirements on commercial agents, inquiry agents and private bailiffs as a pre-condition of licensing of commercial agents, private agents and private inquiry agents.

The level of licence fees also needs to be addressed. The usual principle is that fee income should be such as to cover the costs of administration of the licensing scheme. However, for small licensing schemes (such as this one) such costs, if shared amongst the licensees (or, more particularly, new licensees) may be such as to be a real disincentive to enter the industry. For such cases it is usual to take account of the licence fee charged for the same occupation in a jurisdiction where there are economies of scale which lead to a better indication of what is a fair licensing fee.

Recommendation 3

There should be continuing licensing of employees and sub-agents. The fees for this licensing should be set having regard to both:

(a) the cost of administering the legislation; and
(b) ensuring that the fee level is not a significant barrier to entry.

Issue 4 - negative licensing of exempted persons

There appears to be no good reason why the general conduct rules for agents (eg prohibition on harassment) and certain prohibitions on persons being entitled to become agents should not apply to persons who might otherwise be exempted.

Recommendation 4

There should be a negative licensing scheme for exempted persons. The main elements of this would comprise:

(a) a power for the licensing authority to disqualify, permanently or temporarily, any person from being engaged to perform the functions of an agent; and
(b) a prohibition on engaging a person to perform agent's functions if that person is either a disqualified person or a person known to have committed acts that would be breaches of the Act.

Issue 5 - term of the licence and licence renewals

The current Act has words in it which suggest that licences are renewable. However, no fixed term is given for licences. This means that none have needed to be renewed. This apparent anomaly needs to be removed as soon as possible.

It is axiomatic for a licensing system that there be periodic reviews/monitoring of licensing status. If the objective of the legislation is to monitor the behaviour of market operators, then the lack of any effective renewal or reporting requirements inhibits this.

The current system involves no periodic returns, no periodic licensing fees and minimal periodic dialogue between the licensed persons and the licensing authority. It is a system where there is minimal knowledge of the regulatory authorities of the activities of the regulated occupations. The only formal periodic contact between the Local Court and licensed commercial agents is that which arises from the implicit

requirement that, on an annual basis, the agent provide to the Registrar of the Court evidence of the currency of the bond.

For the purpose of improving the performance of the regulatory functions it is appropriate that a licence or a practising certificate operate for specified periods, and that there be a requirement that the licence holder provide regular information concerning compliance with the Act - for example, information about employees, trust accounts, insurance. The period for such licences or practising certificates should be two years. However, given the apparent low level of problems existing within the occupations regulated by the Act, the licence or the right to practise under a licence should be readily renewable. Such renewal should occur automatically if the relevant returns are lodged. If the licensing authority does not wish to renew a licence or right to practise the onus should be on it to identify some reason which would, at the licence issue stage, bar a person from being licensed.

Recommendation 5

That:

(a) all current licences be given a fixed period to run - eg 12 months from the date of the relevant amending Act;
(b) all new licences be for a fixed term with renewal to be determined by reference to compliance with the Act, the general law and with reporting mechanisms; and
(c) the new fixed term be developed by the Department of Industries and Business in conjunction with the relevant occupational groups, however the suggested period is two years.

Issue 6 - responsibility for the administration of the Act

Currently, the licensing authority is the Local Court. Other aspects of the regulatory system are performed by the agencies administered by the Attorney-General - namely the Office of Courts Administration and the Northern Territory Attorney-General's Department.

This administrative responsibility is anachronistic. Generally speaking front line licensing is no longer thought to be a function that should be performed by the Courts. The role of Courts is to deal with contested matters. Licensing is an administrative activity in which Courts, in modern legislation, are only involved if Parliament identifies some particularly sensitive matter where it wants the Court to exercise a discretion - for example, where a licence can be issued despite the existence of some otherwise disqualifying factor[57].

Additionally, following changes made in 1998 to the structure of the Northern Territory Public Service, most occupations are now the responsibility of the Department of Industries and Business. If the Local Court ceases to be the licensing authority, it appears appropriate to transfer responsibility for these occupations to the Department of Industries and Business.

[57] See, for example, *Prostitution Regulation Act* and the *Private Security Act*

Recommendation 6

That responsibility for the regulation of the *Commercial and Private Agents Licensing Act* be transferred from the Attorney-General to the Minister for Industries and Business and that the licensing roles performed by the Local Court, the Registrars of the Local Court and the Solicitor for the Northern Territory be transferred to licensing authorities and officers operating under the auspices of the Department of Industries and Business.

Issue 7 - other problems with the licensing processes

In the 1992 Report various problems were identified with the licensing process. It is recommended that these problems be reviewed as part of either the development of new legislation or a part of any transfer of responsibilities to the Department of Industries and Business. This is said having due regard to the fact that that Department is attempting to consolidate and rationalise licensing processes for the various occupations.

Recommendation 7

That there be a review for the purpose of implementing modern best practice licensing processes under the *Commercial and Private Agents Licensing Act.*

Issue 8 - right of judicial review of a licensing decision

Non-judicial authorities exercising licensing powers have significant powers to affect the livelihoods of individuals. In performing this role they should be accountable to make decisions that are within the law. Accordingly, it is appropriate for the Local Court to be given the power to review a licensing decision. The basis for the review should be that of an error in the licensing process rather than a full review of the merits of the licensing decision. The grounds for such a review would include lack of procedural fairness, breach of a statutory provision, perceived or actual bias, failure to give an applicant the right to be heard, decision wrong in law, decision against the weight of evidence or improper exercise of a discretion.

Recommendation 8

There be a retention of the right of review concerning licensing decisions. Such reviews should be exercised by the Local Court and should be based on an error in the licensing process - eg, lack of procedural fairness, breach of a statutory provision, perceived or actual bias, failure to give an applicant the right to be heard, decision wrong in law, decision against the weight of evidence, improper exercise of a discretion.

Issue 9 - bond

Currently, commercial agents are required to arrange for a bond. However, the size of the bonds is small and the process of making claims on them is complex (as outlined in Part 5.2). The 1992 review recommended that the requirement that an applicant for commercial agent's licence pay a bond should be abolished but that commercial agents should be insured for at least $500,000. Any such legislation would need to make it

clear that the insurance is to cover the dishonest acts of the agent as well as the dishonest acts of the employees and sub-agents of the licensed agent.

There appears to be no reason to depart from this recommendation. The licensing authority would have the role of ensuring that such an indemnity insurance policy is in place. However, the Working Party considers that there may be competition policy issues associated with mandatory indemnity insurance which it is unable to resolve. It understands that such issues are to be addressed in other reviews (eg legal practitioners, real estate agents and conveyancing agents). The time of completion of those reviews will be an appropriate regime to resolve this issue under the *Commercial and Private Agents Licensing Act.* This review should be able to take place prior to the end of the year 2000.

Recommendation 9

That final consideration of issues concerning bonds and indemnity insurance be deferred pending the resolution of general competition issues.

Issue 10 - holding of trust monies

Currently, monies collected by agents are required to be held in trust. These monies include monies paid to agents (eg after issue of a letter of demand) and monies collected after sale of goods under a writ of execution. Sometimes these monies are held for a very short time. In other cases monies may be held for a long time (eg if there is a dispute about the ownership of the monies).

It appears that no interest is obtained on such monies. This is in keeping with the apparent position elsewhere in Australia with the exception of Queensland. In that State the trust monies attract interest which is paid by the financial institutions into the relevant fidelity fund.

If interest is accrued and if it is used the purpose of the administration of the Act this may create an incentive to provide more costly administration of the scheme than would otherwise be the case. However, if the agent receives the interest this will simply increase their earnings with no commensurate improvement in products or service. If the consumer receives the interest this means that the real price of contracting with agents falls, and that the real price paid more closely reflects the benefit derived by the consumer. It appears, therefore, that the technically strongest case is for the interest to go to the consumer. Some quantification of the expected value of interest that could be earned, relative to the average bond paid and cost of administering the scheme per agent/client would be useful to ascertain the significance of this issue. However, the problem with this approach is that there is no incentive for agents or government to maximise the rate of return or to even ensure compliance. It is something that clients could do for themselves.

The recommendation is that the Queensland position be adopted so that arrangements, based on those in place under the *Agents Licensing Act* (for real estate, business and conveyancing agents) should be made to ensure that interest is paid on trust account money. The interest should be paid into a Fidelity Fund to meet the costs of administering the Act. In such a case it would be a matter of detail as to

whether that Fund should be a new Fund or the Fund which exists for the purpose of the *Agents Licensing Act*. This method of funding licensing agencies and enforcement activity may reduce the incentive for the licensing agency to be cost effective and to provide efficient administration that has a minimum of distortionary effects in the market. In other words there is likely to be more unnecessary regulation if there are greater resources allocated for the purposes of regulation. However, this problem ought to be able to be controlled by ensuring that the operations of the licensing and regulatory authorities are subject to the normal budget processes with the Fund being a mere source of funding rather than an authority for spending.

Recommendation 10

That trust monies be held in interest bearing accounts with the interest being payable into a fidelity fund and to be used for the purpose of the administration of the Act.

Issue 11 - holding of records and supervision

There is a practical need for records to be held regarding debt collection. In addition, there is need for the regulated activities of the business to be managed competently and effectively by a person with a licence. These duties may be amplified by prescriptions in the regulations or in licence conditions. The current provisions are to the effect that there must a branch office in the Northern Territory and that there must be a licensed branch manager resident in the Northern Territory. Given that most of the activities of agents and employees occur outside the office there is little apparent utility in requiring local offices with local supervision. Rather, there should be a duty to have appropriate supervision with the mechanics of this supervision being the responsibility of the licensee.

Recommendation 11

There should be duty for a licensee to ensure that the regulated activities of the business are supervised by a licensed person. However, the *Commercial and Private Agents Licensing Act* should make it mandatory that there be an office in the Northern Territory or that there be a branch manager resident in the Northern Territory.

Issue 12 - requirement for annual audits

It is usual for trust accounts maintained by members of regulated professions and occupations be subject to trust. There is no reason why this general rule should not apply to agents who hold substantial amounts of money or property in trust.

Recommendation 12

There should be a requirement for an annual independent inspection of commercial agents' trust accounts. The regulatory authority should select the inspector but responsibility for paying the inspector should, on pain of losing the licence, rest with the agent.

The responsible authority should have power to direct an independent audit to be taken if it suspects that a commercial agent is in breach of the requirements relating to the maintenance of a trust account.

However, there should be a power to exempt from this requirement licensed agents who hold minimal amounts of money or property in trust.

Issue 13 - receipts

A commercial agent is not currently required to give a debtor a receipt for any payment made or goods taken by a commercial agent. The absence of this obligation appears to be an oversight.

Recommendation 13

Commercial agents must issue receipts for payments made or goods seized.

Issue 14 - harassment

The current Act has limited provision concerning harassment. The offence provisions are limited to exceeding power.

There is a need for the concept of harassment to be widened by specific examples - use of court-like forms, servicing of unissued summons, the impersonation of police and court officials, the carrying of weapons, misleading the debtor as to recovery procedures, use of misleading stationery, unwarranted direct and indirect disclosure of debt information to third parties, various ways of unreasonably communicating with the debtor. It appears appropriate that the offence be contained in the *Summary Offences Act* and that the penalty be six months imprisonment and/or 100 penalty unit ($10,000).

Recommendation 14

The *Summary Offences Act* should be amended so that harassment of debtors by agents and creditors ought to be an offence whose maximum penalty is six months imprisonment and or a fine of $10,000 (100 penalty units).

Issue 15 - Section 43 - Obligations imposed on commercial agents to report to Police when they take possession of a motor vehicle that is the subject of a hire purchase agreement or a mortgage.

This provision came into existence in NSW to prevent confusion for Police when repossessed motor vehicles were reported to the Police as having been stolen.

The current usefulness of the provision has been canvassed with members of the Northern Territory Police. The strong consensus is that the provision ought to be retained. The main reasons for this view are that the section would, if properly implemented, save the police time in dealing with reports of stolen vehicles. It was also suggested that consideration be given to obliging debt collectors to notify Police prior to a repossession, and thus enable Police to be prepared for the violence that such repossession might occasion.

Recommendation 15

That section 43 of the *Commercial and Private Agents Licensing Act* be retained.

Issue 16 - obsolete references in the Commercial and Private Agents Licensing Act to the Local Courts Act

The *Commercial and Private Agents Licensing Act* contains a number of sections (eg 30, 31, 32 and 33A) that are no longer in operation. Subject to the resolution of the issues referred to in Part 18 (dealing with the status of 'private bailiffs') these provisions should be repealed.

Recommendation 16

It appears appropriate to remove the obsolete references.

18. OTHER ISSUES - COURTS LEGISLATION

One of the original purposes of the *Commercial and Private Agents Licensing Act* was that of providing for a system of private bailiffs for use by parties to actions in the Local Court. However, amendments to the legislation relating to the Local Court[58] have removed any obvious linkage between the *Commercial and Private Agents Licensing Act* and the Courts' legislation.

The various Courts have separate approval mechanisms which apply to persons exercising bailiff functions on behalf of the Courts. In practice, the Courts approve for their own purposes only persons who have a licence under the *Commercial and Private Agents Licensing Act*.

It is beyond the scope of this paper to resolve the various ambiguities concerning bailiffs in terms of the operation of the *Local Court Act*, Local Court Rules, *Sheriff Act* and the Supreme Court Rules. There is, however, an outstanding need to assess whether there is need for the occupation of "private bailiff".

[58] Namely the repeal of the *Local Courts Act* by the *Local Court Act 1989*.

19. APPENDIX 1 - OTHER REVIEWS AND PROPOSALS CONCERNING COMMERCIAL AGENTS, PRIVATE INVESTIGATORS, BAILIFFS AND PROCESS SERVERS

19.1 COMMONWEALTH

19.1.1 [Australian] Law Reform Commission Report No. 36, Debt Recovery and Insolvency

In 1976 the Commonwealth Attorney-General requested the Law Reform Commission to report on various matters relating to the application of the *Bankruptcy Act* 1966 (Cth) to small debtors. In making the Report the Commission was required to have regard to "the community's interest in the financial rehabilitation of small but honest debtors, and the need to ensure that creditors have an effective means of enforcing the payment of debts due to them".

In the second of its reports[59] arising from this reference the Commission considered issues relating to the regulation of the occupation of debt collectors and to the activity of debt collecting. It noted:

(a) that there is evidence of abusive tactics being employed by some debt collection agencies[60];
(b) that there are various ways by which unscrupulous debt collectors deceive debtors (eg using documents that look like court documents, providing misleading information about debt recovery procedures and providing misleading information about the consequences of the non payment of debts)[61];
(c) harassment and invasion of privacy. For example, by disclosing debt information to third parties, by contacting the debtor at their place of work.

For the purposes of dealing with these problems the Commission recommended that:

(a) there be a list of prohibited conduct. Engagement in such prohibited conduct should lead to both criminal and civil sanctions. Thus the offender should be liable for a fine payable to Consolidate Revenue and to also pay compensation to the debtor victim of the offence[62];
(b) there be registration of all persons other than bailiffs and solicitors who act as agents for creditors or as employees of creditors in the course of debt recovery. The registering authority would be an administrative agency outside of the court system. The registering agency would test the applicant for knowledge of the relevant rules and would also conduct a criminal history check (concerning convictions for violence, dishonesty or debt recovery matters). Registration would last for two years. Registration would be liable for renewal, cancellation or suspension on the same grounds as apply for the initial consideration of

[59] ALRC 36. The first report was ALRC 6 Insolvency: The Regular Payment of Debts 1977

[60] ALRC 36, page 82

[61] ALRC 36, pages 105-106

[62] ALRC 36. This list is set out on page xxi

registration. There would a requirement for audit but no need for a fidelity bond or fidelity account.[63]

In considering whether there is a need for a registration system on top of sanctions, the Commission noted as follows:

> *'... A number of the Commission's consultants doubted whether an occupational control system was justified. The justification lies in the need to pre-screen..."*

19.2 NORTHERN TERRITORY

19.2.1 Pre 1992 reviews

In the period since 1983, there have been a number of reviews or attempts to reform the Act. Some have been in house. Others have involved public debate. The problems identified with the Act include the following:

- that the Court is not the appropriate licensing authority. This view exists because it is a relative waste of resources of courts to be undertaking such administrative tasks. Additionally, the decision making processes of courts are unsuited to situations where there is no contest about an issue.
- that the authority which deals with complaints and objections should be different from the licensing authority
- that there be a tiered licensing system for agents and subagents
- that there be annual licensing
- that there be more stringent application requirements
- that fees be increased
- that there be training/educational requirements
- that the bonds be increased in values
- that there be compulsory indemnity insurance
- that there be a fidelity fund
- that there be annual auditing
- that there be more exacting requirements concerning the keeping of accounts
- that the penalties for offences be increased
- that there be controls over advertising (ie need for identification)
- that the court have the power to re-open contracts.

19.2.2 Northern Territory review of the *Commercial and Private Agents Licensing Act.*

In 1992 the Northern Territory Department of Law released an issues paper entitled "Commercial Agents, Private Bailiffs and Process Servers".

The Review was aimed at implementing legislation that promotes competence within the profession and which protects the public. It is proposed that legislation will weed out those people who are unsuitable because of their record or character to be engaged

[63] ALRC 36. See page xxii and pages 110-112

as commercial and private agents. The benefits to members of this occupational group are a better image and improved competitive position as against those who are not regulated. The benefits to the public are the protection against the misuse of confidential information and the considerable amount of money that commercial and private agents are entrusted with. It was, however, further stated that the proposals for reform would be evaluated on the following basis:

(1) they must benefit the public;
(2) they are the most effective way of correcting problems;
(3) they provide the minimum necessary regulation to alleviate existing problems;
(4) their benefits outweigh the cost.

This issues paper contained the following recommendations:

1. The licensing of process servers, bailiffs and inquiry agents should be discontinued;
2. A licensing system for commercial agents should be retained;
3. The definition of 'commercial agent' should be simplified to mean "any person (whether or not he or she carries on any other business) who exercise or carries out any of the following functions:

    a) ascertaining the whereabouts of, or repossessing, any goods the subject of a lease, hire-purchase agreement or bill of sale;
    b) collecting, or requesting or demanding the payment of debts, on behalf of any person and for or in consideration of any payment or other remuneration (whether monetary or otherwise), but does not include any employee or sub-agent of a licensed commercial agent";

4. Persons who should be exempt are legal practitioners, clerks of legal practitioners, accountants, officers of the court, trustee companies, financial institutions, insurance brokers, insurance adjustment, Public Trustee, liquidator official receiver trustee in bankruptcy;
5. Sub-agents/employees of a commercial agent should not be licensed. Commercial agents should be strictly liable for wrongful conduct by persons (except other licensed commercial agents) engaged by them, whether as employees or as sub-agents;
6. Licences should expire two years from issue and be renewable;
7. The responsibility for administering the licensing systems should be transferred (from the Court) to an administrative body. The appropriate Government Department would be the Department of Law. The licensing of commercial agents should be included in the *Agents Licensing Act;*
8. The present procedure should be abandoned. A streamline procedure should take its place. A person should apply for a licence to the Board. The licence application form should be designed to obtain information relevant to the decision. There should be no requirement concerning testimonials. There should be no formal right of objection. The application should be advertised in a newspaper circulating in the area where the applicant intends to work. A decision on the application should be made within 28 days. Reasons should be given if the application is rejected. The applicant should be entitled to appeal against a decision of the Local

Court or AAT (if one is established). The Local Court should be entitled to review the decision in its entirety;

9. The requirement that an applicant for commercial agent's licence pay a bond should be abolished. Commercial agents should be insured for at least $500,000;
10. Arrangements should be made to ensure that interest is paid on trust account money. The interest should be paid into a Fidelity Fund to meet the costs of administering the Act;
11. There should be a requirement for an annual independent audit of commercial agents' trust accounts. The responsible authority should have power to direct an independent audit to be taken if it suspects that a commercial agent is in breach of the requirements relating to the maintenance of a trust account;
12. A commercial agent should be under an obligation to give a debtor a receipt for any payment made or goods taken by a commercial agent;
13. A commercial agent should be entitled to recover from a debtor on behalf of the creditor, the reasonably incurred costs of collecting a debt, if the agreement between the creditor and debtor provides for this;
14. Harassment of debtors by commercial agents should be an offence. The penalty for which should be $5,000;
15. The offence of harassment should also cover creditors and inquiry agents; and
16. The concept of harassment should be widened by specific examples - use of court-like forms, servicing of unissued summons, the impersonation of police and court officials, the carrying of weapons, misleading the debtor as to recovery procedures, use of misleading stationery, unwarranted direct and indirect disclosure of debt information to third parties, various ways of unreasonably communicating with the debtor.

Certain of these recommendations were strongly opposed by members of the affected occupation. The recommendations that received the most opposition were those which:

(a) broke down the entry or licensing provisions;
(b) imposed additional responsibilities on the persons owning/operating the businesses.

Additionally, there was some disquiet with the proposals:

(a) to take the Local Court out of the licensing process (loss of prestige);
(b) to introduce annual licensing (it was considered that the power to cancel was sufficient);
(c) to introduce indemnity insurance to replace bonds;
(d) to require annual trust audits.

This issues paper was completed at about the time of the introduction of the *Mutual Recognition Act* and of the VEETAC review. This meant that consideration of the detail of the proposals ceased pending resolution of larger issues concerning the basis of regulation of these kinds of occupations.

19.2.3 Recent Northern Territory Industry comments

By letter dated 23 November 1998 the President of the NT Institute of Mercantile Agents sought to be a part of any review of the *Commercial and Private Agents Licensing Act*. In discussions with Departmental officers, members of the Northern Territory industry have indicated that they see the following problems with the *Commercial and Private Agents Licensing Act* and its administration:

- whether the current system provides for an effective licensing system. It is felt that with the Local Court as the licensing authority there may not be an ability to take meaningful action if things go wrong;
- unlicensed persons are executing warrants;
- there is a need for a Code of Conduct;
- there is a problem with licences being perpetual. They support a requirement that licences be limited so as to operate for periods of two years;
- there is a need for formal training as part of the licensing process; and
- there is a need to keep licensing for commercial agents separate from licensing of security agents.

19.3 NEW SOUTH WALES[64]

19.3.1 1955 legislation

The Attorney-General gave as justification for the *Private Inquiry Agents Bill 1955* complaints from various members of the judiciary about the fact that inquiry agents often engaged in wishful thinking when giving evidence. The Attorney-General compared the licensing of inquiry agents to the licensing of plumbers. In the case of plumbers a licence indicates that the person is competent at plumbing. In the case of inquiry agent the licence should indicate honesty and integrity[65].

19.3.2 1962 legislation

The *Commercial and Private Inquiry Agents Act 1962* re-enacted 1955 legislation. The Second Reading Speech noted that:

> *"It is always difficult to prepare legislation which, by reason of its application to all those who may come within its provisions, pays due regard to the standards and ethics of the reputable organisations that are caught in the net... Nonetheless it has been most heartening to find out that the very reputable organisations to which I refer are content to submit to some of the inconvenience unavoidably present in all forms of regulatory legislation, in order that the good name of both their organisation and their calling is preserved*[66].

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[64] The following is taken from *Review of Private Investigation Industry, Discussion paper* NSW Department of Consumer Affairs, September 1963.

[65] New South Wales Hansard, House of Assembly, 16 November 1955, page 1509-1510. The Bill was also stated to have been based on Canadian legislation.

[66] Hon Mannix, Minister for Justice New South Wales Hansard, Assembly, 27 September 1962, page 770

During the debate there was a discussion on a provision that requires notification to be given to the Police concerning repossession's. The explanation was to prevent confusion for the Police when these vehicles were reported stolen."

Additionally, it was mentioned in the debate how the Act would have differential effects on big versus small business. This would arise because it might mean that small business would no longer be able to collect their own debts.

19.3.3 1990's NSW reviews

The history of the 1990's review of the NSW legislation is set out in some detail because it is illustrative of the problems of assuming that absence of known problems can form the basis of an assumption that there are no problems.

In 1991 the former Chairman of the Licensing Court and Administration Board, Mr R J Bartley, produced for the Business Deregulation Unit of the Department of Consumer Affairs an internal government report. This report suggested that licensing for debt collectors be abandoned as its clients were mainly businesses and commercial interests. Additionally there was a prominent industry association with a well represented membership. It was also said that as the work of private inquiry agents was to "seek information" there was no reason to licence them. Any behaviour which went over the line could be handled under ordinary criminal laws. The review also recommended that responsibility move from Police to Consumer Affairs.

In 1991 the Business Deregulation Unit/NSW Police issued an options paper based on Mr Bartley's paper. This paper questioned the need for licensing and considered it might be that industry associations were better placed to assess applications.

In 1992 the NSW Independent Commission Against Corruption (ICAC) released a report based on its findings as to actual behaviour in the industry. ICAC found various dubious relationships between police and prominent members of the industry concerning the supply of confidential information and the ownership of businesses. The ICAC Commissioner recommended the retention of licensing (with upgraded requirements), more effective controls over private investigators, better enforcement, transfer of responsibility from Police to Consumer Affairs.

19.4 VICTORIA

19.4.1 Process Servers and Inquiry Agents (Repossession) Act 1958

This Act, which dealt with the licensing of inquiry agents, night watchmen, persons repossessing hire purchase goods or persons who make enquiries about "skips" were to be licensed to ensure that persons acting "more or less as semi-policemen should be of good character"[67]. The background to the Bill was described a follows:

[67] Sir Arthur Warner, Minister for Transport, Victorian Hansard. Legislative Council, 23 September 1958, page 476

"For many years prior to 1956, complaints have been received regarding the unscrupulous activities of persons who described themselves as private inquiry agents and process servers. Members of the public had reported to the police that they had paid money to these people for the purpose of making inquiries, particularly in respect of divorce matters, and that they had been unable to obtain satisfaction from the persons employed ... I might point out that the legislation has worked effectively and I can confidently say that since its commencement the number of complaints has diminished"[68].

19.4.2 1983 Victorian Report of the Working Party to Review the Operation of the *Private Agents Act*

This report took as read the need for a licensing system. This meant that it focused on what should be the requirements for such a licensing system. It noted that in Victoria at the time there was no prescribed educational standard. Agents were required by the Act to be competent with the consequence that licences could be removed if an agent was proved, by events, not to be able to undertake the tasks for which the licence was issued. The Report concluded that this was inadequate and stated that "there is a need to raise the professionalism in the industry and to ensure that licence holders are properly trained on accordance with prescribed educational standards"[69]. The Report also contained recommendations for a reduction in the number of exempt occupations[70].

19.4.3 Law Reform Commission Report (Victoria) - Process Servers and Commercial Agents Occupational Regulation Report No 4, March 1989

This report concluded that the licensing of process servers should be abandoned and that the licensing of commercial agents should be retained. In general terms the other proposals in this report were the same as those proposed in the 1992 Northern Territory issues paper. (See above.)

19.4.4 Law Reform Commission Report (Victoria) - Inquiry Agents, Guard Agents and Watchmen Occupational Regulation Report No 5, September 1989

This report supported the continuation of the licensing of inquiry agents with the processes to be much the same as recommended for commercial agents [see above]. Additionally, it recommended that:

"The legislation should specifically prohibit harassment. A civil remedy should be available. Damages should be assessed on tortious principles. One head of damage should be for humiliation and distress. There should be no dollar limit on that head of damages."

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[68] The Hon Arthur Rylah, Attorney-General, Victorian Hansard. Legislative Assembly, 1 October 1958, page 651

[69] Victorian Report of the Working Party to Review the Operation of the Private Agents Act 1983, page 26

[70] Victorian Report of the Working Party to Review the Operation of the Private Agents Act 1983, pages 27-36

19.5 WESTERN AUSTRALIA

19.5.1 Legislation

In 1954 the Western Australian parliament enacted the *Inquiry Agents Licensing Act 1954*. This replaced 1945 legislation and came about consequent to a reform from a Parliamentary Committee which had investigated the issues of whether:

(a) the occupation of 'private inquiry agents' was necessary for the social order; and

(b) whether there should be legislation to control the occupation.

In respect of the first issue the Committee concluded that the occupation is one of life's necessities. In respect of the second the Committee found that some measure of control was urgently necessary. It found that undesirable persons sometimes engage in the business, that exorbitant fees had been charged and that in many instances people have been badly let down. [71]

19.6 SOUTH AUSTRALIA

19.6.1 Legislation

The Second Reading Speech for the (SA) Bailiffs and Inquiry Agents Licensing Bill noted the various functions of bailiffs (eg service of documents, execution of process) and suggested that if these functions are to be carried out by private bailiffs operating outside of the direct supervision of any of the arms of government then:

> *"it is desirable that the law should provide that a person acting a private bailiff is a fit and proper person to act. It is obvious that, if persons with bad character or shady antecedents can act as private bailiffs, undesirable consequences can ensue and that malpractices can occur in carrying out legal processes to enforce the decisions of the courts".* [72]

19.6.2 Subsequent legislation

In South Australia a new legislative scheme was enacted in 1986. This replaced a scheme brought into place in 1972. In 1996 the 1985 scheme was replaced. The second reading speech for the 1985 Act stated as follows:

> "The underlying intention of the Bill remains the same as that of the Act it is proposed to repeal, to regulate the activities of those, who as agents, are occupied in the private prevention of criminal acts and the private enforcement of civil rights. The Government remains satisfied that, in general, these activities, closely allied as they are to those of the Police and of the judicial process, require regulation to guard against unacceptable conduct and impropriety."[73].

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[71] Hon E Nulsen, Minister for Justice, Hansard, Western Assembly, 27 February 1986, page 656

[72] Hon C IL Abbott, Attorney-General, Hansard, South Australian Legislative Council, 23 October 1945, page 583

[73] Hon C J Sumner, Attorney-General, Hansard, South Australian Legislative Council, 27 February 1986, page 656

The 1996 South Australia legislation maintained the generality of a licensing scheme for these occupations with the main focus of change being the mechanical arrangements for the issuing of licences and the regulation of agents. However, it replaced a licensing scheme for process servers by a negative licensing scheme. The Second Reading speech for the Act did not address the purpose of the legislation other than to mention that the Bill is directed towards the lifting of educational and competency standard in the industry as there will be training requirements for new licence applicants. Further mention was made of lifting standards because of the prescription of offences which, if committed by an applicant, justify the refusal of the grant of a licence. The Bill maintained requirements that applicants have business knowledge and experience and that they have adequate financial resources[74].

[74] Hon S J Baker, Deputy Premier, South Australian House of Assembly, 21 November 1995, page 621

20. APPENDIX 2 - FORM OF BOND REQUIRED TO BE PROVIDED BY CERTAIN COMMERCIAL AGENTS

KNOW ALL MEN BY THESE PRESENTS THAT

.....

(name of applicant or insurance company)

of.....

(address)

binds *himself/itself and *his/its heirs, executors, successors and assigns to the Territory in the sum of *$2,000/$1,500/$1,000 to be paid to the Territory in legal tender, for the period on and from ....., 19..., to and including ....., 19....

It is a condition of this bond that if.....

..... (name of applicant)

is the holder of a licence under the *Commercial and Private Agents Licensing Act* and during the currency of that licence complies with that Act as it applies to dealings with moneys held on trust, this bond is void.

* Provided that if.....

(name of insurance company)

gives written notice to .....

(name of applicant)

and the Local Court at ..... that it wishes to be relieved of further liability under the bond, the obligation of .....

.....

(name of insurance company)

under this bond is, on and from 30 days after the date of service of that notice on that Local Court, terminated in respect of transactions occurring after that last-mentioned date.

IN WITNESS WHEREOF:

.....

(name of applicant or insurance company)

has hereunto fixed *his/its hand and seal on the ..... day of ....., 19 ....

*Delete if inapplicable.

21. APPENDIX 3 - SUMMARY OF DISTRIBUTION OF THE DISCUSSION PAPER

Copies of the discussion paper were sent to:

(a) all known agents in the Northern Territory;
(b) industry organisations;
(c) State, Territory and Commonwealth regulatory organisations

22. APPENDIX 4 - SUMMARY OF COMMENTS RECEIVED

NT Treasury.

Treasury questioned:

- the apparent breadth of the proposal that exemption be given to all persons performing agency roles that are incidental to some other occupation;
- the requirement in the *Commercial and Private Agents Licensing Act* that a manager be resident in the Northern Territory;
- the lack of a recommendation that there be a right of appeal from decisions of the licensing authority;
- whether entry requirements are set too low - particularly the required size of the bond;
- the interrelationship of bonds, trust accounts and insurance
- whether there would be overregulation if the funding of the administration of the Act were to be provided by a Fidelity Fund garnered together from interest on trust monies held by agents
- the manner of setting of licence fees.

The issues raised by Treasury have been dealt with in the paper. In the main, the paper has been amended to incorporate discussion of the issues.

The National Competition Council

The National Competition Council queried the recommendation picked up from the 1992 Review governing indemnity insurance. The proposal has been amended by noting that resolution of issues concerning indemnity insurance should be held off pending other reviews that are expected to clarify what are the competition policy concerns with indemnity insurance.

Territory Insurance Office

The Territory Insurance Office supported the continued operation of the *Commercial and Private Agents Licensing Act*. It noted the need for the members of the regulated occupations to be honest and competent.

Northern Territory Power and Water Authority

The Authority noted:

- that it uses agents for the purposes of collecting debts.
- that sometimes contractors are used and are given the power to collect fees at the same time that reconnexions are made.
- that there have been no recorded incidents of any of the agents employing an unprofessional conduct or harassment of customers.
- that it agrees generally with the recommendations contained in the discussion paper

Australian Finance Conference (AFC)

The AFC:

- supported the recommendation for the exemption concerning finance companies
- opposed the concept of a negative licensing scheme concerning the exempted persons. The AFC suggested there were already sufficient provisions which protected consumers[75].

South Australian Commissioner of Consumer Affairs

The SA Commissioner of Consumer Affairs made the point that raising entry standards can be a mechanism for achieving the objectives of the Act.

Industry comments

No substantial written comments were received. However, several members of the affected occupation telephoned the Policy Division of the Northern Territory Attorney-General's Department or sent brief letters. The gist of such calls was that of satisfaction with both the Act and the proposals in the discussion paper. Some comments made include:

(a) an audit requirement should only exist if there is a certain amount (eg $20,000) in the trust account;
(b) some confusion about whether the trust accounts were interest bearing.

There was also an indication that the Institute of Mercantile Agents was likely to propose that there is a need for formal training in accordance with nationally accredited training programs that were due to be announced in early November 1999. However, no submission along these lines has been received.

[75] For example, s. 60 of the *Trade Practices Act 1974* (Cth) and s.55 of the *Consumer Affairs and Fair Trading Act (NT)*. S.55 provides as follows:

A person shall not use physical force or undue harassment or coercion in connection with the supply, or possible supply, of goods or services to a consumer, or in connection with the payment for goods or services by a consumer.

23. SUMMARY OF THE DISCUSSION PAPER AGAINST THE PROVISIONS OF THE FORMAL TERMS OF REFERENCE

1. The review of the *Commercial and Private Agents Licensing 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.

See Parts 15 and 16

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 *Commercial and Private Agents Licensing Act* remains appropriate for securing those objectives;

See Part 8

   (2) Identify the nature of the restrictive effects on competition;

See Part 7

   (3) Analyse the likely effect of any identified restriction on the economy generally;

See Parts 9 and 10

   (4) Assess and balance the costs and benefits of the restrictions identified;

See Parts 9, 10 and 15

   (5) Consider alternative means for achieving the same results, including non-legislative approaches.

See Part 16

1.1 REPORT - NATIONAL COMPETITION POLICY REVIEW - DEBT COLLECTORS, PRIVATE INQUIRY AGENTS, PROCESS SERVERS AND PRIVATE BAILIFFS

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;

See Part 12

   (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.

See Part 13

4. The review should consider whether the regulatory authority should continue to be the Local Court.

See Part 17, Recommendation 6

5. The review 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.

See Parts 8 and 11 and Appendix 1

6. The review shall consult with, and take submissions from, those organisations currently involved with the occupations of commercial and private agents (namely the Office of Courts Administration, the Chief Magistrate, the Solicitor for the Northern Territory and the Commissioner of Police), other Territory and Commonwealth Government organisations (such as the Department of the Treasury, Department of Industries and Business and the Australian Competition and Consumer Commission), other State and Territory regulatory and competition review authorities and with affected members of the occupations and their representative organisations.

See Part 4