



Government of **Western Australia**
Department of **Commerce**
Consumer Protection

CONSULTATION

REGULATORY IMPACT STATEMENT (C-RIS)
Review of the *Auction Sales Act 1973*

December 2016

NOTICE TO PERSONS MAKING A SUBMISSION

Although every care has been taken to ensure accuracy in the preparation of this paper, the information has been produced as general guidance for persons wishing to make submissions to the review of the regulation of the auction sales industry in Western Australia.

The contents of this paper do not constitute legal advice, legal information or Government policy. This paper should not be used as a substitute for a related Act or professional advice.

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MESSAGE FROM THE MINISTER

Review of laws affecting auctioneers in Western Australia



I am pleased to release this Consultation Regulatory Impact Statement (C-RIS) on the review of laws which apply to auctioneers operating in Western Australia.

These laws are contained within the *Auction Sales Act 1973* and the *Auction Sales Regulations 1974* and affect not only auctioneers but also all people who use the services of auctioneers to buy or sell goods.

The purpose of this review is to assess the operation and effectiveness of our auction sales laws to ensure that the auction sales industry operates in a manner that is fair and competitive. The Government is committed to ensuring that regulation is brought into line with market needs, reflects best practice, and is as consistent as possible with other Australian states and territories.

The Government also wishes to address the regulatory burden for business. Any proposals for reform will be assessed in terms of whether they are in fact required, or whether the policy objectives could be achieved through alternative means resulting in lower costs for business, the community and the Government, while continuing to maintain necessary protections for consumers.

The proposals and options in this C-RIS have been developed through the consideration of previous reviews and reports, and consultation with key industry stakeholders. I would like to thank those who provided their input and trust that all will continue to participate in this current review process.

I encourage everyone with an interest in the auction sales industry to take the time to consider this paper and provide feedback on the questions asked. This is your opportunity to have your say in assisting to guide future decisions about how the auction sales industry can best operate.

Hon. Michael Mischin MLC
MINISTER FOR COMMERCE

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HOW TO MAKE A SUBMISSION

Your feedback to this Consultation Regulatory Impact Statement (C-RIS) is sought in relation to the proposed conduct reforms and options for regulation.

There is no specified format for submissions. You are welcome to make a formal submission or write a letter or email outlining your views and/or respond to questions included in this paper. When making your submission please state if you are an auctioneer or a consumer, and what type of property you normally buy or sell (for example, fine art, antiques, collectables, real estate, motor vehicles, plant and machinery, agricultural products etc.).

Guiding questions

This C-RIS contains a range of specific proposals. You do not have to comment on all proposals and can focus only on those proposals that are important and relevant to you. The questions after each proposal are aimed at making it easier for you to present your views and also to provide specific information that is being sought in this review of the Auction Sales Act. You are welcome to raise additional issues and to suggest other options for resolving issues of concern.

Please explain the reasons behind your suggestions as this will help the Department of Commerce, Consumer Protection Division (Consumer Protection) to better understand your viewpoint, and will also assist in identifying the most suitable options for reform. For example, you could couch your suggestion as follows: “I think that vendor bidding should/should not be prohibited because...”.

If possible, please also provide:

- evidence to support your views, for example by including relevant statistics, examples or case studies; and
- estimates of any costs you believe might arise in complying with proposals.

This information will greatly assist Consumer Protection in assessing the issues and possible cost implications of the proposals for reform.

Where to send submissions

Submissions can be mailed to:

Review of the *Auction Sales Act 1973*
Department of Commerce (Consumer Protection Division)
Locked Bag 14
CLOISTERS SQUARE WA 6850

Or emailed to: consultations@commerce.wa.gov.au

Submissions close

The closing date for submissions is **3 March 2017**.

Review updates

You can keep up to date at www.commerce.wa.gov.au/consultations on the review.

How input will be used

The information gathered from this stage of the review will assist in assessing the various options and developing recommendations for reform for consideration by the Government.

Information provided may become public

After the consultation period concludes, all submissions received may be made publicly available on the Consumer Protection website. Please note that, because your feedback forms part of a public consultation process, the Government may quote from your comments in future publications. If you prefer your name to remain confidential, please indicate that in your submission. As submissions made in response to this paper will be subject to freedom of information requests, please do not include any personal or confidential information that you do not wish to become available to the public.

Next Steps

Stakeholder feedback in response to this C-RIS will assist the Government in deciding whether reforms are needed and, if so, the shape of those reforms. Following analysis of submissions to the C-RIS, a Decision Regulatory Impact Statement (D-RIS) will be prepared. The D-RIS will analyse the impacts of the various options and will be used by Government to guide its decisions. The D-RIS will be published via the Department's website once the Government's decision is made public.



TERMINOLOGY

The following is a summary of the abbreviations and key terms used in this paper

ACCC	Australian Competition and Consumer Commission
ACL	Australian Consumer Law (as applied in Western Australia under the <i>Fair Trading Act 2010</i>)
ACT, NSW, NT, QLD, SA, TAS, Vic, WA	Australian Capital Territory, New South Wales, Northern Territory, Queensland, South Australia, Tasmania, Victoria, Western Australia
Auction Sales Act	<i>Auction Sales Act 1973 (WA)</i>
AVAA	Auctioneers and Valuers Association of Australia
AVAWA	Auctioneers and Valuers Association of Western Australia
CAF	Legislative and Governance Forum on Consumer Affairs
Commissioner	Commissioner for Consumer Protection
Consumer Protection	Department of Commerce, Consumer Protection Division
C-RIS	Consultation Regulatory Impact Statement
D-RIS	Decision Regulatory Impact Statement
FTA	<i>Fair Trading Act 2010 (WA)</i>
Licensee	A person licensed as an auctioneer under the Auction Sales Act
Minister	Minister for Commerce
MVDA	<i>Motor Vehicle Dealers Act 1973</i>
NCP review	National Competition Policy review undertaken by the department in February 1999
Property	The term “property” in this paper is not limited to real estate property, such as land and residential properties, but includes all goods that are capable of being bought and sold by auction.
REBA Act	<i>Real Estate and Business Agents Act 1978</i>
REIWA	Real Estate Institute of Western Australia
Reserve price	Price agreed by the vendor and auctioneer as the minimum sale price for property for sale by auction
SAT	State Administrative Tribunal
SBDC	Small Business Development Corporation

EXECUTIVE SUMMARY

The key focus of the review of the *Auction Sales Act 1973* (WA) is to obtain stakeholder feedback to assist in assessing proposals for the overall regulation of the auction sales industry. In analysing the various options for regulation, the potential advantages, disadvantages and costs of the options will be considered in relation to industry, consumers and government.

The Auction Sales Act was last reviewed in 2007, with a draft position paper being completed in February 2008. The position paper was not released and the recommendations were not implemented due to the proposed National Occupational Licensing System (NOLS) being developed around that time. With NOLS not proceeding, and given the time that has lapsed since the conclusion of the previous review, it is appropriate to conduct a follow-up review of this legislation.

Currently responsibilities for enforcement, licensing, disciplinary functions, as well as policy and administration of the Auction Sales Act are spread across three government agencies. Local Magistrates Courts throughout Western Australia currently license auctioneers, the Western Australia Police make checks to determine if an auctioneer is fit and proper, and the Department of Commerce, Consumer Protection Division is responsible for a range of services, including policy development, advice and conciliation services. It was previously recommended and agreed in the last review that full responsibility for the regulation of the auction sales industry would shift to Consumer Protection with the Commissioner for Consumer Protection becoming the licensing authority. In considering the proposals for reform in this paper, stakeholders should presume that the Commissioner will be the single and only regulator of the auction sales industry.

This paper discusses nine recommendations contained in the 2008 position paper. The recommendations sought to address various issues relating to the conduct and practices by auctioneers and participants at auctions. For example, recommendations to address matters relating to disclosure, vendor and dummy bidding, recordkeeping, trust accounts, standard conditions of sale, collusive practices and online auctions were made. The extent to which these recommendations will be implemented will depend on feedback in response to this paper and which option is adopted. This paper outlines the following four options for regulation:

- Option A:** Retain the status quo, that is, make no changes to the current licensing system and conduct provisions.
- Option B:** Retain licensing and introduce additional conduct provisions. This was the recommendation of the 2008 position paper.
- Option C:** Introduce a negative licensing system – the Auction Sales Act will be retained, but auctioneers would not require a licence to operate. The Auction Sales Act would continue to regulate the conduct of auctioneers and unfit persons could be excluded from practising in the industry.
- Option D:** Deregulate the auction sales industry and repeal the Auction Sales Act. The protections of the Australian Consumer Law (ACL) and *Sale of Goods Act 1895* would continue to apply to auction sales.

1 INTRODUCTION

1.1 The origin of legislation to regulate auction sales

The origins of legislation to regulate auction sales in Western Australia can be traced back to 1839.¹ Its purpose at that time was to raise urgently required revenue for the new colony by licensing auctioneers and by requiring that duty be paid on sales at auction.² It was not until the *Auctioneers Act 1921* was introduced that a requirement applied that an auctioneer be a fit and proper person to hold a licence. The *Sales by Auction Act 1937* was introduced, in addition to the *Auctioneers Act 1921*, to prevent improper and objectionable practices occurring at auctions of livestock and farm produce.³ These Acts were repealed and consolidated into the current Auction Sales Act.

1.2 The role of auctions

The auction process is an important method of conducting transactions in our market economy. Auctions and auctioneers play a significant role in ascertaining the market price of goods. Some items, such as uncollected or abandoned goods are required by legislation to be sold by auction.⁴ Auctions are seen to be the fairest way of establishing value and ensuring that parties are treated equitably. The honest and efficient operation of the auction industry, therefore, impacts on the performance of the economy as a whole.

1.3 Scope of the auction sales industry

The auction industry in Western Australia, and throughout Australia generally, is diverse and has a range of sectors in which auctioneers operate, with some tending to specialise in specific areas of the industry. The major sectors include real estate, motor vehicles, plant and machinery, agriculture, including grain, livestock and wool, fine art, jewellery, collectables, general goods, home wares, and furniture.

1.4 Recent developments

A significant development in the last eight years, since the last review concluded in 2008, is the increase in online auctions. The internet has changed the way many businesses now conduct auctions. In some cases, due to the increasing costs of maintaining physical premises, some auction businesses have closed their live auction facilities and have moved their operations to an online only format.⁵ Part 3.9 of this paper raises legislative issues relating to online auctions.

¹ The original Act was titled: *An Act To Regulate The Licensing Of Auctioneers, And The Collection Of Duties On Property Sold By Auction* (No. 1 of 1839).

² Minutes of a meeting in the Legislative Council Chamber 15 October 1839 (State Library records).

³ Watts, Second Reading Speech - Sales By Auction Bill, *Western Australian Parliamentary Debates (Hansard* 25 August 1937, p.300 – 303).

⁴ Legislation related to uncollected or abandoned goods includes the *Disposal of Uncollected Goods Act 1970* (WA); *Residential Tenancies Act 1987*; and the *Residential Parks (Long-stay Tenants) Act 2006*.

⁵ Bid Buy Sold company brochure: <http://www.bidbuysold.com.au/>.

In Western Australia, residential property sold through the auction process⁶ has increased. According to data provided by the Real Estate Institute of Western Australia (REIWA), residential properties sold through the auction process have more than doubled in the majority of quarterly sales in the last five years (2011-2016). Such increases, however, are from a low base and the number of residential properties sold under the auction process is still low compared to properties sold by private treaty in Western Australia. According to REIWA data, there were 5430 houses sold by private treaty in the first quarter of 2016 compared to 118 sold through auction contracts. In the first quarter of 2011 there were 5438 houses sold by private treaty compared to 67 through auction contracts.

1.5 Number of licensed auctioneers in Western Australia

As at 30 June 2016, there were 428 licensed auctioneers in Western Australia, 18 of whom were issued with restricted licences in specific areas such as the auctioning of real estate, livestock, wool, and industrial equipment or in specific locations, such as Kalgoorlie.⁷

Currently, auctioneers are required to lodge their licence applications at the Magistrates Court nearest to their auctioneer practice. No applications lodged for a licence were refused in the past financial year to 30 June 2016. The last cancellation or suspension of a licence occurred in 1994.

1.6 The risks that regulation seeks to address

The licensing of auctioneers and certain conduct requirements seek to maintain the integrity and professionalism of the auction industry while protecting purchasers and vendors from unfair practices. Specifically, in relation to purchasers, potential risks are that:

- the vendor or auctioneer will make misrepresentations or false statements about the goods for sale;
- there will be an artificial inflation of the price through vendor bidding or dummy bidding;
- an unfair buyer's premium will be demanded by the auctioneer, or that the purchaser will not be aware that an additional cost needs to be factored in to cover the cost of the buyer's premium;
- the goods bought at auction will not be supplied to the purchaser;
- the goods sold at auction are faulty or stolen; and
- consumers may be unaware that at auction they buy goods "as is" and without the protection of ACL guarantees that apply to goods bought by means other than an auction.

⁶ A residential property is sold through the auction process when the successful bidder signs an auction contract which contains certain auction terms and conditions of auction. An example of an auction term is payment of a deposit of \$50,000 and settlement in 45 days. An example of REIWA's general conditions of auction is that there will be no more than ten vendor bids made during the bidding period.

⁷ Data provided by the Department of the Attorney General as at 30 June 2016.

Similarly, in relation to vendors, the potential risks are that:

- the auctioneer will fail to pass on the proceeds of the sale to the vendor;
- if the auction is conducted poorly the optimum sale price will not be obtained;
- collusive practices by purchasers (similar to “lot splitting” of farming property) will keep the sale price to a minimum; and
- the auction will be undermined by disruptive behaviour and the maximum price will not be achieved or the auction will not continue.

1.7 Previous reviews

National Competition Policy review (1999-2001)

A National Competition Policy review (NCP review) of the Auction Sales Act was finalised in June 2001. The NCP review found that the benefits of licensing auctioneers did not appear to outweigh the costs of restricting competition and it would be unlikely that the removal of licensing would significantly impact on consumer confidence in the industry or the enforcement of the specific conduct provisions within the Auction Sales Act.

The NCP review report recommended that:

- the licensing system be retained until a full legislative review of the Auction Sales Act was completed;
- the licensing system be repealed, unless justified by new reasons arising from a full legislative review of the Auction Sales Act; and
- if licensing, or some other form of occupational regulation is justified after completion of a full legislative review, the administration of such a system be the responsibility of a single government organisation.

General review (2001-2008)

A general review of the Auction Sales Act commenced in 2001 with a final report released on 8 August 2007 making 12 recommendations for change. Feedback to the report resulted in a number of amendments being made and incorporated into a position paper in 2008. The position paper recommended that licensing of auctioneers continue and a number of additional provisions be included in the Auction Sales Act to regulate the conduct of licensees and participants in the auction process (refer to part 3 of this paper). It was anticipated that the changes proposed in the position paper would be dealt with as part of the proposed National Occupational Licensing System (NOLS). NOLS was envisaged as a single national system for occupational licensing whose objective was to remove overlapping and inconsistent regulation between jurisdictions, as well as to improve business efficiency, reduce red tape, improve labour mobility and enhance productivity. A decision was made by the Legislative and Governance Forum on Consumer Affairs (CAF) in 2013 not to proceed with NOLS.

1.8 Complaints and enquiries in relation to auctions

The number of complaints made to Consumer Protection since 2008 has been relatively low.⁸ From 1 January 2008 to 30 June 2016, 171 complaints were received regarding traditional auctions and 266 complaints regarding online auctions.⁹ Over the same period, Consumer Protection received 1,220 enquiries regarding traditional auctions and 1,136 enquiries regarding online auctions.

The two most frequent complaints raised in relation to both traditional and online auctions related to faulty goods, products being misrepresented, or not being as described, and delays in delivery and payments in the case of online auctions. Other complaints related to audit or trust account issues (i.e. consignment sales trust accounts held by motor vehicle auctioneers), unlicensed motor vehicle dealers buying and/or selling vehicles via auction, and complaints about delays in supply of products bought at auction.

The low level of complaints suggests that the auction industry is a compliant industry which currently presents a low risk to consumers. The table below is a summary of complaint and enquiry data from 2008 to 2016.

Table 1 - Complaint and enquiry data from 2008 to 2016

Complaints	Type	Number	Most frequent issues raised	Number
	Traditional auctions			
	Online auctions	266	Product faults Delay in supply and payment Misrepresentation	97 53 42
Total		437		
Enquiries	Traditional auctions	1220	Product faults Misrepresentation	241 163
	Online auctions			
		1136	Product faults Misrepresentation Delay in supply and payment	219 158 132
Total		2356		

⁸ The figures may be skewed somewhat because currently the administration of the Act is split between three agencies. There may have been cases where people have not complained because they did not know who to complain to. The complaint and enquiry figures present here are only those that have been received by Consumer Protection.

⁹ Auctioneers are licensed to conduct auctions and act as selling agents on behalf of the vendor. An auction licence entitles an auctioneer to conduct an auction both by traditional means, whereby people gather together to bid at a physical location, or by online means, whereby people may bid for goods and services via the internet.

2 CURRENT REGULATORY FRAMEWORK

2.1 Objectives of the Auction Sales Act

The principal objectives¹⁰ of the Auction Sales Act are to:

- increase consumer confidence in the auction system;
- protect purchasers and vendors against specific unfair and anti-competitive conduct at auctions; and
- prevent and/or trace the sale of stolen or diseased livestock at auctions.

The Auction Sales Act seeks to achieve these objectives through licensing of auctioneers and the prohibition of certain types of conduct of auctioneers.

2.2 Overview of the Auction Sales Act

Licensing

Currently auctioneer licences must be held by a natural person, but may be granted to a person for the benefit of a firm or corporation.¹¹ There are no requirements that auctioneers have minimum qualifications or experience. Auctioneers must apply for licences and renewals annually at their local Magistrates Court.¹² An applicant must advertise in a local newspaper their intention to be licensed as an auctioneer at least 28 days before of the required date of the hearing.¹³ The application for a licence must include three original character testimonials. A hearing in relation to the application must take place not less than 35 days after the date of lodgement of the application.

All applications are referred to the Western Australia Police Licensing Services where checks determine whether the applicant is “fit and proper”. The Commissioner of Police or any other person may object to the granting of a licence.¹⁴ On this basis a magistrate makes a determination. Generally, if the magistrate is satisfied that the proposed licensee (and firm) is fit and proper to hold such a licence, the magistrate may grant the application. All licences may be subject to such conditions, limitations or restrictions as the magistrate considers fit.¹⁵

¹⁰ These objectives were stated in various previous documentation, including the NCP Issues Paper (July 1999), NCP Review Report (June 2001), and the Auction Sales Act review discussion paper (September 2001).

¹¹ *Auction Sales Act 1973* section 8.

¹² The *Licensing Provisions Amendment Act 2015* was assented to on 2 December 2016 to enable the introduction of three year licensing renewal for auctioneers. Further details of recent amendments are provided under part 2.6.

¹³ The *Licensing Provisions Amendment Act 2015* introduced an amendment to the Auction Sales Act to remove advertising requirements.

¹⁴ *Auction Sales Act 1973* section 11.

¹⁵ *Auction Sales Act 1973* section 16.

The majority of auctioneers obtain a general licence which entitles them to conduct auctions for all types of goods. Other types of licence include:

- a restricted licence – limits the classes of business, parts of the State and/or times during which an auctioneer may carry on business;
- an interim licence - may be granted to a person wishing to sell on the auctioneer's behalf if incapacity prevents an auctioneer from selling by auction;
- an occasional licence – authorises a person to conduct auctions on an isolated occasion and may only be granted to an applicant five times in a year in the same locality; and
- a provisional licence - authorises the licence holder to act as an auctioneer under the direct supervision and instruction of a licensed auctioneer. A provisional licence can only be granted for a period of two months and cannot be granted more than three times in a calendar year.¹⁶

For the purpose of a licence, other than a general licence, the class or classes of business that the regulations may prescribe are as follows:

- any interest in land;
- motor vehicles;
- wool;
- livestock;
- second hand articles; and
- any other specified commodity or thing.

Certain sales by auction are exempted from the Auction Sales Act and therefore exempted from the requirement to be performed by a licensed auctioneer, such as auctions ordered or performed by certain government institutions, charitable, educational or church auctions, or auctions for which the Governor has granted an exemption status.¹⁷

Suspension, cancellation or disqualification

A licence may be suspended, cancelled or disqualified by a magistrate on the request of the Commissioner of Police if the licensee:

- is guilty of improper conduct in relation to the carrying on of the business of an auctioneer;
- has been found guilty of any offence involving dishonest or fraudulent activity; or
- is guilty of any offence under the Auction Sales Act.¹⁸

¹⁶ *Auction Sales Act 1973* section 7.

¹⁷ Section 5(1) of the *Auction Sales Act 1973* specifies the situations where exemptions are granted from complying with the Act. Section 5(2) enables the Governor to grant further exemptions by Order in Council. To date this provision has been used on only one occasion in 2007 (Government Gazette 13 March 2007) in relation to fundraising to enable non-profit bodies to be exempt from the requirement to use a licensed auctioneer if the sole purpose of the auction sale is to raise funds for the purposes of the non-profit body.

¹⁸ *Auction Sales Act 1973* section 22.

Conduct provisions

The Auction Sales Act includes a number of conduct provisions concerning anti-competitive or unfair conduct, including:

- it is an offence for an auctioneer to knowingly make any representation or statement which is false or misleading in any material particular in relation to any lot put up for sale at an auction¹⁹;
- a prohibition on mock auctions. A mock auction is an auction where goods are sold for less than the highest bid made by the purchaser or part of the purchase price is repaid or credited to the purchaser; the right to bid is restricted to persons who have bought or agreed to buy other goods; or any money or article is given away or offered as a gift in addition to the lot bought. Mock auctions are undesirable because the sales techniques employed may distort the value of the goods or place prospective purchasers under unfair pressure or deprive them of the opportunity to make reasoned judgments;
- a requirement to provide notification in the conditions of sale of any right to make a vendor bid²⁰;
- it is an offence for auctioneers to purchase stock auctioned by them unless the vendor has previously consented in writing to the purchase²¹; and
- it is an offence for bidders to collude at agricultural auctions.²²

Recordkeeping requirements

The Auction Sales Act imposes some recordkeeping requirements on licensees for the purposes of tracing unpaid monies, and stolen or diseased stock, including requirements that:

- licensees account for money received on a vendor's behalf by separately recording any such money in a record of accounts in sufficient detail to enable those accounts to be audited²³;
- a licensee must render to the vendor an account in writing of the sale and monies received within 42 days of the completion of the sale or within 14 days on the demand of the vendor²⁴; and
- licensees must keep a register of all stock sold at auction²⁵ and obtain the original of the waybill²⁶ for all livestock to be sold at auction.²⁷

¹⁹ *Auction Sales Act 1973* section 24.

²⁰ *Auction Sales Act 1973* section 29.

²¹ *Auction Sales Act 1973* section 30(5). This is a conflict of interest which breaches the fiduciary duty an auctioneer owes to the vendor.

²² *Auction Sales Act 1973* section 31. The practice known as "lot splitting" or an "auction ring" is a form of collusion. The Auction Sales Act states that a person who induces or attempts to induce any other persons to abstain from bidding at a sale by auction of livestock or farm produce, by promising to allow the abstaining bidder a right to some or all of the property after sale, commits an offence. A person who agrees to abstain from bidding also commits an offence.

²³ *Auction Sales Act 1973* section 26.

²⁴ *Auction Sales Act 1973* section 27.

²⁵ *Auction Sales Act 1973* section 30.

Offences

Any person who fails to comply with the requirements of the Auction Sales Act commits an offence and is liable to a penalty not exceeding \$400, unless a penalty is expressly provided for the offence (currently the maximum penalty is \$1,000).²⁸

If the review finds that some form of regulation of the auction sales industry is warranted, the penalty amounts will be increased and where appropriate brought in line with other jurisdictions and relevant legislation.

Administration of the Auction Sales Act

Responsibilities for enforcement, licensing, disciplinary functions, as well as policy and administration of the Auction Sales Act are currently spread across three government agencies:

- Western Australia Police are responsible for conducting probity checks on applicants. The Commissioner of Police may also commence disciplinary proceedings against auctioneers;
- the Magistrates Court processes applications for auctioneer licences, and magistrates hear the applications, usually in chambers. The Magistrates Court also hears disciplinary proceedings against auctioneers; and
- Consumer Protection is responsible for the administration of the Auction Sales Act, policy development and the investigation of complaints of unfair trading practices under the Auction Sales Act or the ACL in relation to the conduct of auctions. Consumer Protection is currently not directly involved in the administration of the licensing system.

As recommended in the 2008 position paper, it is intended that the regulation of the auction sales industry will be consolidated and shifted to Consumer Protection with the Commissioner for Consumer Protection becoming the regulator and licensing authority.

2.3 General conduct provisions of the Australian Consumer Law

The general conduct provisions of the ACL, which apply to the conduct of auctioneers, include laws prohibiting misleading and deceptive conduct, unconscionable conduct, and the use of unfair contract terms.²⁹ The provisions of the ACL may also apply to buyers and sellers at auctions if the transaction is considered to be in trade or commerce.

²⁶ A waybill is a document issued by a carrier giving details and instructions relating to the transport of a consignment of goods (in this case livestock). Typically the waybill will show the names of the consignor and consignee, the point of origin of the consignment, its destination, and route.

²⁷ *Auction Sales Act 1973* section 32.

²⁸ *Auction Sales Act 1973* section 35.

²⁹ *The Australian Consumer Law: A guide to provisions* (Commonwealth of Australia 2010).

For example, a buyer, who engages in the business of purchasing property to generate rental income could potentially be captured by the ACL if, for example, they place a bid at an auction and have no intention of purchasing the property.³⁰

Aggrieved persons may seek damages for any loss incurred as a result of a breach of any of the provisions of the ACL.

2.4 The Australian Consumer Law as it applies to goods bought at auction

The ACL is limited in its application to goods bought at auction. Only consumer guarantees relating to title, undisturbed possession, and undisclosed securities apply to goods purchased at an auction — and only where an auction was conducted by an auctioneer who acts as an agent of the person selling the goods.

For all other types of transactions, the ACL creates a basic set of guarantees for consumers who acquire goods and services from Australian suppliers, importers or manufacturers. These guarantees are intended to ensure that people receive the goods or services for which they have paid. The ACL also sets out the remedies applicable when consumer guarantees are not met.³¹

The full range of consumer guarantees apply every time people buy goods and services by means other than an auction. If, however, a business sells goods through an online auction website they may be required to abide by the consumer guarantees, as these websites do not generally act as an agent for the person selling the goods. If people take up an option to buy at an online auction site at a fixed price, they are covered by the same consumer guarantees that apply to non-auction sales. Consumer guarantees under the ACL require that the seller must guarantee that:

- goods will be of acceptable quality;
- goods will be fit for a disclosed purpose;
- goods will match their description;
- goods will match the sample or demonstration model;
- the manufacturer will ensure facilities for repair, and parts for the goods are reasonably available;
- they will honour any express warranties;
- the buyer has title to the goods;
- the buyer has undisturbed possession of the goods; and
- there are no undisclosed securities on the goods.

These are consumer guarantees that apply to goods sold by auction as well as by private treaty.

³⁰ *Carter v Delgrove Holdings Pty Ltd* [2013] FCCA 783 – in this case the director of Delgrove Holdings Pty Ltd was the successful bidder at an auction, but then refused to sign the contract or proceed to settlement. The Court found that, in not revealing his intention not to purchase the property following the making of his bid, the director had engaged in misleading and deceptive conduct.

³¹ Remedies normally available under the ACL, for goods bought through transactions other than auctions, include a refund, repair, replacement or exchange, compensation, or the cancellation of a contract. The remedy that purchasers are entitled to will depend on whether the failure to comply with the consumer guarantee is major or minor. Consumer guarantees available are very limited for goods bought at auctions.

2.5 Other legislation impacting on the operations of auctioneers in Western Australia

The operations of auctioneers are also impacted by the *Sale of Goods Act 1895* which regulates the sale of goods and includes some specific provisions in relation to the conduct of auctions. For example, provisions making it unlawful for the seller, or a third party, to bid on behalf of the seller unless notification was given, the right of a bidder to retract a bid before the fall of the hammer, and the right of a seller to set a reserve price.³²

In addition to holding an auctioneer's licence, auctioneers carrying on the business of auctioning real estate or motor vehicles also have to hold a licence under the *Real Estate and Business Agents Act 1978* or *Motor Vehicle Dealers Act 1973*, respectively. Both of these Acts impose conduct provisions in relation to licensees, including requirements to maintain trust accounts, and in the case of real estate agents, having to comply with a code of conduct.

2.6 Recent amendments to the Auction Sales Act

The Government has taken steps to amend the Auction Sales Act in advance of this review. Since the *Licensing Provisions Amendment Act 2015* was assented to on 2 December 2016, amendments to the Auction Sales Act:

- remove the requirement to provide two copies of each character testimonial to support the original character testimonial when applying for an auctioneer's licence;
- remove the requirement to publish a notice in a prescribed form in a newspaper;
- enable a magistrate to award a general or restricted licence for a period that is not less than 12 months but no more than a period to be prescribed; and
- provide for general or restricted licences to be issued or renewed for a prescribed period (it is intended that a period of up to three years will be prescribed).

2.7 The regulation of auction sales in other jurisdictions

The regulation of auction sales varies across Australia. In Queensland, there are two Acts that apply to auction sales. The *Property Occupations Act 2014* applies to the sale of real property by auction – licensees are also permitted to sell other types of property by auction, but only if the property is connected to a real property auction (such as livestock as part of an auction for a farm house and rural land). The *Motor Dealers and Chattel Auctioneers Act 2014* applies to auctions of:

- cars or other motor vehicles;
- livestock or agricultural equipment;
- art or collectibles; and
- any other items except real estate.

³² *Sale of Goods Act 1895* section 57.

In New South Wales, there are also two Acts that apply to auctions. The *Property Stock and Business Agents Act 2002* applies to auctions of land and livestock. Every real estate agent's licence and stock and station agent's licence is subject to the condition that the holder of the licence must not act as an auctioneer unless the licensee is accredited as an auctioneer under section 21 of that Act. The *Motor Dealers and Repairers Act 2013* licenses motor dealers that auction motor vehicles.

Similarly, in Victoria, there are two Acts that apply to auctions. The *Sale of Land Act 1962* and the Sale of Land (Public Auctions) Regulations 2014 apply to the sale of land by public auction. Estate agents and accredited auctioneers are approved by the Business Licensing Authority. The *Motor Car Traders Act 1986* applies to auctions of motor vehicles. A licensed motor car trader may apply to the Business Licensing Authority for an endorsement to the licence authorising the holder to conduct sales of motor cars at public auction.

In South Australia, the *Land Agents Act 1994* and the *Land and Business (Sale and Conveyancing) Act 1994* apply to the sale of land or businesses by auction. Auctioneers must be registered (as an agent or sales representative and an auctioneer) to carry on business under the *Land Agents Act 1994*.

In the ACT, the *Civil Law (Sale of Residential Property) Act 2003* applies to the sale of residential property by auction. An auctioneer (seller's agent) is not required to be licensed or registered.

In Tasmania, the *Property Agents and Land Transactions Act 2005* applies to general auctioneering and sale of land by real estate agents and their employees, all of whom must be registered.

In the Northern Territory, the *Auctioneers Act*³³ applies to the sale of goods or property by auction. An auctioneer must hold a licence and the licence period may be for one, three or five years.

³³ The *Auctioneers Act* as in force at 1 July 2016.

3 PREVIOUS RECOMMENDATIONS ON CONDUCT PROVISIONS

This part of the paper outlines previous recommendations regarding conduct provisions made in the 2008 position paper.

3.1 Vendor bidding and dummy bidding

The 2008 position paper recommended that:

- the Auction Sales Act be amended to prohibit dummy bidding outright and to prohibit vendor bidding except where the right to make vendor bids is expressly stated in the conditions of the auction and each and every vendor bid is disclosed as a vendor bid when it is made;
- industry associations develop voluntary codes of conduct which include the prohibition of dummy bidding and adequate disclosure of vendor bidding;
- the Auction Sales Act be amended to include the power to prescribe a mandatory code of conduct if required³⁴; and
- significant penalties be imposed for breach of the dummy bidding and vendor bidding provisions.

Vendor bidding

Vendor bidding is the practice where persons acting on behalf of the vendor, including in some instances, the auctioneer, make bids at auction. The objective of this practice is to start the bidding process in the absence of legitimate opening bids and to drive the bidding price up to, and beyond, the reserve price, thus assisting in obtaining the best price for the auctioned goods. However, as a result, such a practice may have the effect of misleading and deceiving consumers as to a fair market price.

Vendor bidding is permitted in Western Australia, provided that the right to make vendor bids is notified in the terms and conditions of sale.³⁵ An auctioneer may bid on behalf of the seller where the auctioneer has authority to do so. The Auction Sales Act does not limit the number of vendor bids or prohibit vendor bidding above the reserve price. There is also no requirement to identify the vendor (or person bidding on the vendor's behalf) or advise which bids are vendor bids.

Dummy bidding

Dummy bidding occurs when an auctioneer invents bids or takes bids 'out of thin air'. This clearly disadvantages purchasers and is often done without the knowledge of vendors. The term 'dummy' bidding includes 'shill' bidding which involves practices such as 'planting' a person at an auction to raise the price of bids.

³⁴ Section 42 of the *Fair Trading Act 2010* (WA) provides for the Commissioner for Consumer Protection to make regulations to prescribe a code of practice for fair dealings.

³⁵ *Auction Sales Act 1973* section 29.

This person generally has no intention of making a purchase. The Auction Sales Act is silent on the issue of dummy bidding, but this practice is expressly prohibited in all other jurisdictions.

Penalties for breach of the specific provisions concerning vendor bidding and dummy bidding, range from \$5,000 in Tasmania to \$24,000 in Victoria.

Registration of bidders

The registration of bidders was previously considered as a way of identifying bidders in order to prevent dummy bidding and to ensure that the auctioneer only accepts bids from registered bidders. Auctioneers record the bidder's details (such as name and contact details) prior to the auction and allocate a number or a paddle.

Legislation in other jurisdictions includes the following:

- the Australian Capital Territory, confines regulation to the sale of land by auction and provides that all bidders must be recorded and that the auctioneer may only take bids from recorded bidders, who must display their bidder numbers³⁶;
- New South Wales also provides that all bidders in relation to the sale of residential property or rural land must be registered and that the auctioneer may only take bids from registered bidders³⁷;
- South Australia provides that an auctioneer may only accept bids from registered bidders at an auction of residential land, with the auctioneer to audibly announce the bidder's unique identifier;³⁸ and
- Queensland requires that all bidders must be registered and that the auctioneer may only accept bids from registered bidders.³⁹

In the previous review of the Auction Sales Act the proposed requirement for registration and taking bids only from registered bidders was strongly opposed by industry participants⁴⁰ for a number of reasons, such as:

- it is impractical in multi-lot, high volume auctions, where the bidding process must flow very quickly due to the large number of items being auctioned as the practice would slow the auction to a rate unacceptable to everyone attending a general auction;
- the anonymity of bidders would be lost. Bidders, especially losing bidders, may not want to be identified and privacy should be respected; and
- real estate auctions in Western Australia are usually conducted in the open air, on-site where bidders can arrive at the auction site at any time and start bidding at any stage of the auction process.

³⁶ Civil Law (Sale of Residential Property) Regulation 2004 regulations 25-28.

³⁷ *Property Stock and Business Agents Act 2002 (NSW)* sections 67-70.

³⁸ *Land and Business (Sale and Conveyancing) Act 1994 (SA)* section 24K.

³⁹ *Property Occupations Regulation 2014 (Qld)* regulation 23; *Motor Dealers and Chattel Auctioneers Regulation 2014 (Qld)* regulation 28.

⁴⁰ Submissions from AVAA, AVAWA, Pickles Auctions, GFL Fine Art, H.E. Wells & Sons, Ross's Auctioneers & Valuers, Manheim Fowles, Beevis & Co Auctioneers and Valuers, McKenzies Auctioneers, Valuers & Exhibitions, REIWA.

In practice, however, Consumer Protection understands that where there is a high volume of goods being auctioned, the registration of bidders normally occurs so that the winning bid can be easily identified and recorded for billing purposes. Usually only the winning bid is identified by a registered number.

No recommendations were previously made in relation to registration of bidders and it was left to the industry to decide whether to register bidders or not. This issue remains open for comment.

3.2 Collusion

Collusive practices prevent genuine competitive bidding and prevent sellers from achieving a fair market price. For example, lot splitting is a collusive practice at agricultural auctions in which bidders group together and make prior arrangements not to bid to limit the number of bidders and reduce the price at which a property is sold. As a result, very few bids are received and the lots are sold below market value. It is usual that some form of second 'knock-out' auction is entered into amongst the colluding parties during which the difference in the price paid at auction and the knock-out auction is split between the colluding parties.

Alternatively, the property may be split up in a pre-arranged manner, with the colluding parties receiving a proportion of the quantity, but at a considerably reduced price. Lot splitting has the effect of reducing competition and prices for vendors at auction.

In Western Australia, lot splitting is currently prohibited at auctions of livestock and farm produce. Section 31 of the Auction Sales Act creates an offence for a person to induce or attempt to induce others to abstain from bidding at these types of auctions. This offence is specific to auctions of livestock and farm produce, but does not include wool auctions.⁴¹ It was suggested during the NCP review that the exclusion of wool from the definition of 'farm produce' could allow collusion and inducements to occur at wool auctions. It was also suggested that this behaviour also occurs at general auctions.

The 2008 position paper recommended that the prohibition against lot splitting (collusion) at farm auctions be extended to all auctions. It is important to ensure that genuine competitive bidding is encouraged at all auctions and there appears to be no good reason to differentiate between auctions of farm produce and auctions of other goods. It is likely that more general collusive behaviour is prohibited in the terms and conditions of most auction companies.

3.3 Charging a buyer's premium

A buyer's premium is a fee paid by the winning bidder in order to distribute the cost of an auction between the buyer and the seller, with both the buyer and the seller paying part of

⁴¹ Currently wool, for historical reasons, is excluded from this Act's definition of farm produce and therefore conduct at wool auctions is not regulated by the Act. A degree of industry self-regulation is exercised by the Australian Wool Exchange Limited (AWE) which is a public company which audits wool offered for auction sale to ensure that it complies with certain standards. AWE's Code of Practice for the preparation of Australian Wool Clips is an industry document that describes the recommended practices and standards to which wool should be prepared.

these costs.⁴² This is a world-wide practice which emerged in the mid 1980's. Currently, there are no provisions in the Auction Sales Act dealing with the buyer's premium.

The 2008 position paper recommended that charging a buyer's premium should not be prohibited but that mandatory disclosure of the buyer's premium to potential bidders be required under the Auction Sales Act. Since the conclusion of previous consultations in 2008, it appears that the charging of a buyer's premium has become the industry norm and that auctioneers now factor the buyer's premium into their cost structures. It has also become industry practice to disclose the buyer's premium to potential buyers at the commencement of every auction and to further disclose it in the written terms and conditions of the auction so that buyers are made aware that they must factor this cost into their winning bid.

Previous consultations on this issue showed that the majority of stakeholders supported charging a buyer's premium for the following reasons:⁴³

- the charging of a buyer's premium occurs in all other Australian jurisdictions and in other countries. Prohibiting the buyer's premium could result in important items being relocated to other states where auctioneers can offer lower commission rates to vendors;
- the charging of a buyer's premium is required because of increased costs of conducting an auction and unlike a retailer, an auctioneer cannot increase the price of the goods to recoup increased expenses as the price is subject to market forces;
- charging a buyer's premium enables the vendor to strike a reasonable commission rate with the auctioneer and not bear the entire costs of selling their goods;
- a buyer's premium is charged for services which benefit the buyer, such as displaying the goods, invoicing for taxation purposes, providing catalogues and historical information, and assisting in loading and delivering of goods purchased;
- provided buyers are made aware of the buyer's premium, they can make their own informed decisions;
- the charging of a buyer's premium has become accepted by buyers and very few industry complaints are received in relation to this issue; and
- without income from charging the buyer's premium, small family-run auction businesses would be unable to compete and smaller auctioneers would be forced to close their businesses. This would reduce competition and service levels in the auction industry.

Previous consultations also revealed that while industry broadly supported the charging of a buyer's premium, it also supported the introduction of rules relating to the disclosure of the premium to potential bidders.

⁴² A buyer's premium ranges from about 10 per cent to 25 per cent of the sale price depending on industry and individual business pricing structures.

⁴³ Submissions from AVAA, AVAWA, Hayes Auctioneers, McLernon's Supply & Demand, Pickles Auctions, GFL Fine Art, Smithbroughton Industrial Auctioneers, T.S. McMahon Auctioneers, Ross's Auctioneers & Valuers, ManheimFowles, Beevis & Co. Auctioneers & Valuers, SBDC, McKenzies Auctioneers, Valuers & Exhibitions, Grays (Aust) Holdings.

Three responses to the 2007 review opposed charging a buyer's premium for the following reasons:

- purchasers could be at a disadvantage as it is sometimes difficult to factor the cost of a buyer's premium into the total price when bidding⁴⁴, especially given the speed at which auctions are carried out;⁴⁵ and
- as the auctioneer is acting on behalf of the vendor and providing a service to the vendor, all fees payable to the auctioneer should be the responsibility of the vendor. In addition, a buyer is in no position to negotiate with an auctioneer, whereas a vendor can negotiate a fair and appropriate fee for service.⁴⁶

Consumer Protection does not propose to regulate how auctioneers set their fees. Its interest is ensuring that consumers are fully aware of costs prior to participating in an auction.

3.4 Disclosure of sale or purchase by auctioneers

The Auction Sales Act currently prohibits auctioneers from making a purchase of livestock that they are commissioned to auction, unless the vendor has previously consented in writing to that purchase.⁴⁷ Previous consultations suggested that this prohibition against purchases of livestock by auctioneers be extended to all goods sold at auction. Full disclosure of the auctioneer's participation in the auction process, as either vendor or bidder, would alleviate potential problems concerning conflict of interest. The 2008 position paper recommended that the Auction Sales Act be amended to include a requirement that auctioneers clearly disclose if they are the vendor or intend to bid on goods sold at auction, and that auctioneers be required to obtain the vendor's prior written consent if they intend to purchase goods at auction. Respondents to the 2007 review supported this recommendation. One respondent was of the view that the recommendation should be extended to prohibit the purchase and sale of goods owned by auctioneers or related parties⁴⁸ rather than merely requiring auctioneers to disclose if they are the vendor or a bidder.⁴⁹

3.5 Harassment and disruptive behaviour

The 2008 position paper recommended that provisions be included in the Auction Sales Act to seek to prohibit disruptive behaviour, harassment or exertion of undue influence by any person (including vendors, bidders, auctioneers and their agents) at auctions. Under a variety of circumstances auctions have the potential to be undermined by people behaving in a disruptive manner.

Most respondents to previous reviews of the Auction Sales Act agreed to the recommendation to prohibit harassment and disruptive behaviour. Examples of disruptive behaviour include heckling, asking time consuming questions of little or no consequence,

⁴⁴ Submission from P Conti.

⁴⁵ Submission from K Bebbington.

⁴⁶ Submissions from P Conti, G Cahill and J Wilson.

⁴⁷ *Auction Sales Act 1973 section 30(5).*

⁴⁸ A related party could be a related entity or a person directly related to the auctioneer.

⁴⁹ Submission from ManheimFowles.

making misrepresentations with a view to discouraging others from bidding and generally upsetting the marketing environment at auction.

On rare occasions, auctioneers may harass persons at auctions or exert undue influence on bidders. Some jurisdictions have provisions preventing this type of behaviour. For example, in Victoria, the *Sale of Land Act 1962* prohibits a bidder or buyer's advocate from hindering any other potential bidder from attending or participating in an auction, harassing another bidder, inducing a person not to bid at auction, and doing anything with the intention of preventing, disrupting or causing the cancellation of an auction.⁵⁰

3.6 Standard conditions or rules of conduct

The 2008 position paper recommended that the Auction Sales Act be amended to include the power to prescribe standard auction conditions or rules of conduct and a requirement that these auction conditions be disclosed to bidders prior to auction.

During the 2007 review some industry members, including the Auctioneers and Valuers Association of Australia (AVAA) suggested that standard conditions of auctions be prescribed, particularly in relation to auctions of real estate.⁵¹ Standard rules would clearly set out the conditions of sale and the obligations of parties involved.

Other jurisdictions have prescribed rules of conduct for auctions. For example, in Victoria, pursuant to the Sale of Land (Public Auctions) Regulations 2014, at least 30 minutes before the bidding starts, the auctioneer must display the rules that apply to the auction.

While some respondents raised concerns that standard auction conditions or rules would not recognise the unique differences inherent in auctioning different types of goods, industry generally agreed that where it is possible to standardise certain conditions or rules, the power to prescribe these should exist in the legislation. Some industry members indicated that they would be willing to work with government in developing standard auction conditions or rules of conduct where relevant.⁵²

3.7 Recordkeeping and reporting

The 2008 position paper recommended that, in relation to the sale of second-hand goods by auctioneers, the Auction Sales Act be amended to include:

- recordkeeping and reporting requirements, including a record of all goods received and a description of the goods;
- a requirement that auctioneers ascertain the name and address of a vendor and verify their identification; and
- a requirement that all information held by auctioneers in relation to the sale of second hand goods be made available to police on request.

⁵⁰ *Sale of Land Act 1962* (Vic) Section 47.

⁵¹ Submissions from B Letts and the AVAWA.

⁵² Submissions from the AVAWA and ManheimFowles.

The Auction Sales Act imposes some recordkeeping requirements on auctioneers for the purposes of tracing unpaid monies and stolen and diseased stock. The Auction Sales Act provides that licensees are required to account for money received on a vendor's behalf by separately recording any such money to show full and accurate particulars of each transaction to enable those accounts to be properly audited. These accounts must be retained for a period of three years.⁵³.

The Auction Sales Act also requires licensees to keep a register of all stock sold at auction⁵⁴ and obtain the original of the waybill for all livestock to be sold at auction.⁵⁵.

Some stakeholders who made submissions to previous reviews believed that these less stringent reporting requirements can provide an avenue for auctioneers to be unwittingly involved in the disposal of stolen goods. The potential for criminals to use the auction process for sale of goods is further exacerbated by having no requirement for second-hand dealers to provide the police with information about goods obtained at auction.⁵⁶.

The Small Business Development Corporation supported the requirement that auctioneers be required to ascertain the name, address and identification of a vendor in the interests of reducing the incidence of auctions being used to dispose of stolen goods. The SBDC suggested that in order to keep compliance costs to a minimum, "standardised notification procedures with minimum data elements" need to be developed so that the amount of compulsory recordkeeping required by government is kept to a minimum.

There was general agreement that auctioneers should keep records in accordance with the Auction Sales Act.⁵⁷ Both the AVAA and the Auctioneers and Valuers Association of Western Australia (AVAWA) agreed that general auctioneers be required to make a record of all goods received, including a general description of the goods. They also agreed that potential vendors should be required to provide identification on receipt of their consignment to auction as this reduces the opportunity for stolen goods to be sold at auction.

The AAWA and other respondents pointed out that, in the general auction industry, it is highly impractical to expect auctioneers to record specific details, such as serial numbers prior to auction.

Reasons for this include the high labour intensity of the task, lack of storage facilities to store goods while serial numbers and other details are being recorded, the high volume of goods, the need for rapid weekly turnover of goods and profit margins which cannot support additional labour costs. The AAWA also highlighted that the auction process is not generally used for the sale of stolen goods due to the inherent transparency of the auction process and the fact thieves are not usually willing to wait up to 30 days to receive payment for goods.

⁵³ *Auction Sales Act 1973* section 26.

⁵⁴ *Auction Sales Act 1973* section 30.

⁵⁵ *Auction Sales Act 1973* section 32.

⁵⁶ Regulation 15(3) of the Pawnbrokers and Second-hand Dealers Regulations 1996 provides that second-hand dealers are not required to provide the police with information about goods that the dealer has obtained at an auction within the meaning of the Auction Sales Act.

⁵⁷ Submissions from the AVAA, the AAWA, GFL Fine Art, Western Australia Police, Ross's Auctioneers & Valuers, ManheimFowles, Beevis & Co. Auctioneers & Valuers, KcKenzies Auctioneers, Valuers & Exhibitions, SBDC.

The Western Australia Police supported the requirement for an auctioneer to obtain the name and address of a vendor and to verify their identification. The Western Australia Police were of the view that this level of recordkeeping would be acceptable, provided that the current process, whereby payment is made via cheque or bank transfer, continues. Respondents agreed that police should have access to information held by auctioneers, only where required.

3.8 Holding vendor funds in a trust account

The 2008 position paper recommended that the Auction Sales Act be amended to include a requirement for auctioneers to hold auction proceeds in a separate trust account. It was also recommended that trust accounts be audited on an annual basis and that auctioneers be permitted to use the interest accumulated to offset costs incurred in administering the trust account (e.g. bank charges, government fees and auditing costs).

The NCP review noted that there are no provisions in the Auction Sales Act to protect against misuse of auction sale proceeds, with auctioneers able to combine these proceeds with the general trading operating funds of the business. This means, that in the event of an auction business being liquidated, vendors then may find it difficult to recover unpaid sale proceeds.

The Auction Sales Act requires licensees to account for money received on a vendor's behalf by separately recording any such money.⁵⁸ However, there is no requirement that the funds be held in a separate account. This means that these funds are not quarantined from the assets of the auctioneer or the assets of the firm should it become insolvent.

The 2007 review sought feedback as to whether there is a need to address this issue. Respondents generally supported the proposal to introduce trust account requirements. The SBDC supported the proposal that the interest from trust accounts be retained by auctioneers to offset administration costs.

Another submission suggested that trust account interest be used to pay bank fees and government charges, with the balance to be paid into a fidelity fund. The AVAWA argued that it was not viable at this stage for smaller general auction businesses to make contributions to a fidelity or compensation fund. It is further noted that current low interest rates would mean that it is unlikely that significant surplus funds would be generated.

⁵⁸ *Auction Sales Act 1973* section 26.

Some respondents opposed the introduction of new trust account requirements. Reasons given included:

- trust account requirements would be a further unnecessary imposition on local auctioneers;
- a company in difficulty could easily deplete the trust fund before a liquidator or administrator was appointed, irrespective of the penalties, therefore the new trust requirements would be of little benefit;
- screening operators would be a more effective way of reducing the financial risk to consumers by preventing those of doubtful character or those in financial difficulty from operating in the industry; and
- the requirements would unfairly disadvantage smaller auctioneers to the benefit of larger auction firms which have the administrative resources to comply with such requirements.

Given that some auctioneers are employed by larger auction businesses, a provision could be included in the Auction Sales Act to exempt auctioneers that are employees from the requirement to separately hold a trust account but to require the firm for whose benefit the licence is granted to hold a trust account.

3.9 Conducting online auctions

The concept of an online auction was clearly not contemplated at the time the Auction Sales Act was introduced in 1973 and no amendments have been made to the Act in response to the advent of online auctions. The following types of auctions are now typically available online:⁵⁹

marketplace online auctions - these are a popular way of buying, with a well-known example being eBay. In these virtual markets, a business sets up the website and provides a set of rules and guidelines, but it is left to the individual buyers and sellers to deal directly with each other. The seller sets the first bid or reserve for the goods and then receives bids on the goods. The online auction site provides the means to do this, but the companies that manage these sites are not agents of the vendor with a duty to extract the highest possible bid or make best endeavours to sell the goods for the vendor.⁶⁰ As such, the internet companies are not classed as auctioneers unless they also engage in other auctioneering activities.

traditional auctions online - this is where the auctioneer acts on behalf of the seller of the goods and instead of interested buyers gathering together in person, a website is used to create a virtual auction. In this type of auction the auctioneer is an agent for the seller. Using online auction forums, traditional auction companies are able to reach wider audiences and achieve higher prices for their vendors.

⁵⁹ Extract taken from ACCC website page "Online auctions".

⁶⁰ For example, <http://pages.ebay.com/help/community/png-user.html> has the User Agreement for eBay online auctions.

auctions conducted by website - this is where a business through its own website offers their products for sale by an auction process.

The 2008 position paper recommended that general provisions concerning the conduct of auctions should also apply to online auctions conducted in Western Australia where appropriate. In particular, it was recommended that the provisions should apply to those persons carrying out an auctioneer's business using the internet, rather than simply those persons using a website (e.g. eBay) to sell their own property. The 2008 position paper recognised that jurisdictional issues may be problematic in terms of enforcement and, therefore, recommended that Consumer Protection further consider the regulation of online auctions in consultation with the relevant national and international authorities. All respondents to the issue of auctioneers conducting online auctions agreed with these recommendations.⁶¹

Regulation of online auction sites creates jurisdictional challenges because online auction sites are likely to be located outside of Western Australia and in some instances either the buyer or seller may not reside in the state.

Through the use of the internet, auctioneers are able to effectively operate in Western Australia from anywhere in the world without being licensed, potentially creating an unfair advantage for them over locally based licensed auctioneers.

Owing to the anonymous nature of online auctions, they are also a platform that can be used for fraudulent activities. Common complaints regarding online auctions include failure of the seller to deliver goods or to provide goods of the standard advertised.⁶² There is also evidence that fraudulent activities occur during the auction itself, with both vendors and bidders lodging false bids.⁶³ General consumer protection provisions under the ACL, which also apply to the conduct of online auctions, seek to prohibit or limit some of this fraudulent or unfair conduct. The ACL provides that a person or corporation shall not, in trade or commerce:

- accept payment for goods or services when there is an intention to not supply the goods or services or to supply goods or services materially different from those for which payment is accepted⁶⁴;
- engage in misleading or deceptive conduct or conduct that is likely to mislead or deceive⁶⁵; or
- make false or misleading representations in connection with the supply of goods or services.⁶⁶

⁶¹ Submissions from AVAA, the AVAWA, SBDC, GFL Fine Art, Ross's Auctioneers & Valuers, ManheimFowles, Grays (Aust) Holdings Pty Ltd.

⁶² From 2008 to 2016, Consumer Protection received an average of 31 complaints per year about online auctions.

⁶³ Internet Auctions, Consumer Protection and the Trade Practice Act, M Webster and A Sorenson, January 2004, FindLaw Australia.

⁶⁴ ACL section 36 (civil); section 158 (criminal).

⁶⁵ ACL section 18.

⁶⁶ ACL section 29 (civil); section 151 (criminal).

Table 2 below provides a summary of the conduct provisions proposed in the 2008 position paper, and a comparison of these provisions where they occur in other jurisdictions.

Table 2 – Conduct provisions across jurisdictions

Conduct	ACT	NSW	VIC	TAS	QLD	SA	NT	WA
<i>Vendor bidding and dummy bidding</i> Vendor bidding is prohibited unless disclosed under the conditions of sale prior to auction	✓	✓	✓	✓	x	✓	✓	✓
The number of vendor bids allowed must be disclosed in the conditions of sale	✓ ⁶⁷	✓ ⁶⁸	✓	✓	x	✓	✓	✓
Vendor permitted to make more than one bid	x	✓ ⁶⁹	✓	✓	x	✓	✓	✓
Immediately before or in the process of making the bid, the auctioneer announces that the bid is made on behalf of the seller	✓	✓	✓	✓	✓	✓	x	x
Dummy bidding is prohibited	✓	✓	✓	✓	x	✓	✓	x
<i>Registration of bidders</i> Bids may only be taken from registered bidders	✓	✓	x	x	✓	✓	x	x
<i>Collusive behaviour</i> Prohibition of collusive behaviour at auctions	x	✓	x	✓	x	✓	x	✓ ⁷⁰
<i>Harassment and disruptive behaviour</i> Prohibition of disruptive behaviour at auctions	x	x	✓	x	x	✓	x	x
<i>Charging a buyer's premium</i> Legislation allowing or prohibiting the charging of a buyer's premium	x	x	x	x	✓ ⁷¹	x	x	x

⁶⁷ Section 30, *Civil Law (Sale of Residential Property) Act 2003* (ACT) provides for an auctioneer of residential property to make one bid.

⁶⁸ Regulation 15(3), *Property Stock and Business Agents Regulation 2014* (NSW) provides that more than one vendor bid may be made to purchase the interest of a co-owner of residential property or rural land.

⁶⁹ Section 81, *Property, Stock and Business Agents Act 2002* (NSW) states “A sale by auction of livestock may be notified in the conditions of sale to be subject to the right by the seller or by any person on behalf of the seller or auctioneer to make 1 bid or such other number of bids as may be prescribed by the regulations.”

⁷⁰ Prohibition of collusive behaviour (lot splitting) is confined to agricultural auctions.

⁷¹ Section 92, *Property Occupations Act 2014* (QLD) and section 130, *Motor Dealers and Chattel Auctioneers Act 2014* (QLD) provide that in the event a buyer's premium applies to an auction of goods, that the auctioneer must not charge a buyer's premium unless he/she obtains the written consent of the owner.

Conduct	ACT	NSW	VIC	TAS	QLD	SA	NT	WA
Disclosure Auctioneer must disclose/obtain written approval if he/she intends to sell or bid for goods at auction	x	✓	x	✓x	✓ ⁷² x	✓	x	✓ ⁷³
Rules/conditions of sale The auctioneer must display the rules/conditions of sale that apply to the auction at a reasonable time or at least 30 minutes before the bidding starts	✓	✓	✓	✓	x	✓	x	x
Recordkeeping Requirements for auctioneers to keep appropriate records	✓	✓	x	✓	✓	✓	✓	✓
Trust accounts Requirement for auctioneers to hold auction proceeds in a separate trust account	✓ ⁷⁴	✓	x	✓	✓	✓	x	x
Online auctions Provisions relating to online auctions	x	✓ ⁷⁵	x	x	x	x	x	x

3.10 Questions - regulation of the conduct of auctioneers

Where possible, please provide evidence to support your views and answers, for example by including relevant statistics, examples or case studies.

Questions - regulation of the conduct of auctioneers

- Question 1** Do you support the implementation of any or all of the conduct provisions outlined in parts 3.1 to 3.9 above? If so, why?
- Question 2** Please outline the costs that you believe would arise for auction businesses if any or all of the conduct provisions in parts 3.1 to 3.9 were implemented.
- Question 3** Are there any other conduct provisions that should be considered? If so, why?

⁷² Section 137, *Motor Dealers and Chattel Auctioneers Act 2014* (QLD) requires a chattel auctioneer to disclose to those present at the auction that an associate of the chattel auctioneer intends bidding at the auction.

⁷³ The requirement to disclose if the auctioneer is a seller or intends to bid is limited to livestock auctions.

⁷⁴ A licensed agent must keep a trust account as required under the *Agents Act 2003*.

⁷⁵ "Auction" means the sale of property by any means including the Internet" under section 3 of the *Property, Stock and Business Agents Act 2002* (NSW).

4 OPTIONS FOR FUTURE REGULATION

Outlined below are four possible options for the regulation of the industry, grouped under three main categories:

- **retain licensing** – Options A and B retain some form of licensing of auctioneers with regulation of conduct;
- **negative licensing** – Option C provides that there be no requirement for auctioneers to be licensed, but there be requirements for continued regulation of conduct, and an ability to exclude persons who breach these requirements from operating in the auction industry; and
- **no licensing and no industry specific regulation** – Option D would deregulate the industry by repealing the Auction Sales Act and removing licensing and industry specific conduct regulation. The current protections of the ACL and *Sale of Goods Act 1895* would continue to apply to auctioneers and auction sales.

As stated earlier in this paper, in considering the options below, respondents should be aware it is intended that the regulation of the auction sales industry will shift to Consumer Protection.

4.1 Option A: Retain status quo

Option A would retain the current licensing system and regulation of some conduct at auctions.⁷⁶ The advantages and disadvantages of option A include:

Advantages

- Provides consumer protection through screening of participants to determine if they are a fit and proper person to hold a licence and operate in the industry.
- Entry requirements are not onerous.
- Provides some conduct provisions relating to recordkeeping and behaviour at an auction.

Disadvantages

- Imposes compliance costs on industry and government.
- Costs associated with licensing are likely to be passed on to vendors and purchasers.
- Conduct provisions in the Auction Sales Act may not adequately address certain practices such as vendor or dummy bidding, collusive practices, the holding of vendor funds, and conflicts of interest.

⁷⁶ Option A includes recent amendments to the Auction Sales Act that are contained in the *Licensing Provisions Amendment Act 2015* which was assented to on 2 December 2016 (see part 2.6 of this paper).

4.2 Option B: Retain licensing for those not already licensed under the *Real Estate and Business Agents Act 1978* or the *Motor Vehicle Dealers Act 1973* and introduce additional conduct provisions

Under Option B:

- the licensing of auctioneers would be retained;
- licensed real estate agents or registered sales representatives under the *Real Estate and Business Agents Act 1978* (REBA Act) and licensees under the *Motor Vehicle Dealers Act 1973* (MVDA) would be exempted from having to also hold a licence under the Auction Sales Act as they are regulated under their respective industry licensing Acts⁷⁷; and
- subject to feedback through this review, conduct provisions would be strengthened where appropriate, in line with the proposals set out in part 3 of this paper.

The advantages and disadvantages of Option B include:

Advantages

- Retains consumer protection through screening of participants to determine if they are a fit and proper person to hold a licence and operate in the industry.
- Increased consumer confidence resulting from more comprehensive conduct provisions.
- Reduced costs for real estate agent auctioneers and motor vehicle dealer auctioneers only having to hold one licence to operate in their respective industries.
- Reduced licensing costs for government not having to also licence real estate agents and motor vehicle dealers under Auction Sales Act.

Disadvantages

- Increased compliance costs for auctioneers to comply with expanded conduct provisions.
- Increased compliance costs to government associated with expanded conduct provisions.
- Auctioneers are likely pass on the costs associated with licensing and increased compliance to vendors and purchasers.

⁷⁷ Consequential amendments to the MVDA and REBA Act may be required to implement any conduct provisions implemented in the Auction Sales Act, that are not already addressed in the REBA Act or the MVDA.

4.3 Option C: Introduce a negative licensing system and additional conduct provisions

Under Option C the Auction Sales Act would be retained but a person would not be required to obtain a licence to operate as an auctioneer. Real estate agents or registered sales representatives under the REBA Act and licensees under the MVDA would continue to be licensed under their respective industry Acts.⁷⁸

Auctioneers would still be required to comply with conduct provisions. There would also be a mechanism within the Auction Sales Act to remove auctioneers from the industry for serious breaches of conduct. While the regulator would no longer licence auctioneers, it would continue to investigate any allegations of unjust conduct by agents and take action against those who breach the relevant conduct standards.

The advantages and disadvantages of Option C include:

Advantages

- Lower costs for auctioneers who would no longer be required to pay licensing fees.
- Reduced costs for government in the administration of the licensing system.
- Unsuitable persons can be removed from the industry.

Disadvantages

- Without positive licensing, some consumer detriment may occur if an inappropriate person enters the industry and conducts business as an auctioneer.
- Retained compliance costs for government without cost recovery through payment of licensing fees.
- More difficult for regulators to engage in compliance programs as market participants are not always easily identifiable.

4.4 Option D: Deregulate the auction sales industry

Under Option D, the Auction Sales Act would be repealed and a person wishing to act as an auctioneer would not be subject to any industry specific legislation to operate. The current protections of the ACL and *Sale of Goods Act 1895* would apply to auction sales.

The advantages and disadvantages of Option D include:

Advantages

- Lower costs for auctioneers who would no longer be required to pay licensing fees.
- Reduced costs for auctioneers associated with meeting statutory conduct requirements relating to sale by auction, such as mandatory recordkeeping and disclosure requirements.

⁷⁸ Ibid.

- Reduced costs for government by not having to license auctioneers.
- Consumers and vendors may benefit from reduced costs being passed on by auctioneers.

Disadvantages

- Increased risk of consumer detriment through inappropriate persons operating in the industry.
- The ACL provides limited consumer guarantees for consumers.

4.5 Questions – options for future regulation

Where possible, please provide evidence to support your views and answers, for example by including relevant statistics, examples or case studies. Please also provide information about the costs of the proposals where you can.

Questions - options for future regulation	
Question 4	Which option, or combination of options, do you support? Why?
Question 5	Are there any options that you strongly oppose? Why?
Question 6	If licensing is retained, should the number of licence types be reduced to a single licence, with conditions used instead to state any restrictions or type of auction activity allowable under the licence? Why?
Question 7	What transitional issues need to be allowed for under your preferred option? For example, a certain time period to alter documentation and adjust business practices?

5 COSTS OF LICENSING - MAGISTRATES COURT AND CONSUMER PROTECTION

Table 2 below sets out the estimated costs incurred by industry under the current single licensing function administered by the Magistrates Court. Table 3 sets out the estimated licensing and related costs an auctioneer would incur today, if Consumer Protection was responsible for administering the current regulatory regime for auctioneers.⁷⁹

5.1 Licensing by the Magistrates Court

Under the current regime, applications for licences are referred by the Magistrates Court to the Western Australia Police to conduct probity checks on the applicant. The associated costs for the police to undertake the check is incorporated as part of the current licensing fee. Consumer Protection's administration of the licensing regime would see such checks being undertaken by the Commissioner for Consumer Protection. Therefore, Table 3 includes the cost of an applicant providing a national police clearance certificate as part of a new licence application or the renewal of a licence.

Table 3 – Licensing by the Magistrates Court

Application for a new licence	Amount
Annual licence fee	\$179 ⁸⁰
Advertising in the newspaper	\$313 ⁸¹
Administrative/opportunity costs (estimated as one hour for processing, photocopying, lodgement, travel; opportunity costs are based on an auctioneer's fee of \$200 per hour)	\$200 ⁸²
Total	\$692
Application for renewal	Amount
Annual licence renewal fee	\$179
Administrative/opportunity costs (estimated as half an hour for processing, photocopying, lodgement, travel; opportunity costs are based on an auctioneer's fee of \$200 per hour)	\$100
Total	\$279

⁷⁹ Consumer Protection's cost recovery model apportions all the costs associated with delivering the functions required to regulate an industry, including: licensing; compliance; conciliation; education; advice; and policy development.

⁸⁰ Auction Sales Regulations 1974 regulation 3(1), fee for general auctioneers licence.

⁸¹ Cost provided by the AVAWA. The *Licensing Provisions Amendment Act 2015* removes the requirement to advertise a notice of application for an auctioneer's licence.

⁸² Auctioneer's fee of \$200 per hour was an estimate provided by the AVAWA. It is presumed that if one hour of an auctioneer's time is spent on applying for a licence, there is a cost of output forgone where instead the auctioneer could have earned equivalent income as a result of meeting with clients, conducting an auction, or conducting other business activities that generate income.

5.2 Licensing by Consumer Protection

The costs estimated below are based on Consumer Protection's cost recovery model for the regulation of employment agents. The employment agents industry contains around the same number of licensees and similar licensing provisions as in the Auction Sales Act. It is considered, therefore, that the work required for Consumer Protection to process new applications and renewal applications for auctioneer's licences, would be comparable to that of employment agents. As noted above, Consumer Protection's cost recovery model apportions all the costs associated with delivering the functions associated with regulating an industry. The costing model also factors in that the processes and time involved in assessing and creating an initial licence record for a new applicant are greater than those associated with the renewal of an existing licence. One-off set up costs will also be incurred in order to transfer licence records from the Magistrates Court to Consumer Protection.⁸³ It is also noted that efficiencies and potential savings to the licensing function will eventually be realised through the planned implementation of online occupational licensing by the Department of Commerce⁸⁴ and triennial licensing.⁸⁵ These future savings are not included in the current licence fee estimates.

Table 4 – Licensing by Consumer Protection⁸⁶

Application for a new licence	Amount
Annual licence fee	\$331
Administrative/opportunity costs (estimated as one hour for processing, photocopying, lodgement, travel, opportunity costs are based on an auctioneer's fee of \$200 per hour)	\$200
National police clearance certificate	\$52.60 ⁸⁷
Total	\$583.60
Application for renewal	Amount
Annual licence renewal fee	\$189
Administrative/opportunity costs (estimated as one hour for processing, photocopying, lodgement, travel, opportunity costs are based on an auctioneer's fee of \$200 per hour)	\$100
National police clearance certificate	\$52.60
Total	\$341.60

⁸³ Set up costs would include: IT modifications to Consumer Protection's licensing database; data transfer, including checking and verification of all records; data entry; and file storage for hard copy records. Apportioned set up costs are estimated at \$80,000.

⁸⁴ 2015/16 Department of Commerce Annual Report, page 40.

⁸⁵ The *Licensing Provisions Amendment Act 2015* contains an amendment to the Auction Sales Act to enable licences to be issued for a prescribed period – a period of three years is intended to be prescribed.

⁸⁶ Calculations are based on present day costs and on the assumption that Consumer Protection is the licensing authority administering the current licensing and compliance requirements of the Auction Sales Act.

⁸⁷ www.police.wa.gov.au/Police-Direct/Apply-for-Information/Information-Access-Fees.

Based on the above calculations, the annual licence fee would be \$331 if Consumer Protection was responsible for the full regulation of the auction industry. However, the overall cost to the applicant to apply for and obtain a new licence would reduce from the current estimated cost of \$692 to \$583.60 under Consumer Protection's licensing processes. While new applicants would incur the cost of having to obtain and supply a national police clearance certificate (\$52.60), this would be offset by not incurring the cost (\$313) of having to advertise their application for a licence in the newspaper.⁸⁸

The annual renewal fee would be \$189 and the overall cost to the applicant for the renewal of a licence would increase slightly from \$279 to \$341.60, primarily due to the applicant having to obtain and supply a national police clearance certificate (\$52.60).

6 IMPLEMENTATION AND EVALUATION

6.1 Implementation

Implementation of all the options would require amendment to existing legislation, principally the Auction Sales Act. There may be a need for consequential amendments to other legislation, subject to the option adopted.

Transitional provisions may be required to allow industry time to comply with any new requirements and to allow certain provisions to continue to apply if necessary. For example, consideration will need to be given to providing licence holders sufficient time to become acquainted with and adjust their operations to comply with additional conduct provisions (e.g. setting up a trust account) should Option B or C be implemented.

6.2 Evaluation

Any evaluation process will be outlined in the Decision RIS once a preferred option has been identified.

⁸⁸ The *Licensing Provisions Amendment Act 2015* contains an amendment to the Auction Sales Act to remove the requirement for applicants for a new licence to advertise notice of their application in the newspaper.

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