



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

CONSULTATION

REVIEW OF EMPLOYMENT AGENTS ACT 1976

July 2015

Making a submission

The Government is interested in receiving your feedback on this paper.

We are seeking stakeholder responses on the specific issues raised in this paper and whether there might be any unanticipated consequences in implementing the proposed reforms. For your reference, a copy of the *Employment Agents Act 1976* (the Act) may be downloaded from the State Law Publisher website at:

http://www.slp.wa.gov.au/legislation/statutes.nsf/main_mrtitle_296_homepage.html

Written comments, queries and submissions should be forwarded by **11 September 2015**. It is recommended that you provide a clear and concise submission outlining your preferred opinions, the reasons for them and your suggestions for change. When making a submission, please also indicate the capacity in which you are responding (e.g. employment agent, industry body).

Please forward any submissions to the Director, Legislation and Policy, Consumer Protection Division, Department of Commerce, Consultation on Employment Agents Licensing Locked Bag 14, Cloisters Square, Perth, WA 6850, or by email to consultations@commerce.wa.gov.au

For all inquiries please contact Felicity Bonner on (08) 6552 9418 or via email at felicity.bonner@commerce.wa.gov.au

After the consultation period concludes, responses may be made publicly available on the Department of Commerce website. Your feedback forms part of a public consultation process and the Government may quote your submission in future publications. If you would 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 other information that you do not wish to become available to the public.

The Department has no objection to all or part of this document being copied. Due recognition of the source would be appreciated. Additional copies of this paper may be downloaded from the Department's website. Telephone queries may be directed to 1300 30 40 54. This publication is available on request in alternative formats to assist people with special needs.

Disclaimer:

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 *Employment Agents Act 1976*. The contents of the paper do not constitute legal advice or legal information and they do not constitute Government policy. This paper should not be used as a substitute for a related Act or professional advice.

INTRODUCTION

In accordance with the *Employment Agents Act 1976* (the Act), employment agents that carry on business in Western Australia are required to hold a licence.

In keeping with the current initiative to reduce regulatory burden, the Western Australian Government is considering the introduction of a negative licensing system for employment agents. Under this system, people would not be required to be licensed in order to conduct business as an employment agent, but the Government would have the ability to exclude people from the industry if they were found to have breached regulated standards or engaged in unjust conduct.

The Government first considered the introduction of negative licensing in 2003, when it was recommended as a result of the National Competition Policy Review into the *Employment Agents Act 1976* (the NCP Review). This recommendation was made again in 2009 in the Red Tape Reduction Group report (the RTRG Report).

The Government is now seeking views from industry and other stakeholders on the proposal to abolish the current licensing system under the Act and replace it with negative licensing. Comments are also sought in relation to other recommendations arising from the NCP Review and the RTRG Report which relate to conduct requirements for employment agents. Feedback from this consultation will be used to shape reform of the Act and, more generally, the regulation of employment agents.

CURRENT SYSTEM

The Act establishes a licensing system for employment agents and governs the manner in which licensed agents conduct their business. The Consumer Protection Division of the Department of Commerce (the Department) is responsible for administration of the Act.

A person applying for an employment agent's licence is required to be fit and proper and of good character, and the Commissioner for Consumer Protection (the Commissioner) must be satisfied that adequate management and supervision will be provided to safeguard the interests of jobseekers. The fee to apply for an employment agent licence is \$970 for a three year licence, and the renewal fee is \$720.

There are currently approximately 590 licensed employment agents in Western Australia.

Once licensed, an employment agent must comply with the conduct requirements contained within the Act. A key requirement is that employment agents are prohibited from charging fees to job seekers. Other conduct requirements include maintaining financial and other records, and submitting a scale of fees chargeable to employers to the Commissioner for approval.

The Department monitors the employment agent industry through its compliance program. It conducts checks on licensees to ensure they are complying with the requirements under the Act, and investigates any complaints received from the public regarding employment agents. The number of complaints received by the Department is low (an average of 15 per year, the majority of which are found to be unsubstantiated).

PROPOSED CHANGES TO THE ACT

Negative licensing

The Government is proposing to abolish the current licensing system under the Act and replace it with negative licensing.

Under a negative licensing system, employment agents would be required to comply with regulated standards in terms of work or conduct. Industry entry would not be regulated but there would be a mechanism within the Act to provide the Commissioner with the authority to institute disciplinary proceedings in the State Administrative Tribunal to exclude an agent from the industry where they have breached regulated standards in the Act.

While the Department would no longer licence employment agents, it would continue to investigate any allegations of unjust conduct by agents. Indeed, compliance would still be a key element in the regulation of employment agents if negative licensing were to be introduced. The Department would retain the authority to investigate the conduct of those engaged in the business of being an employment agent and take action against those that are found to have breached the requirements under the Act.

The benefits of a negative licensing scheme include:

- Reduced regulation and lower costs for agents. Consultation conducted as part of the NCP Review suggested that the only substantial administrative cost incurred by employment agents was the application and renewal fees. These fees would no longer be applicable under a negative licensing system.
- Retention of conduct requirements. Employment agents would continue to be regulated by the Act in terms of conduct, which is an important safeguard for both employers and job seekers.
- Continued monitoring of the industry, with an established procedure for excluding employment agents who breach conduct requirements under the Act. While the Commissioner would no longer assess applicants before they commenced work as an employment agent, the Act would allow for application to the State Administrative Tribunal to ban a person from the industry.

The main disadvantage of a negative licensing system is that it may result in inappropriate persons conducting business as employment agents, as there would be no assessment prior to an agent commencing business. However, despite the existing long standing licensing regime, a common complaint received by the Department is that of unlicensed trading as an employment agent, suggesting that this issue already exists to some extent. As mentioned above, the Department will continue with its compliance program to combat instances of unscrupulous behaviour and exclude agents from the industry if necessary.

The Department receives only a small number of complaints in relation to employment agents (an average of 15 per year), and most of these complaints are found to be unsubstantiated after an investigation, which suggests that the industry operates effectively with a low level of risk to job seekers. The most common complaints allege that a person is carrying on business as an employment agent without a licence, or that an employment agent has unlawfully charged fees to a job seeker.

Under a negative licensing system, allegations of unlicensed trading would no longer be relevant, but the Department would continue to investigate allegations of employment agents charging fees to job seekers. It is expected that the level of risk to job seekers will not increase if the current licensing system were to be abolished.

The Government is of the view that a negative licensing regime is commensurate with the level of risk to job seekers and the public and is a viable option to achieve the objectives of reducing regulation and lowering costs for business.

Do you support the Government's proposal to abolish the licensing of employment agents and replace it with a negative licensing scheme? Please provide reasons.

Conduct requirements

The NCP Review and the RTRG Report also made recommendations in relation to the conduct requirements contained within the Act.

Under a negative licensing system, any conduct provisions would be considered to be regulated standards, and breaching them could result in exclusion from the industry.

- Prohibition against charging fees to job seekers (section 36 of the Act)

In accordance with the Act, employment agents are prohibited from charging any fees to job seekers.

The NCP Review and the RTRG Report both recommended the retention of this provision. The Government is of the view that this prohibition provides an important protection to job seekers from dishonest conduct by employment agents. In jurisdictions that allow fees to be charged to job seekers, there have been reports of agents advertising job finding services for a fee with the aim of attracting mass applications, but having little or no intention of undertaking any work in response.

Do you support the Government's proposal to retain the prohibition against charging fees to job seekers? Please provide reasons.

- Charging fees to employers (sections 37 and 38 of the Act)

Currently, employment agents are required to submit a scale of fees to the Commissioner for approval. Agents are required to charge employers according to the approved scale of fees, unless both parties have otherwise agreed in writing in advance the basis on which the employer is to be charged.

The NCP Review made two recommendations relating to the charging of fees to employers:

- to remove the need to seek approval from the Commissioner for the scale of fees chargeable to employers; and
- to allow fees to be negotiated between employment agents and employers, but preclude agents from demanding or receiving any fee that is unjust, where there is no prior agreement.

The Government is of the view that the requirement to submit a scale of fees to the Commissioner for approval is an unnecessary regulatory burden on employment agents, and intends to amend the Act to remove this requirement.

Do you support the Government's proposal to remove the requirement to submit a scale of fees to the Commissioner for approval? Please provide reasons.

The Government is reconsidering the recommendation relating to the negotiation of fees between employment agents and employers.

The object of the Act is principally to protect job seekers who engage the services of an employment agent, or who are offered work on behalf of an employer by an agent. Notably, the negotiation of a contract between an employment agent and an employer is a business transaction that has no bearing on the eventual relationship between the job seeker and the employer.

Accordingly, the Government is seeking views on whether the Act should be amended to relax the regulation of fees and simply require employment agents to disclose their fees to employers before agents provide any services. The Act would make it clear that the parties remain free to negotiate a different fee structure should they choose to do so.

Any disputes arising as a result of fees charged by the employment agent would be dealt with in the Magistrate's Court or through an Alternative Dispute Resolution (ADR) service.

Do you support an amendment to the Act to require employment agents to disclose their fee structure to employers prior to commencing work? Please provide reasons for your response.

- ‘Notice of Employment Offered’ (section 42 of the Act)

Employment agents are currently required to provide each prospective employee with a ‘Notice of Employment Offered’ (the Notice) which specifies relevant details about the job they are being offered (e.g. the employer’s details and the salary). The Notice must contain a statement that the terms of employment are a matter to be negotiated between the employer and employee, and that the particulars set out in the Notice are given for guidance only. Employment agents are required to keep a copy of all Notices, and note on each one whether or not the offer of employment was taken up.

The NCP Review recommended that the requirement for employment agents to provide Notices be relaxed where it is impractical to do so, subject to the consent of the employee.

The Government is reconsidering this recommendation on the basis that it may provide an important safeguard for employees, as it gives them written notice of what has been negotiated between the employment agent and employer. Even though the Notice is provided only for guidance, it could serve as a useful tool for prospective employees when negotiating the terms of their employment. There is an imbalance of power between an employer and prospective employee, which has the potential to place the employee in a vulnerable position. Being able to refer to the Notice for information about what was agreed between the employment agent and the employer may ensure that the employee does not feel compelled to agree to terms of employment that are different to what they expected and possibly not suitable for their situation.

The Government is of the view that employers should continue to be allowed to negotiate terms different to those listed in the Notice with the employee, as is currently provided for in the Act.

The Government is seeking views on the requirement for employment agents to provide a ‘Notice of Employment Offered’.

Do you support retention of the requirement to provide a Notice of Employment Offered? Are there instances where it is impractical to provide a Notice? Please provide reasons for your responses.