

# Final Report

## Review of the *Auction Sales Act 1973*

Final Report - July 2007



Department of Consumer  
and Employment Protection  
Government of Western Australia



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and Employment Protection  
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## **Foreword**

The auction process is an important method of conducting transactions in our market economy. In Western Australia auctions and auctioneers now play a significant role in balancing supply and demand within the economy to ascertain market price. Efficient regulation of the auction industry therefore impacts on the performance of the entire economy.

This industry is currently regulated by the *Auction Sales Act 1973*. Considering the WA industry was first regulated in 1839, and that the legislation has been through a number of previous significant amendments, it is important any proposed changes are fully considered.

In recent years there has been an on-going review of the auction sales industry and the proposed changes have been developed through considerable consultation with key stakeholders, including industry participants and associations, government agencies and the general public.

I am pleased to release the final report on the review of the *Auction Sales Act 1973* and invite your comment. The proposed changes aim to increase consumer confidence in the auction system and protect buyers and sellers against unfair and anti-competitive conduct at auctions. The Government's position on issues such as vendor and dummy bidding, disclosure by auctioneers, record keeping, trust accounts, internet auctions, and the licensing of auctioneers is clarified in this final report.

The State Government is committed to ensuring current regulation is brought into line with modern market practices and that it is as consistent as possible with other Australian states and territories. We believe the changes outlined in this report will streamline the administration of this important area of legislation and will result in improved practices and protection for buyers and sellers.

Your input is sought to ensure any changes to the regulation of this industry are practical and that auction practices are fair and competitive.

A handwritten signature in black ink, appearing to read 'Sheila McAuley'. The signature is fluid and cursive, with a long horizontal stroke at the beginning.

**SHEILA M<sup>C</sup>HALE MLA**  
**MINISTER FOR CONSUMER PROTECTION**



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# 1 EXECUTIVE SUMMARY

## 1.1 Introduction

The *Auction Sales Act 1973* ("the Act") currently regulates auctioneers in Western Australia. The principal objectives of the Act are to:

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

The Act seeks to achieve these objectives through mechanisms such as licensing of auctioneers, prohibition of certain conduct at auctions and record keeping requirements imposed on auctioneers.

This report outlines recommendations for amendment to the Act. The recommendations have been developed following a lengthy review process involving both a National Competition Policy review of the Act and a review of the general operation of the Act.

## 1.2 Summary of recommendations

Government is confident that the following recommendations will streamline the administration of the Act, result in increased protection for consumers, both vendors and purchasers, and introduce improved and appropriate reporting and record-keeping mechanisms.

### 1) Vendor bidding and dummy bidding

It is recommended that the Act be amended to prohibit dummy bidding completely, 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.

In order to facilitate enforcement it is recommended that all bidders be required to be registered, and that auctioneers must only take bids from registered bidders, with bidders to be identified by a number or paddle.

It is also recommended that significant penalties be imposed for breach of the prohibition on vendor bidding and that a purchaser should be entitled to claim compensation for loss or damage caused by any person breaching the provisions.

**2) Lot splitting or buyer auction rings**

It is recommended that the prohibition against lot splitting be extended to all auctions. Lot splitting is a form of “auction ring” in which bidders group together to abstain from bidding to reduce the price at which the property is sold. Lot splitting is currently prohibited at auctions of livestock or farm produce.

**3) Buyer’s premiums**

It is recommended that auctioneers be prohibited from requiring payment of a buyer’s premium. A buyer’s premium is paid as a levy on the buyer for the privilege of buying at auction and is paid as revenue to the auctioneer.

**4) Disclosure of sale or purchase by auctioneers**

It is recommended that the Act be amended to include a requirement that an auctioneer provide clear disclosure if he or she is the vendor or purchaser of goods sold at auction and that the auctioneer be required to obtain the vendor’s prior written consent if the auctioneer intends to purchase goods at auction.

**5) Harassment and disruptive behaviour**

It is recommended that provisions be included in the Act prohibiting disruptive behaviour, harassment or exertion of undue influence by any person (including vendors, purchasers, bidders, auctioneers and their agents) at auctions.

**6) Standard conditions or rules of conduct for sale by auction**

It is recommended that the Act be amended to include the power to prescribe standard auction conditions or rules of conduct. There would also be a requirement that these auction conditions be disclosed or provided to bidders prior to auction.

**7) Record keeping**

It is recommended that, in relation to the sale of certain classes of second-hand goods, auctioneers be required to make a record of goods received, including a description of the goods and details of the party selling the goods, and to provide this information to the police. Auctioneers who suspect that any goods offered for sale may have been stolen or unlawfully obtained would be required to inform a member of the police force and provide a description of the goods. Auctioneers would also be required to ascertain the name and address of vendors of second-hand goods and verify their identification.

**8) Trust accounts**

It is recommended that a requirement for auctioneers to hold auction proceeds in a separate trust account be included in the Act.

**9) Licensing**

It is recommended that the licensing regime under the Act be retained. The current requirement that an applicant for a licence must be “fit and proper” should be removed and replaced with more specific criteria related to matters such as good character (based on criminal record checks), financial capacity and past occupational history or experience.

**10) Internet auctions**

It is recommended that general provisions concerning the conduct of auctions also apply to internet auctions conducted in Western Australia if appropriate. It is recognised that jurisdictional issues could have an impact in relation to enforcement. It is therefore recommended that this issue be considered on a national basis.

**11) Administration of the Act**

The Western Australian Police (“the Police”) have recommended that administration of the Act be vested in the Department of Consumer and Employment Protection (Consumer Protection), with the Commercial Agents Unit, a division of the WA Police Service, conducting inquiries into the criminal activities of auctioneers, together with the tracking of suspect property. Notwithstanding views expressed by a variety of stakeholders, the Police have advised that it regards administration of the Act as contrary to its current Frontline First strategic direction with its focus on frontline policing functions.

A further transfer of responsibilities to Consumer Protection in the form of the Act would require the provision of additional resources to DOCEP. It is recommended that, subject to the provision of suitable resources, the administration of the Act be fully vested in Consumer Protection.

**12) Offences**

It is recommended that all penalties for offences under the Act be increased significantly to be commensurate with other jurisdictions and consumer protection legislation.



## 2 GLOSSARY OF TERMS USED IN THIS PAPER

<b>the Act</b>	<i>Auction Sales Act 1973</i>
<b>Commissioner</b>	Commissioner for Consumer Protection
<b>Consumer Protection</b>	Consumer Protection, a division of the Department of Consumer and Employment Protection
<b>DOCEP or the Department</b>	Department of Consumer and Employment Protection
<b>General Review</b>	Review on the current operation of the Act undertaken by the Department following release of a Discussion Paper in September 2001
<b>Licensee</b>	A person licensed as an auctioneer under the Act
<b>Minister</b>	Minister for Consumer Protection
<b>NCP Review</b>	National Competition Policy Review of the Act undertaken by the Department following release of an Issues Paper in February 1999
<b>Reserve price</b>	Price set by the vendor as the minimum sale price for property for sale by auction
<b>VEETAC</b>	Vocational Education, Employment and Training Committee



## 3 BACKGROUND

### 3.1 The auction industry

The practice of auctions can be traced back to antiquity and has involved many different forms throughout the years. The modern type of auction is commonly the ascending bid “English” auction. In the course of these auctions the auctioneer takes bids on an increasing scale and the property is sold to the highest bidder on the fall of a hammer.

Arguably the most recognised types of auction are those of fine art and antiques made famous by the auction houses of Sotheby’s and Christie’s. Many other goods, however, also rely on the auction system to facilitate transactions between buyers and sellers. Land, motor vehicles, plant and machinery, and agricultural products are just some of the types of property commonly sold at auction. Some items, such as uncollected goods, are required by legislation to be sold by auction<sup>1</sup>.

Reliance on the system of sale by auction has meant that auctions and auctioneers now play a significant role in balancing supply and demand within the economy to ascertain market price. Efficient regulation of the auction industry therefore impacts on the performance of the economy as a whole.

### 3.2 Regulation of the auction industry in Western Australia

Legislation to regulate auctioneers has been in place in Western Australia since 1839. An historical overview of the regulation of the auction industry in Western Australia is at Appendix 9.1.

The *Auction Sales Act 1973* currently regulates auctioneers in Western Australia. The principal objectives of the Act are to:

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

The Act seeks to achieve these objectives through mechanisms such as licensing of auctioneers, prohibition of certain conduct at auctions and record keeping requirements imposed on auctioneers.

An overview of the current provisions and administration of the Act and a brief outline of other relevant legislation is at Appendix 9.2.

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<sup>1</sup> *Disposal of Uncollected Goods Act 1970 (WA)*

## 4 REVIEW PROCESS

In recent years the Act has been examined in varying contexts. The following is a brief outline of the review processes undertaken to date and a summary of issues raised in the reviews.

### 4.1 National Competition Policy Review

As a requirement of the Competition Principles Agreement, agreed to by all Australian Governments in April 1995, the Western Australian Government carried out a National Competition Policy Review (NCP Review) of the Act. The report on this review was finalised in June 2001. The terms of reference and a summary of National Competition Policy principles is at Appendix 9.3.

An Issues Paper was released in February 1999. Following analysis of submissions and other material, in line with the terms of reference outlined in Appendix 9.3, a Report on the NCP Review was developed.

#### 4.1.1 Findings

The NCP Review found that the benefits of licensing did not appear to outweigh the costs of restricting competition and that the removal of licensing would be unlikely to significantly effect consumer confidence in the industry or the enforcement of the specific provisions within the Act.

The Report on the NCP Review recommended that:

- the licensing system be retained until a full legislative review of the Act was completed;
- the licensing system be repealed, unless justified by new reasons arising from the full legislative review of the 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.

The National Competition Council has endorsed the recommendations of the NCP Review.

#### 4.1.2 Additional issues raised

During the NCP review it became clear that there was a need to consider the adequacy and scope of the current provisions in the Act and investigate the need to include other provisions to regulate auctions and ensure fair competition. The issues that arose were, however, outside the scope of the NCP review. A summary of these additional issues is at Appendix 9.4.

It was recommended that these issues be considered as part of a full legislative review of the Act.

## 4.2 General Review of the *Auction Sales Act 1973*

A Discussion Paper was released in September 2001 to seek public comment from industry participants, industry associations, government agencies and the general public on the current operation of the Act and the possible need for changes to existing legislation.

### 4.2.1 Discussion Paper: Issues considered

The Discussion Paper outlined a number of key issues identified through the NCP Review process and sought comment on those issues from stakeholders. In addition, stakeholders were invited to raise any other issues that they believed may be having a detrimental effect on the operation of the Act and the auction industry. The following issues were identified and considered in the General Review.

- Is there a need for the licensing of auctioneers to be administered under a single government agency and if so, which agency should have responsibility?
- Is there a need to amend the definition of “farm produce in section 4 of the Act, to include wool?
- Is there a need to introduce legislation to govern the practice of vendor bidding (including “dummy” or “shill” bidding)?
- Is there a need to introduce new legislation, or remove existing legislation, in response to the increased use of the internet for conducting auctions?
- Is there a need to address other issues that have been raised as concerns for consumers and industry participants (such as lot splitting, buyer’s premiums and trust account requirements)?

### 4.2.2 Discussion Paper: Respondents

A list of stakeholders who responded to the Discussion Paper is at Appendix 9.5.

## 4.3 This final report

This final report details all the issues raised and identified in both the NCP and general review processes, together with other emerging issues, and presents recommendations for action. The NCP Report noted that new or amended provisions under the Act may justify a need for the retention of some sort of licensing, negative licensing, registration or certification system<sup>2</sup>. Accordingly, this report discusses proposals concerning conduct and record keeping provisions of the Act (sections 5 and 6) and then considers whether licensing is required in light of other recommendations made (section 7).

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<sup>2</sup> NCP Report, page 35

## 5 REGULATION OF CONDUCT

### 5.1 Vendor bidding and dummy bidding

Vendor bidding is the practice where persons acting on behalf of the vendor 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.

Dummy bidding occurs when an auctioneer invents bids or takes bids “out of thin air”, often without the knowledge of the vendor. The term “dummy” bidding in this report includes “shill” bidding which involves practices such as “planting” a person in an auction to raise the price of bids without an intention to purchase.

#### 5.1.1 Current legislation in Western Australia

Currently vendor bidding is permitted in Western Australia provided that the right to make vendor bids is notified in the conditions of sale.

Section 29 of the Act states:

- (1) *A sale by auction 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 of the auctioneer to make a bid or a specified number of bids.*
- (2) *A seller, and any person on behalf of the seller or of the auctioneer who makes, and any auctioneer who knowingly takes from any such person, -*
  - (a) *any bid at a sale by auction unless the right so to bid has been notified in the conditions of sale; or*
  - (b) *more than the number of bids so specified in the conditions of sale,*  
*commits an offence.*

An auctioneer may bid on behalf of the seller where the auctioneer has authority to do so. An auctioneer may not take dummy bids by inventing bids and bidding without the authority of the seller by taking bids “out of thin air”, or “off the wall”.

The 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.

Section 57 of the *Sale of Goods Act 1895* states:

In the case of a sale by auction –

- (3) *Where a sale by auction is not notified to be subject to a right to bid on behalf of the seller, it shall not be lawful for the seller to bid himself or to employ any person to bid at such sale, or for the auctioneer knowingly to take any bid from the seller or any such person. The buyer may treat any sale contravening this rule as fraudulent.*
- (4) *A sale by auction may be notified to be subject to a reserved or upset price, and a right to bid may also be reserved expressly by or on behalf of the seller.*  
*Where a right to bid is expressly reserved, but not otherwise, the seller, or any one person on his behalf, may bid at the auction.*

The *Sale of Goods Act 1895* applies to the sale of goods<sup>3</sup>, but not to the sale of real property. Dummy bidding is not permitted under the *Auction Sales Act 1973* or the *Sale of Goods Act*. In addition, the practice of dummy bidding is likely to breach section 10 of the *Fair Trading Act 1987* which provides that a person shall not, in trade or commerce, engage in conduct that is misleading or deceptive or likely to mislead or deceive.

#### 5.1.2 Issues

Vendor bidding and dummy bidding have recently received a fair degree of attention. The judiciary has described dummy bidding as an “evil, deceitful and misleading stratagem to boost bids”<sup>4</sup>. The Australian Competition and Consumer Commission (ACCC) has indicated that it is of the view that the practices of dummy bidding and undisclosed vendor bidding are completely unacceptable, with the Chairman of the ACCC making the following statements:

*It is a practice designed simply to fleece more money out of a prospective homebuyer who is forced to bid more and more to outbid someone who has no more intention of buying the property than the letter box or the garden gnome.*

Unless it is fully disclosed both at the start of the auction and at the time of the bid, the Commission considers all dummy bidding on behalf of the vendor to be deceptive and misleading conduct.<sup>5</sup>

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<sup>3</sup> Defined as including “all chattels personal other than things in action and money. The term includes emblements, industrial growing crops, and things which are attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale (Section 60(1) *Sale of Goods Act 1895*).

<sup>4</sup> *Fletcher v Dunne* (unreported, Melbourne Magistrates Court, 6 June 2001)

<sup>5</sup> Address by Graeme Samuel, Chairman of the ACCC, to the Real Estate Institute of Victoria, Melbourne, 25 March 2004

Vendors can benefit from vendor bidding, and conversely, bidders and potential bidders can be disadvantaged, in a number of ways. Vendor bidding may stimulate bidding at the start of an auction and help it reach the reserve price, thereby increasing the chances of a successful sale and avoiding the costs associated with an unsuccessful sale.

Vendor bidding may inflate the sale price indirectly beyond the reserve price by overstating the true demand for the property, thereby encouraging excessive bidding where vendor bids are made at or just below the reserve price. Vendor bidding may also directly inflate the sale price when vendor bids are received above the reserve price or when there has been no reserve set.

Bidders are often unlikely to realise that they are bidding against a seller who obviously has no interest in purchasing the property that has been put up for sale. Whilst it is a requirement that the right to make vendor bids be noted in the conditions of sale, there is no requirement that this specific issue be raised with potential purchasers prior to auction.

Additionally, even professional purchasers may be unable to take account of vendor bidding as there is no requirement that sellers, auctioneers or persons bidding on their behalf must be identified before the auction takes place or at the time of bidding. It is argued that this creates a false or misleading market environment.

In this way, vendor bidding can allow the seller to artificially inflate the price of the property, thereby limiting competition amongst genuine potential purchasers. In these cases, a true commercial outcome reflecting the strength of the market may not be possible. The purchaser may eventually buy the property for a higher price than would have been offered if the vendor had not bid. Even if the property does not reach the reserve price, the purchaser, in negotiating a subsequent private purchase, may be ignorant of the true market value of the property.

### 5.1.3 Responses to the Discussion Paper

The Discussion Paper sought feedback in relation to the following issues:

- whether vendor bidding should be prohibited;
- if vendor bidding is prohibited, what level of penalty should be created for the offence;
- if vendor bidding is to be retained, is there a need for limits to be placed on its use;
- if limits are introduced, what should those limits be (for example, number of bids, identification of bidders, prohibition on bidding above the reserve price); and
- whether Section 57 of the *Sale of Goods Act 1895* should be removed from that Act and incorporated in the Act.

A number of stakeholders were of the view that both vendor and dummy bidding should be prohibited completely. These stakeholders argued that vendor bidding is a “practice which is designed to deceive” and a sham practice designed to create false market conditions<sup>6</sup>.

Some stakeholders were also of the view that the practice of vendor bidding has the effect of distorting market values<sup>7</sup> by creating false expectations and assumptions in the marketplace<sup>8</sup>. One submission stated that the whole idea of dummy bidding was “to fool interested purchasers into believing they are paying the true market value of the property in question”<sup>9</sup>.

Some submissions argued that the reserve price is effectively a vendor bid<sup>10</sup> and that “interests of vendors can be adequately protected through the use of reserve prices without the necessity of the deceptive device of vendor bids”<sup>11</sup>.

It can be argued that a true auction scenario should involve a willing vendor and competing, willing and independent potential purchasers. If genuine bids cannot be attracted at an auction, this suggests that there is not sufficient interest in the property in the market or that an auction is not the most appropriate mechanism for sale of the property.

Other stakeholders supported the continued practice of vendor bidding, but recognised that some restrictions might be required to curb potential abuses of the practice<sup>12</sup>. These stakeholders were of the view that dummy bidding is a necessary part of the auction process, often used to commence proceedings<sup>13</sup>, maintain the flow of the auction<sup>14</sup> or “run up” bidding to near the reserve price<sup>15</sup>. This is viewed by some stakeholders as being of benefit to both the vendor and purchaser as it is more likely to result in a successful auction.

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<sup>6</sup> Submission of Nisbet J

<sup>7</sup> Submission of Nisbet J

<sup>8</sup> Submission of J Lightowlers

<sup>9</sup> Submission of Nisbet J

<sup>10</sup> Submission of K B Bebbington

<sup>11</sup> Submission of J Lightowlers

<sup>12</sup> Submission of R E Wells

<sup>13</sup> Submission of P Conti

<sup>14</sup> Submission of REIWA

<sup>15</sup> Submission of B Letts

It should be noted that there appeared to be general consensus from those responding to the discussion paper that dummy bidding is inappropriate and that the use of vendor bidding when purchasers are not advised of the vendor's right to bid is unfair and unjustified. However, it was contended that the vendor should be entitled to maximise his or her return on goods under auction, provided this is not being done at the expense of a fair and transparent auction process<sup>16</sup>.

Vendor bidding is viewed by some stakeholders as a mechanism to obtain the best price on the day and, having declared the rules and conditions of the auction to the public, there is no deceit or misleading of the purchasers<sup>17</sup>.

It has been argued that there is no compulsion for purchasers to bid at auction<sup>18</sup> or to continue bidding<sup>19</sup>. If purchasers are made aware of the vendor's right to bid, they have the choice as to whether or not they wish to bid in this environment<sup>20</sup>.

It is therefore apparent that if vendor bidding is to be permitted, adequate disclosure of the vendor's right to bid is necessary. This is currently required to some extent pursuant to section 29 of the Act and section 57 of the *Sale of Goods Act 1895*. It has been argued that increased disclosure requirements are necessary through mechanisms such as publication of the vendor's right to bid in the conditions of sale and making those conditions readily available, declaration of this fact to those assembled at the auction and identification of the seller (or person acting on behalf of the seller)<sup>21</sup>.

Other limits have also been suggested. A number of stakeholders support a prohibition on vendor bidding above the reserve price<sup>22</sup> and limits on the number of vendor bids that may be made<sup>23</sup>.

The standard form of contract used by members of the Real Estate Institute of Western Australia Inc (REIWA) outlining auction particulars and conditions of sale includes the following standard clause:

The vendor reserves the following rights:

- to bid personally or by the Vendor's Agent or the Auctioneer up to the reserve price by not more than ten (10) bids;
- without disclosing any reserve price, to withdraw the property from sale at any time before it has sold whether or not the sale has commenced.

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<sup>16</sup> Submission of the Western Australian Farmers Federation (Inc)

<sup>17</sup> Submission of R Fry

<sup>18</sup> Submission of REIWA

<sup>19</sup> Submission of K Lewis

<sup>20</sup> Submission of J Wilson

<sup>21</sup> Submission of the Western Australian Farmers Federation (Inc)

<sup>22</sup> Submissions of REIWA, I Flanagan, B Letts, J Wilson, D McManus and K Lewis

<sup>23</sup> Submissions of B Meegan, REIWA, B Letts, J Wilson, P Williams, P Conti and D McManus

Some stakeholders are of the view that the limits contained in this clause are adequate to protect the interests of purchasers and have recommended that a provision similar to this clause be prescribed in the legislation so that it will be applicable to all auctions and not just those involving REIWA members<sup>24</sup>.

Other stakeholders are of the view that disclosure in the conditions of sale is not enough to meet the requirements of the REIWA Code of Conduct that “an agent must not knowingly mislead or deceive any parties in negotiations or transactions”<sup>25</sup>. It has been argued that vendor bidding may also breach the provisions in the *Trade Practices Act 1985 (Cth)* and other fair trading legislation<sup>26</sup> prohibiting misleading and deceptive conduct.

These stakeholders are of the view that auctioneers must go one step further and disclose each and every vendor bid as a “vendor bid” at the time the bid is made because if “such disclosure does not occur it is difficult to argue that this practice is not misleading”<sup>27</sup>. This view is in line with that expressed by the Australian Competition and Consumer Commission (ACCC).

There was general consensus from the submissions that heavy penalties should be imposed for breach of any provisions imposing restrictions on vendor bidding, including cancellation or suspension of licence<sup>28</sup>. It has also been suggested that penalties be imposed on vendors<sup>29</sup> and that the contract for sale should be deemed void at the option of the purchaser<sup>30</sup>.

#### 5.1.4 Other jurisdictions

A number of other states and territories in Australia have provisions similar to section 57 of the *Sale of Goods Act 1895 (WA)* in their equivalent legislation<sup>31</sup> and in some other Acts<sup>32</sup>. Some jurisdictions have introduced stricter controls in relation to vendor bidding, particularly in relation to the sale of real estate.

In the Australian Capital Territory the *Civil Law (Sale of Residential Property) Act 2003* (the ACT Act) applies to the sale of residential property at public auction and provides that vendor bidding is prohibited, unless permitted under the Act.

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<sup>24</sup> Submissions of B Letts, REIWA

<sup>25</sup> REIWA Code of Conduct clause 5(2)

<sup>26</sup> Such as the Fair Trading Act 1987 (WA)

<sup>27</sup> Submission of P Conti

<sup>28</sup> Submissions of B Meegan, P Conti, K Bebbington

<sup>29</sup> Submissions of K Bebbington

<sup>30</sup> Submission of P Conti

<sup>31</sup> *Sale of Goods Act 1954* (ACT) section 60; *Sale of Goods Act* (NT) section 60; *Sale of Goods Act 1923* (NSW) section 60; *Sale of Goods Act 1895* (SA) section 57;

<sup>32</sup> *Fair Trading Act 1992* (ACT) section 15A; *Auctioneers Act* (NT) section 15; *Conveyancing Act 1919* (NSW) section 15A; *Property Law Act 1974* (Qld) section 60

An auctioneer is permitted to make one bid on behalf of the vendor if the conditions of auction permit the making of the bid, the auctioneer orally declares at the auction before bidding begins that the conditions permit the making of the bid and immediately before, or when making the bid, the auctioneer states audibly that the bid is being made for the vendor<sup>33</sup>.

Auctions must be conducted in accordance with the standard auctions conditions prescribed in the regulations<sup>34</sup> and the conditions of auction must also be available prior to auction<sup>35</sup>. The ACT Act also provides that all bidders must be recorded and that the auctioneer may only take bids from recorded bidders, who must display their bidder numbers<sup>36</sup>.

In New South Wales the *Property, Stock and Business Agents Act 2002* (the NSW Act) provides for restrictions on bidding by or on behalf of the seller or auctioneer in relation to the sale of residential property, rural land or livestock by auction. The NSW Act provides the conditions of sale may provide notification that the sale is subject to the right of the seller or by any person on behalf of the seller or auctioneer to make one bid (and only one bid). The right to make a vendor bid only arises if the right has been notified in the conditions of sale<sup>37</sup>. In relation to auctions of residential property or rural land the auctioneer must, when taking the bid, clearly state that the bid is being made on behalf of the seller or the auctioneer<sup>38</sup>.

The NSW Act 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 bidders<sup>39</sup>. In addition, the NSW Act provides that the Director General may approve a consumer education guide for prospective bidders at an auction of residential property or rural land and requires that agents take all reasonable steps to ensure that bidders are provided with a copy of the guide before the auction<sup>40</sup>.

In Victoria, the *Sale of Land Act 1962* (Victorian Act) includes similar provisions to the ACT Act and provides that an auctioneer is permitted to make a bid on behalf of the vendor if the conditions of auction permit the making of the bid, the auctioneer orally declares at auction before bidding begins that the conditions permit the making of the bid and immediately before, or when making the bid, the auctioneer states audibly that the bid is being made for the vendor<sup>41</sup>.

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<sup>33</sup> *Civil Law (Sale of Residential Property) Act 2003* (ACT) section 30

<sup>34</sup> Section 31A and Schedule 1 of the *Civil Law (Sale of Residential Property) Regulations 2004* (ACT Regulations)

<sup>35</sup> ACT Regulations Section 32

<sup>36</sup> ACT Regulations Sections 25-28

<sup>37</sup> NSW Act Sections 66 (residential property and rural land) and 81 (livestock)

<sup>38</sup> NSW Act Section 66

<sup>39</sup> NSW Act Sections 67-70

<sup>40</sup> NSW Act Section 71

<sup>41</sup> Victorian Act Section 41

The conditions of auction must be available prior to auction<sup>42</sup> and a purchaser is entitled to claim compensation for loss or damage caused by any person failing to comply with the provisions<sup>43</sup>.

In Tasmania, the *Auctioneers and Real Estate Agents Act 1991* (Tasmanian Act) provides that vendor bidding is not permitted unless it is clearly stated that the owner or a person acting for the owner may bid for the property and the owner or person acting on their behalf is specifically identified to the people assembled for the auction<sup>44</sup>. The Queensland legislation *Property Agents and Motor Dealers (Auctioneering Practice Code of Conduct) 2001* (Queensland Code) provides that an auctioneer must not engage in conduct that is fraudulent or misleading. The example provided in the Queensland Code makes it clear that the use of dummy bidding would amount to fraudulent or misleading conduct<sup>45</sup>. Penalties for breach of the specific provisions concerning vendor bidding range from \$5,000 in Tasmania to \$24,000 in Victoria.

### **Recommendation 1: Vendor bidding and dummy bidding**

It is recommended that the Act be amended to prohibit dummy bidding completely 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. Purchasers should be confident that the law requires all bids to be genuine to ensure that they are buying the property at true market value. This in turn might encourage a higher level of participation by genuine bidders.

It is recognised that enforcement of a prohibition on dummy bidding and the proposed restriction on vendor bidding would not be without difficulty. In order to facilitate enforcement it is recommended that all bidders be required to be registered, and that auctioneers must only take bids from registered bidders. Bidders would be identified as registered bidders by a number or paddle and auctioneers would be required to state the number of the bidder when accepting a bid. Vendors, or persons bidding on behalf of vendors, could also be required to have different colour paddles to assist in identifying the bid as a vendor bid.

It is also recommended that significant penalties be imposed for breach of the dummy bidding and vendor bidding provisions and that a purchaser should be entitled to claim compensation for loss or damage caused by any person breaching the provisions.

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<sup>42</sup> Victorian Act Section 43

<sup>43</sup> Victorian Act Section 44. An application for compensation is determined by the Victorian Civil and Administrative Tribunal.

<sup>44</sup> Tasmanian Act Section 12

<sup>45</sup> Recent Developments Suggest An End to Dummy Bidding, M Cameron and J Lim, (2002) 17(3) APLB page 18

## 5.2 Lot splitting or buyer auction rings

Lot splitting is a form of “auction ring” in which bidders group together to abstain from bidding to reduce the price at which the property is sold. It is usual in auction rings 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 much-reduced price.<sup>46</sup>

### 5.2.1 Current legislation in Western Australia

Section 31 of the Act creates an offence for a person to induce or attempt to induce others to abstain from bidding at auctions. This is to prevent collusion between bidders, which has the effect of reducing competition and reducing prices for vendors. This offence only relates to auctions of livestock or farm produce.

### 5.2.2 Issues

The issue was raised during the consultation phase of 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 suggested that this behaviour is also occurring at general auctions. It is important to ensure that genuine competitive bidding is encouraged at all auctions and it does not appear to make sense to differentiate between auctions of farm produce and auctions of other goods.

### 5.2.3 Responses to Discussion Paper

The Discussion Paper sought feedback in relation to whether the definition of farm produce should be expanded to include wool, thus providing greater protection against lot splitting in relation to the sale of wool at auction or whether the prohibition against lot splitting should apply to all auctions.

There was general support from stakeholders for both proposals. However, if the prohibition against lot splitting is extended to all auctions an amendment of the definition of farm produce will not be required.

### **Recommendation 2: Lot splitting and buyer action rings**

It is recommended that the prohibition against lot splitting be extended to all auctions.

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<sup>46</sup> Harvey & Meisel, *op-cit*, pp.209-219 and Watts *op-cit* pp.300-303.

## 5.3 Buyer's premiums

A buyer's premium is paid as a levy on the buyer for the privilege of buying at auction and is paid as revenue to the auctioneer. There is no current provision in the Act dealing with buyer's premiums. A significant number of complaints arise concerning the imposition of a buyer's premium.

### 5.3.1 Issues

It has been argued that bidders will factor the cost of the premium into the level of their bids, and that this results in a lower price for the vendor. However, it can be counter-argued that the alternative is for the auctioneer to charge a higher commission or rate to the vendor, with the net result being the same for the vendor.

### 5.3.2 Responses to the Discussion Paper

The Discussion Paper sought feedback as to whether there is a need to take any action to address this issue.

The majority of stakeholders who provided a response in relation to this issue were of the view that buyer's premiums should not be permitted. These stakeholders were of the view that 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 bidding<sup>47</sup>, especially given the speed at which auctions are carried out<sup>48</sup>.

A number of stakeholders expressed the view that 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<sup>49</sup>. 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.

The alternative view was also expressed that the issue of buyer's premiums should be left to the market to determine<sup>50</sup>.

### **Recommendation 3: Buyer's premiums**

It is recommended that auctioneers be prohibited from requiring payment of a buyer's premium.

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<sup>47</sup> Submission of P Conti

<sup>48</sup> Submission of K Bebbington

<sup>49</sup> Submissions of P Conti, G Cahill and J Wilson

<sup>50</sup> Submission of Small Business Development Corporation

## 5.4 Disclosure of sale or purchase by auctioneers

The Act currently prohibits an auctioneer from making a purchase of stock placed in the auctioneer's hands for sale by auction, unless the vendor has previously consented in writing to that purchase.

### 5.4.1 Issue

It has been suggested that this prohibition against purchases of stock by auctioneers<sup>51</sup> be extended to all goods sold at auction. An issue was also raised in the consultation on the NCP Review concerning advice to be provided to bidders when goods being sold at auction are owned by auctioneers. Clear disclosure of the auctioneer's participation in the auction process as either vendor or purchaser would alleviate potential problems concerning conflict of interest.

#### **Recommendation 4: Disclosure of sale or purchase by auctioneers**

It is recommended that the Act be amended to include a requirement that an auctioneer provide clear disclosure if he or she is the vendor or purchaser of goods sold at auction and that the auctioneer be required to obtain the vendor's prior written consent if the auctioneer intends to purchase goods at auction.

## 5.5 Harassment and disruptive behaviour

Concern was raised in a submission to the General Review about disruptive behaviour of buyer's advocates at auctions<sup>52</sup>.

### 5.5.1 Issue

Examples of this behaviour include heckling, asking questions of little or no consequence, offering untruths about a property or the environment with a view to discouraging others from bidding and generally upsetting the marketing environment at auction. Victoria has recently introduced measures to address the issue of disruptive behaviour at public auctions. The *Sale of Land Act 1962 (Vic)* 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<sup>53</sup>.

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<sup>51</sup> *Auction Sales Act 1973* Section 30 (5)

<sup>52</sup> Submission of REIWA

<sup>53</sup> *Sale of Land Act 1962 (Vic)* Section 47

Some jurisdictions have also enacted provisions preventing auctioneers from harassing persons at auctions or exerting undue influence on bidders.

### **Recommendation 5: Harassment and disruptive behaviour**

It is recommended that provisions be included in the Act prohibiting disruptive behaviour, harassment or exertion of undue influence by any person (including vendors, purchasers, bidders, auctioneers and their agents) at auctions.

## **5.6 Standard conditions or rules of conduct for sale by auction**

Some stakeholders have suggested that standard conditions of auction be prescribed, particularly in relation to auctions of real estate<sup>54</sup>.

### **5.6.1 Issue**

Other jurisdictions currently make provision for standard conditions or rules of conduct. For example, in Victoria the *Sale of Land Act 1962* provides that the Governor in Council may make regulations with respect to regulating the conduct of public auctions of land, prescribing standard rules for the conduct of public auctions of land and requiring the provision of certain information at auctions<sup>55</sup>. The *Sale of Land Regulations 2004* (Vic) prescribes a standard set of rules for the conduct of public auctions.

The New South Wales *Property, Stock and Business Agents Act 2002* provides that regulations may prescribe conditions that are to be applicable to the sale by auction of land or livestock. A set of conditions of sale is prescribed in the *Property, Stock and Business Agents Regulations 2003* (NSW). Standard rules could clearly set out the conditions of sale and obligations of parties involved. Issues concerning matters such as how bids are to be taken and sale below the reserve set by the vendor could be addressed in these conditions.

### **Recommendation 6: Standard conditions or rules of conduct for sale by auction**

It is recommended that the Act be amended to include the power to prescribe standard auction conditions or rules of conduct. There would also be a requirement that these auction conditions be disclosed or provided to bidders prior to auction.

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<sup>54</sup> Submission of B Letts

<sup>55</sup> *Sale of Land Act 1962* (Vic) section 48

## 6 RECORD KEEPING AND REPORTING OBLIGATIONS

### 6.1 Record keeping

The Act imposes some record keeping requirements on licensees for the purposes of tracing unpaid monies and stolen and diseased stock.

#### 6.1.1 Current legislation in Western Australia

The Act provides that licensees are required to 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 audited. The accounts must be retained for a period of three years<sup>56</sup>.

The Act also requires licensees to keep a register of all stock sold at auction<sup>57</sup> and obtain the original of the waybill for all livestock to be sold at auction<sup>58</sup>.

#### 6.1.2 Issues

Concern has been raised in relation to the sale of stolen goods at auction. The *Pawnbrokers and Second-hand Dealers Act 1994* provides that pawnbrokers and second-hand dealers are required to make a record of goods received, including a description of the goods and details of the party pawning or selling the goods<sup>59</sup>, and to provide this information to the police<sup>60</sup>. It should be noted that these requirements apply only in relation to limited classes of goods, such as jewellery and electrical equipment, and not to all goods. In addition, a pawnbroker or second-hand dealer who suspects that any goods in their possession or offered for sale or pawn may have been stolen or unlawfully obtained must inform a member of the police force and provide a description of the goods<sup>61</sup>.

With the exception of the requirements in relation to the sale of stock, no such reporting requirements are in place in relation to auctioneers generally. The *Pawnbrokers and Second-hand Dealers Act 1994* does not apply to auctioneers licensed under the Act<sup>62</sup>. In addition, whilst the Act requires "full and accurate details" of transactions to be kept involving money received on behalf of another person, there is no requirement for such information to be forwarded to the police and no specific requirement about recording the details of the property involved<sup>63</sup>.

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<sup>56</sup> *Auction Sales Act 1973* section 26

<sup>57</sup> *Auction Sales Act 1973* section 30

<sup>58</sup> *Auction Sales Act 1973* section 32

<sup>59</sup> *Pawnbrokers and Second-hand Dealers Act 1994* sections 41 and 43

<sup>60</sup> *Pawnbrokers and Second-hand Dealers Act 1994* section 79 and *Pawnbrokers and Second-hand Dealers Regulations 1996* Regulation 15

<sup>61</sup> *Pawnbrokers and Second-hand Dealers Act 1994* section 78

<sup>62</sup> *Pawnbrokers and Second-hand Dealers Act 1994* section 4

<sup>63</sup> *Auction Sales Act 1973* section 26

These lesser reporting requirements can provide an avenue for auctioneers to unwittingly be involved in the disposal of stolen goods. The potential for criminals to use the auction process for sale of goods is further exacerbated by the fact that there is no requirement for second-hand dealers to provide the police with information about goods obtained at auction<sup>64</sup>.

It has been suggested that similar reporting requirements to those imposed on pawnbrokers and second-hand dealers also be imposed on auctioneers<sup>65</sup> to ensure that police records provide a comprehensive picture of the property industry and permit a cross matching of information with other police intelligence.

The *Pawnbrokers and Second-hand Dealers Act 1994* also requires that a licensee under that Act must ascertain a person's full name and address and verify their identity before entering into a contract with that person. It has been suggested that similar requirements be imposed in relation to the sale of second-hand goods by auction.

### **Recommendation 7: Record keeping**

It is recommended that, in relation to the sale of second hand goods by auctioneers, the Act be amended to include:

- record keeping and reporting requirements; and
- a requirement that auctioneers ascertain the name and address of a vendor and verify their identification, similar to those outlined in the *Pawnbrokers and Second-hand Dealers Act 1994*.

Alternatively, the *Pawnbrokers and Second-hand Dealers Act 1994* could be amended to apply to auctioneers.

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<sup>64</sup> 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 1973*.

<sup>65</sup> Submission of WA Police Service

## 6.2 Trust Accounts

During the NCP Review, one issue that was raised was the fact that there are no provisions in the Act to protect against misuse of auction sale proceeds, with auctioneers able to mix these proceeds with the general trading funds of the business. In the event of an auction business being liquidated, vendors then may find it difficult to recover the sale proceeds.

### 6.2.1 Current legislation in Western Australia

As mentioned above, the Act provides that licensees are required to account for money received on a vendor's behalf by separately recording any such money<sup>66</sup>. 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 firm should it become insolvent.

### 6.2.2 Issues

As a way of protecting vendors' interests, it has been suggested that a separate trust account should be maintained by the auctioneer, for the depositing of auction sale proceeds. A further suggestion was that the interest earned from such trust accounts could be used to fund an industry fidelity fund.

It is recognised that there may be some cost involved in maintaining trust accounts, however the benefits that trust account requirements would provide to consumers should be viewed as outweighing those potential costs.

### 6.2.3 Responses to the Discussion Paper

The Discussion Paper sought feedback in relation to whether there is a need to take action to address this issue. Submissions generally supported the proposal to introduce trust account requirements. The majority of submissions to the General Review did not address the issue of introduction of a fidelity fund. One submission suggested that trust account interest could be used to pay bank fees and Government charges, with the balance to be paid into a fidelity fund.

### **Recommendation 8: Trust Accounts**

It is recommended that a requirement for auctioneers to hold auction proceeds in a separate trust account be included in the Act.

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<sup>66</sup> *Auction Sales Act 1973* section 26

## 7 LICENSING

### 7.1 NCP Recommendations

The NCP Review of the Act recommended that the licensing system for auctioneers be repealed unless licensing appeared justified following a full legislative review of the Act.

### 7.2 Other Jurisdictions

#### 7.2.1 Regulation prior to NCP Reviews

At the time the NCP Review was carried out auctioneers were required to be licensed in the majority of jurisdictions in Australia. Western Australia, Victoria, the Australian Capital Territory and the Northern Territory had specific Auctioneer Acts and similar licensing regimes for auctioneers (although different provisions were included within each Act)<sup>67</sup>. Tasmania and Queensland had specific Auctioneer Acts, which had more onerous licensing systems and regulations. South Australia and New South Wales did not licence auctioneers specifically and did not have specific auctioneer legislation. Some auctioneers in South Australia and New South Wales were, however, required to be licensed or to comply with other Acts<sup>68</sup>.

#### 7.2.2 VEETAC Recommendations

The disparity in licensing requirements for auctioneers was recognised as an issue by Governments in the early 1990s, particularly in the context of the mutual recognition of qualifications across jurisdictions. Governments established the Vocational Education, Employment and Training Committee (VEETAC) Working Party on Mutual recognition to examine occupations registered in some but not all jurisdictions<sup>69</sup>. The Working Party reported in May 1993 and recommended that existing partial registration requirements be removed for a variety of occupations, including auctioneers<sup>70</sup>.

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<sup>67</sup> note that real estate auctioneers are licensed under the *Estate Agents Act 1980* in Victoria.

<sup>68</sup> see *Property Stock and Business Agents Act 1941 (NSW)* - auctioneers who sell land require a real estate or stock agents licence (depending on the type of land sold); *Pawnbrokers and Second-hand Dealers Act 1996 (NSW)* - auctioneers who sell second-hand goods on their own account must be licensed; *Motor Dealers Act 1974 (NSW)* requires auctioneers of motor vehicles to be licensed; *Land Agents Act 1994 (SA)* - auctioneers who sell land must be registered and *Second-hand Vehicle Dealers Act 1995 (SA)* regulates auctioneers but they are exempt from licensing.

<sup>69</sup> National Competition Council 2001, *Assessment of Governments' Progress in Implementing National Competition Policy and Related Reforms: June 2001*, Ausinfo, Canberra, page 18.3.

<sup>70</sup> VEETAC (Vocational, Education, Employment and Training Committee) 1993, *Report on the Review of the Partially Registered Occupations*, Report by the Working Party on Mutual Recognition, Canberra, page 306.

However, a number of stakeholders argued for continued registration based on consumer protection grounds<sup>71</sup>.

### 7.2.3 **Developments in other jurisdictions following NCP Reviews**

Other jurisdictions in Australia have also completed NCP Reviews of auctioneer legislation. In most instances these reviews have recommended reforms. In the majority of jurisdictions the requirement for auctioneers to be licensed has been repealed but legislation still exists to regulate the conduct of persons conducting auctions or certain types of auctions.

Specific licensing of auctioneers is now not required in the Australian Capital Territory, New South Wales, South Australia and Victoria. In the Northern Territory legislation providing for the repeal of the Auctioneers Act and the licensing system under that Act has been enacted but will not commence until suitable code of practice provisions are in place. In Tasmania auctioneers must be registered with the Property Agents Board unless they are in the employment of a licensed real estate agent<sup>72</sup>The only other State to retain the requirement for auctioneers to be licensed is Queensland.

## 7.3 **Should licensing be retained in Western Australia?**

As mentioned previously, the NCP Review of the Act recommended that the licensing system for auctioneers be repealed unless licensing appeared justified following a full legislative review of the Act.

### 7.3.1 **Benefits of licensing**

A recognised benefit of licensing is that it fosters increased confidence in an industry by assuring the public that licensees are competent, honest and have an incentive to maintain good business practices. This is of particular importance when licensees are responsible for handling other people's money.

Occupational regulation based on licensing is premised on an assessment that it is better at the outset to exclude from the market incompetent or dishonest partitioners rather than deal with the consequences of their actions later<sup>73</sup>. Licensing criteria need to be adequate to achieve this aim. Licensing criteria should therefore include components related to an applicant's qualifications, experience and integrity or fitness to practice in an industry.

Loss of licence as a disciplinary measure is considered an additional incentive for licensees to comply with legislative requirements. The public also benefits if rogue auctioneers are prevented from operating through cancellation or suspension of their licences.

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<sup>71</sup> Ibid, page 305

<sup>72</sup> *Property Agents and Land Transactions Act 2005 (Tas)*

<sup>73</sup> National Competition Policy Guidelines – Victorian Government.

Licensing also assists in regulation of an industry, particularly when record keeping and trust accounting requirements are imposed, by providing a record of those persons operating in an industry.

### 7.3.2 Effectiveness of current licensing system

The current application process and test of whether an applicant is a fit and proper person to hold an auctioneer's licence do not appear to have significantly restricted access to the industry.

Currently the Act requires that the magistrate may grant an application for a licence if satisfied that the applicant is a fit and proper person<sup>74</sup>. The magistrate may grant the licence subject to such conditions, limitations or restrictions as the magistrate thinks fit to impose.

It appears that until August 1998, the Police only checked an applicant's police record and not the level of experience an applicant held in deciding whether to lodge an objection to an application.

In July 1998, however, a magistrate refused an application for a general licence because the applicant, and the firm on whose behalf the application was made, did not have any experience in the auction industry<sup>75</sup>. As a result of this decision, the Commercial Agents Unit now requires applicants to have approximately two to three years experience as an auctioneer otherwise the Unit will object to an application for a general licence. This restriction is not necessarily a complete barrier to entry, however, because the Commercial Agents Unit will usually recommend that an inexperienced applicant who is otherwise "fit and proper" to hold an auctioneer's licence (with a satisfactory criminal and proprietary record) be granted a restricted licence.

The Commercial Agents Unit has also introduced more stringent checks of an applicant's character which include more detailed police record checks and checks on evidence of improper conduct within other industries (such as suspension or cancellation of a real estate licence).

Some respondents to the General Review suggested that current licensing criteria were inadequate and recommended that more stringent criteria should be imposed, including minimum education requirements<sup>76</sup> and demonstration of an appropriate level of competency<sup>77</sup>. Some stakeholders also advocated introduction of continuing professional education requirements<sup>78</sup>.

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<sup>74</sup> *Auction Sales Act 1973* section 16(6)

<sup>75</sup> A decision by Magistrate Brown in the Fremantle Court of Petty Sessions on the 30 July 1998. Magistrate Brown refused the application for a general licence on behalf of a firm because neither the firm nor the individual who applied for the licence had any previous experience in the industry beyond three months work experience.

<sup>76</sup> Submissions of B Meegan, REIWA

<sup>77</sup> Submission of REIWA

<sup>78</sup> Submission of K Lewis

In the absence of more stringent criteria it can be argued that the benefits of licensing, which relate to increased confidence in licensees' competence, will be diminished due to the fact that competence does not need to be demonstrated in order to obtain a licence.

VEETAC recommended that the "fit and proper" requirement be removed from licensing legislation and replaced with specific criteria related to, for example, the criminal history and past occupational history of intending practitioners<sup>79</sup>.

If licensing is retained, more stringent licensing criteria should be introduced and appropriate disciplinary measures would need to be included for failure to comply with the Act and regulations.

The NCP Review found that:

- given the low barriers to entry into the auction industry, the small number of complaints per year and other consumer protection legislation regulating auctioneer conduct<sup>80</sup>, it was considered that the removal of auctioneer licensing would not significantly increase the number of complaints or decrease the level of consumer confidence within the auction industry<sup>81</sup>; and
- the current provisions of the Act concerning conduct do not significantly rely on the licensing system for their enforcement or compliance.

The NCP Review concluded that the removal of licensing would not substantially increase the number of offences committed under the Act or increase the difficulty of encouraging compliance with the provisions<sup>82</sup>.

Based on these findings, it appears that licensing should be retained only if required in order to permit enforcement of or compliance with any proposed new conduct provisions.

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<sup>79</sup> VEETAC (Vocational, Education, Employment and Training Committee) 1993, *Report on the Review of the Partially Registered Occupations*, Report by the Working Party on Mutual Recognition, Canberra, page 8

<sup>80</sup> such as the *Fair Trading Act 1987* and *Trade Practices Act 1974* (Cth)

<sup>81</sup> NCP Report, page 23

<sup>82</sup> NCP Report page 30

### 7.3.3 Is licensing required to support specific conduct provisions?

The NCP Review considered whether licensing was necessary to support the following current provisions of the Act:

- prohibition of false or misleading statements<sup>83</sup>;
- prohibition of mock actions<sup>84</sup>;
- provisions concerning the right of the vendor to bid<sup>85</sup>;
- provisions concerning purchase of stock by auctioneers<sup>86</sup>;
- prohibition of lot splitting or auction rings<sup>87</sup>; and
- requirements to maintain accounts and records<sup>88</sup>.

The NCP Review found that licensing was not necessary to support these provisions.

The majority of proposals outlined in this paper involve an expansion or strengthening of the provisions concerning conduct outlined above<sup>89</sup>, or concern the conduct of persons other than auctioneers<sup>90</sup>. Accordingly, licensing may not necessarily be required in order to support these proposals.

Other proposals about conduct, such as a prohibition on the imposition of buyers premiums and requirements to abide by standard auction conditions, do not necessarily require licensing of auctioneers to support them, particularly if adequate penalties are imposed for non-compliance.

However, it can be argued that potential loss of licence acts as a significant incentive for licensees to comply with the conduct provisions outlined in the Act.

Another benefit of licensing is that it assists in the monitoring of requirements in relation matters such as record keeping and trust accounts, by providing a comprehensive record of those persons engaged in an industry. Other occupations, for which trust account provisions are imposed, such as real estate agents, generally rely on a licensing system to assist in compliance programs.

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<sup>83</sup> *Auction Sales Act 1973* section 24

<sup>84</sup> *Auction Sales Act 1973* section 25

<sup>85</sup> *Auction Sales Act 1973* section 29

<sup>86</sup> *Auction Sales Act 1973* section 30

<sup>87</sup> *Auction Sales Act 1973* section 31

<sup>88</sup> *Auction Sales Act 1973* sections 26, 27, 30 and 32

<sup>89</sup> For example, the proposal about disclosure of sale or purchase by auctioneers

<sup>90</sup> For example, the proposal to expand the prohibition on lot splitting and the proposals to prohibit vendor bidding and harassment or disruptive behaviour.

## **7.4 Alternatives to licensing**

The following options could be considered as an alternative to licensing of auctioneers.

### **7.4.1 Negative licensing**

Negative licensing eliminates the requirement for a person to be licensed. Instead, it replaces the licensing system with a system under which persons are not screened before starting to practice, and are only prohibited from practising if shortcomings in their operations are identified.

Negative licensing therefore includes a mechanism for preventing inappropriate persons from operating in an industry, provided that complaints are made concerning inappropriate conduct.

A system of negative licensing has the benefit that there is no requirement to administer a licensing system. However, it is more difficult for regulators to engage in pro-active compliance, as market participants are not easily identifiable.

### **7.4.2 Regulation of conduct**

It may be possible to regulate sale by auction as a type of selling (in a similar manner to door-to-door trading) with legislation in place to regulate the manner in which auctions are conducted, without a requirement for licensing. Any person selling by auction would be required to comply with these conduct requirements, with failure to comply incurring significant penalties.

Legislation could include provisions regulating the conduct of auctioneers, vendors and purchasers, without the need for licensing. Regulation in this manner might alleviate some of the issues arising in relation to Internet auctions and the competitive advantage gained by those operating from outside Western Australia.

A disadvantage of regulation without licensing is that regulators do not have a comprehensive record of those persons operating in an industry, thus making it more difficult to engage in proactive compliance. This may be of significance if more stringent record keeping and trust account requirements are imposed. In addition, no checks are made of practitioners' suitability before they enter the industry, potentially exposing consumers to greater risks.

### **7.4.3 System of registration**

An alternative to a licensing system is one of simple registration, whereby all persons operating in an industry would be required to register with an appropriate body and provide up-to-date contact details. No criteria would be specified for registration and no assessment of appropriateness to practice in the industry is undertaken.

Such a system does not restrict entry to the industry, but does have the advantage of maintaining a record of those practicing in an industry for the purposes of implementing proactive compliance and education or information campaigns.

#### 7.4.4 **Repeal Auctions Act**

Another suggested alternative to licensing under the Act is to repeal the Act and include provisions concerning sale by auction in other licensing Acts such as the *Real Estate and Business Agents Act 1978*, the *Motor Vehicle Dealers Act 1973* and the *Pawnbrokers and Second-hand Dealers Act 1994*. A benefit of this approach is that licensees under each of these Acts would only need to look to one Act to determine their obligations. In addition, the provisions concerning auctions could be tailored to suit the particular type of property being sold, for example motor vehicles or real estate.

A disadvantage of this approach is that a number of types of property sold at auction are not dealt with by persons licensed under another licensing regime, for example livestock, farm produce, fine arts, boats, farm machinery, furniture and collectables<sup>91</sup>. Furthermore, if different provisions are included in each licensing Act, general auctioneers might be subject to variety of different legislative regimes and requirements.

### **Recommendation 9: Licensing**

It is recommended that the licensing regime under the Act be retained. The current requirement that an applicant for a licence must be “fit and proper” should be removed and replaced with more specific criteria related to matters such as good character (based on criminal record checks), financial capacity and past occupational history or experience.

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<sup>91</sup> A number of classes of goods are excluded from the definition of second-hand goods under the *Pawnbrokers and Second-hand Dealers Act 1994*.

## 8 OTHER ISSUES

### 8.1 Internet auctions

The introduction and rapid growth in the use of the internet has brought with it the development of the Internet auction.

#### 8.1.1 Current legislation in Western Australia

The concept of an internet auction was clearly not contemplated at the time the Act was introduced and no amendments have been made to the Act in response to the advent of Internet auctions.

#### 8.1.2 Issues

Large online auction sites have typically been facilitators for buyers and sellers to transact under an auction format. 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 internet auction companies 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<sup>92</sup>. As such the internet auction companies may not generally be classed as auctioneers unless they also are engaged in other auctioneering activities.

Traditional auction companies are, however, starting to use online auction formats to reach wider audiences and achieve higher prices for their vendors.

Regulation of online auction sites creates jurisdictional challenges because online auction sites are likely to be located outside of Western Australia and either the buyer or seller may also not reside in the State. This creates challenges for the regulation of the industry.

Through the use of the internet, auctioneers are able to effectively operate in Western Australia from anywhere in the world without being licensed. This can create a disadvantage for Western Australian-based auctioneers who are required to be licensed and therefore are competing against persons who may not be subject to the same restrictions or requirements, particularly given the disparity in licensing requirements across Australian jurisdictions. Unfortunately, because of the anonymous nature of Internet auctions, they are a vehicle that can be used for fraudulent activities. Common complaints include failure of the seller to deliver the goods or to provide goods of the standard advertised. There is also evidence that activities of a fraudulent nature occur during the auction itself, with both vendors and bidders lodging false bids<sup>93</sup>.

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<sup>92</sup> for example see the User Agreement for Ebay online auctions at <http://pages.ebay.com/help/community/png-user.html>.

<sup>93</sup> Internet Auctions, Consumer Protection and the Trade Practice Act, M Webster and A Sorenson, January 2004, FindLaw Australia

General consumer protection legislation such as the *Trade Practices Act 1974* (Cth) and the *Fair Trading Act 1987* (WA) could operate to prohibit or limit some of this fraudulent or unfair conduct. These Acts provide 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 accepted<sup>94</sup>;
- engage in misleading or deceptive conduct or conduct that is likely to mislead or deceive<sup>95</sup>; or
- make false or misleading representations in connection with the supply of goods or services<sup>96</sup>.

These prohibitions could apply to the conduct of Internet auctions. However there may be some issues arising as to whether the conduct took place “in trade or commerce”. It may therefore be preferable, from a consumer protection perspective, for specific prohibitions to be enacted in relation to the conduct of Internet auctions and for those provisions applying to auctions generally to also apply to auctions conducted over the Internet.

### 8.1.3 Responses to the Discussion Paper

This Discussion Paper sought feedback in relation to:

- whether there is a need to introduce new legislation, or remove existing legislation, in response to the increased use of the internet for conducting auctions; and
- any other issues with regard to the regulation of internet auctions.

The submissions identified a number of concerns in relation to internet auctions and indicated general support for regulation of internet auctions. Some submissions suggested that separate legislation<sup>97</sup> or a separate part of the Act be introduced to regulate internet auctions<sup>98</sup>.

It was suggested that legislation in relation to internet auctions should cover issues such as registration or identification of purchaser, method of payment and time limits on lots to be sold.

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<sup>94</sup> *Trade Practices Act 1987* (Cth) section 58 and *Fair Trading Act 1987* (WA) section 21

<sup>95</sup> *Trade Practices Act 1987* (Cth) section 52 and *Fair Trading Act 1987* (WA) section 10

<sup>96</sup> *Trade Practices Act 1987* (Cth) section 53 and *Fair Trading Act 1987* (WA) section 12

<sup>97</sup> Submission of B Meegan

<sup>98</sup> Submission of REIWA

### **Recommendation 10: Internet auctions**

It is recommended that general provisions concerning the conduct of auctions also apply to internet auctions conducted in Western Australia if appropriate.

The provisions should apply to those persons carrying out an auctioneer's business using the internet, rather than simply those persons utilising a website such as e-bay to sell their own property.

It is recognised that jurisdictional issues could have an impact in relation to enforcement. It is therefore recommended that this issue be considered on a national basis.

## **8.2 Administration of the Act**

### **8.2.1 Current position in Western Australia**

The Commercial Agents Unit, a division of the WA Police Service, is responsible for the auction licensing system through its involvement in the application process. The Commercial Agents Unit employs licensing and administrative officers, who together with local police officers, assess applicants for a licence. This process usually includes a personal or telephone interview to assess the "fit and proper" standing of the applicant. An assessment report is then sent to the Department of the Attorney General clerks who process the licence applications and forward them to magistrates who hear applications, usually in chambers.

Consumer Protection is not directly involved in the administration of the licensing system, but may investigate complaints in relation to auctioneers. The Minister for Consumer Protection, and Consumer Protection, as a division of DOCEP, are also responsible for the administration of the Act itself.

### **8.2.2 Issues**

The current administration of the auction licensing system across three Government organisations creates difficulties for these organisations in the coordination, consistency and improvement of the administration of the Act. The current system can also create complexities for auctioneers and consumers when dealing with the Government.

It is considered that it would be more efficient to have the administration of the Act being the responsibility of a single Government organisation.

### 8.2.3 Responses to the Discussion Paper

The Discussion Paper sought feedback in relation to:

- whether there is a need to consolidate the administration of the Act;
- if there is a need to consolidate under one agency, which agency that should be; and
- what other mechanisms could be used to make the administration of the Act more efficient.

Submissions generally supported the consolidation of administration of the Act with one body.

Some stakeholders were of the view that DOCEP was the appropriate administering body due to its role in administration of licensing under other Acts such as the *Real Estate and Business Agents Act 1978* and the *Motor Vehicle Dealers Act 1973*<sup>99</sup>.

However, the majority of stakeholders were of the view that the Commercial Agents Unit would be the appropriate administering body as it has current experience in regulation of auctioneers<sup>100</sup>. If licensing is to continue, infrastructure, financial processes and record keeping facilities are currently in place at the Commercial Agents Unit<sup>101</sup>. In addition, this would be complementary to its current role in administering licensing systems for pawnbrokers and second-hand dealers<sup>102</sup> and would permit the Commercial Agents Unit to obtain a more complete picture of the second-hand property market, thus improving its ability to identify and recover stolen property sold at auctions.

It was also suggested that a centralised database should be used to monitor the conduct of licensees and permit the public to ascertain whether an auctioneer is licensed<sup>103</sup>.

It was also suggested that if the Commercial Agents Unit administered the Act that DOCEP could undertake a role in dealing with consumer complaints, particularly in relation to fair trading issues<sup>104</sup>. Such an arrangement might not completely address current difficulties and confusion in relation to the division of responsibility, but would provide a greater degree of clarity.

Notwithstanding views expressed by a variety of stakeholders, the Western Australian Police (“the Police”) have advised that it regards administration of the Act as contrary to its current Frontline First strategic direction with its focus on frontline policing functions.

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<sup>99</sup> Submissions of K Lewis, SBDC

<sup>100</sup> Submission of REIWA

<sup>101</sup> Submission of WA Police Service

<sup>102</sup> Submission of WA Police Service

<sup>103</sup> Submission of REIWA

<sup>104</sup> Submissions of D McManus, REIWA, WA Police Service

The Police have recommended that administration of the Act be vested in Consumer Protection, with the Commercial Agents Unit conducting inquiries into the criminal activities of auctioneers, together with the tracking suspect property.

The need for the Police to focus on its Frontline First strategy is acknowledged, however, the administrative responsibility for the Debt Collectors Licensing Act was transferred to Consumer Protection from the Police in 2004 without resources being provided and a further transfer of responsibilities to Consumer Protection – in the form of the Act – would require the provision of additional resources.

### **Recommendation 11: Administration of the Act**

It is recommended that, subject to the provision of suitable resources, the administration of the Act be fully vested in Consumer Protection.

## **8.3 Offences**

### **8.3.1 Current legislation in Western Australia**

Currently the Act provides that any person or corporation failing to comply with or contravening the Act commits an offence and is liable to a penalty of \$400, unless a penalty is expressly provided.

Higher penalties are prescribed for breach of other provisions including carrying on a business as an auctioneer without a licence (\$500), conducting a mock auction (\$1,000) and purchase of stock by an auctioneer without the prior written consent of the vendor (\$1,000).

### **8.3.2 Issues**

The current penalties are inadequate to act as a deterrent against breaches of the Act. Other jurisdictions in Australia impose significantly higher penalties for misconduct by auctioneers and other persons involved in the auction process, for example, the penalty for breach of the provisions concerning vendor bidding under the Victorian *Sale of Land Act 1962* is \$24,000.

### **Recommendation 12: Offences**

It is recommended that all penalties for offences under the Act be increased significantly to be commensurate with other jurisdictions and consumer protection legislation.

## 9 APPENDICES

### 9.1 Historical overview of regulation of the auction industry in WA

Legislation to regulate auctioneers was first introduced into Western Australia in 1839<sup>105</sup>. This legislation was intended to raise urgently required revenue for the new colony by licensing auctioneers and by requiring that a percentage be paid duty on sales at auction<sup>106</sup>. Licensing was essentially an administrative means of ensuring auctioneers collected the duty to be paid by vendors to the government when they sold goods at auction.

From 1839 to 1872 minor amendments were made to the original 1839 Act. In 1873 the law relating to auctions was consolidated<sup>107</sup>. The duties required to be paid by sellers were removed in order to increase the number of sales and expand trade generally. The prescribed fee to be paid for an auctioneer's licence was increased and various classes of licence were created.

The *Auctioneers Act 1921* again consolidated various amendments and introduced the requirement that an auctioneer be a fit and proper person to hold a licence. An application for a licence was lodged with the magistrate of the district in which the applicant resided.

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<sup>108</sup>. The improper practices were known as lot splitting, or tossing, and involved prior arrangements being made between bidders not to bid. As a result, very few bids would be received and the lots would be sold below market value. The goods would then be distributed between the participants in a previously agreed manner and at a lower price than ordinarily would have been paid at auction. Lot splitting had the effect of reducing competition and prices for vendors at auction.

The *Auctioneers Act 1921* and the *Sales by Auction Act 1937* were repealed and consolidated in the *Auction Sales Act 1973*. The Act continued the licensing of auctioneers, the prohibition against lot splitting, and introduced a number of new measures. The Act is still in force today.

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<sup>105</sup> An Act To Regulate The Licensing Of Auctioneers, And The Collection Of Duties On Property Sold By Auction No. 1 of 1839.

<sup>106</sup> Minutes of a meeting in the Legislative Council Chamber 15 October 1839 (see records held at *Alexander Library*).

<sup>107</sup> An Act To Repeal The Duties On Sales By Auction And To Impose A New Duty On The License To Be Taken Out By All Auctioneers In Western Australia No.3 of 1873.

<sup>108</sup> Watts, Second Reading Speech - Sales By Auction Bill, *Western Australian Parliamentary Debates (Hansard)*, 25 August 1937, p.300 - 303.

## 9.2 Overview Of The Auction Sales Act 1973

### 9.2.1 Licensing

The Act currently includes the following requirements concerning the licensing of auctioneers.

#### **Requirement to be licensed**

All auctioneers are required to be licensed<sup>109</sup>. Licences must be held by a natural person but may be granted to a person for the benefit of a firm or corporation<sup>110</sup>.

Certain sales by auction are exempted from the requirement to be performed by a licensed auctioneer<sup>111</sup>. These are usually auctions ordered or performed by certain Government institutions; charitable, educational or church auctions; or auctions for which the Governor has granted an exemption status.

#### **Application for a licence**

Applications for a licence are made to the Magistrates Court nearest the proposed principal place of business of the applicant. The application must include three original character testimonials. A hearing in relation to the application must take place within 35 days of the application.

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. The application must also be forwarded to the local senior police officer. The Commissioner of Police or any other person may object to the granting of a licence<sup>112</sup>.

Hearings for the grant of a licence are held before a magistrate. 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<sup>113</sup>.

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<sup>109</sup> *Auction Sales Act 1973* section 6

<sup>110</sup> *Auction Sales Act 1973* section 8

<sup>111</sup> *Auction Sales Act 1973* section 5

<sup>112</sup> *Auction Sales Act 1973* section 11

<sup>113</sup> *Auction Sales Act 1973* section 16

## **Classes of licence**

There are no specific requirements that auctioneers have minimum qualifications or experience and licences are not restricted in number. The following types of licences may be granted<sup>114</sup>:

- A general licence allows an auctioneer to practise throughout Western Australia in relation to all classes of business. A general licence has a duration of one year.
- A restricted licence may limit either the classes of business, parts of the State or times during which an auctioneer may carry on business. A restricted licence has a duration of one year.
- 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 is for sale by auction on an isolated occasion. Occasional licences may only be granted to an applicant five times in a year in the same locality.
- 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 can not be granted more than three times in a calendar year.

## **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 Act<sup>115</sup>.

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<sup>114</sup> *Auction Sales Act 1973* section 7

<sup>115</sup> *Auction Sales Act 1973* section 22

### 9.2.2 Conduct provisions

The Act includes a number of provisions concerning anti-competitive or unfair conduct.

#### **Misrepresentation**

The Act provides that it is an offence for any person, in the course of business as 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 auction<sup>116</sup>.

#### **Mock auctions**

Mock auctions are prohibited under the Act<sup>117</sup>. 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, or stated to be restricted, to persons who have bought or agreed to buy other goods;
- any money or article is given away or offered as a gift or in addition to the lot bought; or
- the sale of any lot is obtained by deception, including a deception as to present intention.

Mock auctions are viewed as undesirable because the sales techniques employed place prospective purchasers under unfair pressure and are calculated to deprive them of the opportunity to make reasoned judgments<sup>118</sup>.

#### **Unnotified bidding**

The Act provides that a sale by auction may be notified in the conditions of sale as being subject to the right of the vendor, or of any person on behalf of the vendor, or of the auctioneer, to make a bid or a specified number of bids (this is referred to as “vendor bidding”) <sup>119</sup>.

A vendor or auctioneer who makes, or an auctioneer who knowingly takes from any person, an unnotified vendor bid, or more vendor bids than have been specified in the conditions of sale, commits an offence.

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<sup>116</sup> *Auction Sales Act 1973* section 24

<sup>117</sup> *Auction Sales Act 1973* section 25

<sup>118</sup> *Gallagher v Celfa Pty Ltd* [1979] 2 NSWLR 107 at 11 per Roden J

<sup>119</sup> *Auction Sales Act 1973* section 29

The requirement to notify the right of the vendor to bid at auction in the conditions of sale is essentially a codification of the common law which has long considered unnotified vendor bids to be fraudulent<sup>120</sup>.

### **Unnotified purchase of stock**

Under the Act it is unlawful for auctioneers to purchase stock auctioned by them unless the vendor has previously consented in writing to the purchase<sup>121</sup>. This is a codification of the common law position that an unnotified purchase of a vendor's property by an auctioneer is a conflict of interest which breaches the fiduciary duty an auctioneer owes to the vendor<sup>122</sup>.

### **Lot splitting**

The Act provides that any person who induces other persons not to bid at a sale by auction of livestock or farming 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<sup>123</sup>. This practice is also known as an "auction ring".

#### **9.2.3 Record keeping requirements**

The Act imposes some record keeping requirements on licensees for the purposes of tracing unpaid monies, and stolen or diseased stock.

#### **Records of accounts**

The Act provides that licensees are required to 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 audited. The accounts must be retained for a period of three years<sup>124</sup>.

A licensee must also 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 vendor<sup>125</sup>.

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<sup>120</sup> *Mortimer v Bell* [1865] L.R. 1 Ch. App. 10 at p.15.

<sup>121</sup> *Auction Sales Act 1973* section 30(5)

<sup>122</sup> see the law in relation to agency and fiduciary duties in: Fridman G.H *Fridman's Law of Agency* (7ed) 1996 Butterworths, Sydney, pp.174 - 189.

<sup>123</sup> *Auction Sales Act 1973* section 31

<sup>124</sup> *Auction Sales Act 1973* section 26

<sup>125</sup> *Auction Sales Act 1973* section 27

## **Stock sold at auction**

The Act requires licensees to keep a register of all stock sold at auction<sup>126</sup> and to obtain the original of the waybill for all livestock to be sold at auction<sup>127</sup>.

### **9.2.4 Offences**

Any person who fails to comply with the requirements of the Act commits an offence and is liable to a penalty not exceeding \$400, unless a penalty is expressly provided for the offence<sup>128</sup>.

### **9.2.5 Administration of the Act**

Currently responsibilities for enforcement, administration, licensing and disciplinary functions of the Act are spread across three Government agencies.

#### **Western Australian Police Service**

The Commercial Agents Unit of the Western Australian Police Service is responsible for the auctioneer licensing system through its involvement in the application process. The Commissioner for Police may commence disciplinary proceedings against auctioneers.

#### **Department of the Attorney General**

Department of the Attorney General clerks must process applications for auctioneer licences and magistrates hear the applications, usually in chambers. The Magistrates Court hears disciplinary proceedings against auctioneers.

#### **Department of Consumer and Employment Protection**

Administration of the Act is within the portfolio of the Minister for Consumer Protection, with Consumer Protection providing policy and legal support and investigating complaints of unfair trading practices in relation to the conduct of auctions. Consumer Protection is not directly involved in the administration of the licensing system.

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<sup>126</sup> *Auction Sales Act 1973* section 30

<sup>127</sup> *Auction Sales Act 1973* section 32

<sup>128</sup> *Auction Sales Act 1973* section 35

#### 9.2.6 Other legislation in Western Australia

A number of other Acts applicable in Western Australia may impact on the operations of auctioneers.

The *Fair Trading Act 1987* and the *Commonwealth Trade Practices Act 1974* deal with general fair trading issues and prohibit misleading and deceptive conduct in trade or commerce and misrepresentation in relation to the provision of goods and services. The *Sale of Goods Act 1895* regulates the sale of goods and includes some specific provisions in relation to the conduct of auctions.

The *Real Estate and Business Agents Act 1978* and *Motor Vehicle Dealers Act 1973* require that real estate agents and motor vehicle dealers hold licences under those Acts. In some instances, a person carrying on a business as an auctioneer may also be required to hold an additional licence under one of these Acts. However, the *Pawnbrokers and Second-hand Dealers Act 1994* specifies that it does not apply to auctioneers acting in accordance with a licence issued under the *Auction Sales Act*<sup>129</sup>.

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<sup>129</sup> *Pawnbrokers and Second-hand Dealers Act 1994* section 4(1)

### 9.3 National Competition Policy Review

#### Terms of Reference and National Competition Policy Principles

The Competition Principles Agreement<sup>130</sup> states that each review should:

- clarify the objectives of the legislation;
- identify the nature of the restriction on competition;
- analyse the effect of any identified restriction on competition and the economy generally;
- assess and balance the costs and benefits of the restriction; and
- consider alternative means for achieving the same results, including non-legislative approaches.

These principles formed the terms of reference for the review of the Act. In addition, the terms of reference for review of the Act also required the review to:

- consider the scope and administration of any justified restrictions.

The guiding principle of the Competition Principles Agreement<sup>131</sup> is that legislation should not restrict competition unless it can be demonstrated that:

- the benefits of the restriction to the community as a whole outweigh the costs; and
- the objectives of the legislation can only be achieved by restricting competition.

Social, economic and environmental factors were also taken into account in assessing the costs and benefits of the Act<sup>132</sup>.

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<sup>130</sup> Competition Principles Agreement clause 5(9)

<sup>131</sup> Competition Principles Agreement clause 5(1)

<sup>132</sup> For further information on NCP Principles and Agreements see the National Competition Council website at [www.ncc.gov.au](http://www.ncc.gov.au)

#### 9.4 Additional Issues raised during the NCP Review Process

Some of the additional issues raised by stakeholders during the NCP Review Process included:

- practice of and justification for vendor bidding;
- extension of the prohibition against auction rings beyond just livestock and farm produce;
- extension of the prohibition against unnotified purchases by auctioneers of goods sold at auction by an auctioneer beyond that of just stock;
- notification when goods being sold at auction are owned by auctioneers;
- issues concerning the exclusion of wool from the definition of 'farm produce' and how it is covered by State or Commonwealth legislation at auction sales;
- protection of vendors against auctioneer bankruptcy and insolvency;
- introduction of buyer premiums;
- tighter regulation of second-hand goods sold at auction;
- impact of the internet on auction regulation;
- regulation of specific types of auctions under industry specific Acts and whether a number of separate licences might be required (for example, motor vehicles, real estate and second hand goods);
- whether general fair trading provisions concerning auctions could be included in other legislation;
- the need for nationally accredited training for real estate auctioneers in relation to skills and competencies;
- whether motor vehicles sold at auction should be sold under the same warranty conditions as those sold by other licensed motor vehicle dealers; and
- regulation of specific types of auctions, such as real estate and motor vehicle under Industry Specific Acts.

## 9.5 Submissions to the General Review

1	Bebbington, Kevin Bruce
2	Cahill, Gil
3	Conti, Paul (Time Conti Sheffield)
4	Flanagan, Ian (Gregson Flanagan Fine Art Limited)
5	Fry, Richard (Roy Weston)
6	King, John
7	Letts, Brian
8	Lewis, Kingsley (Burgess Rawson)
9	Lightowlers, John
10	McManus, David
11	Meegan, Brian (Brian Meegan and Associates)
12	Nisbet, Judge PM QC
13	Real Estate Institute of Western Australia
14	Small Business Development Corporation
15	Stainforth Smith, J
16	Wells, Rodney E (HE Wells & Sons)
17	Western Australia Police Service
18	Western Australian Farmers Federation (Inc)
19	Williams, Peter (Roy Weston)
20	Wilson, John



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Government of Western Australia

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