

**A Preliminary Study of the proposed National Licensing System
for Property Agents Trust Accounts**

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ABSTRACT

Every State and Territory within Australia has a range of regulatory bodies to oversee consumer protection and the distinct licenses that comprise their regimes. In the case of property agents, licensing is managed under the auspices of individual state and territory Offices of Fair Trading. However, despite uniformity in the choice of regulator, the licensing provisions themselves are not uniformly designed, or enforced. This is particularly the case with respect to trust account regulations. More specifically, while each jurisdiction mandates compliance with trust account regulations, each jurisdiction has also enacted differing provisions, requirements and penalties. This lack of consistency is counter productive to the development of a seamless property market throughout Australia and can lead to inefficiencies and gaps in consumer protection. At the heart of these deficiencies lie broader issues concerning the type of governance that Australia should adopt with respect to its property sector.

In July 2008, the Council of Australian Governments (COAG) agreed to establish a national licensing arrangement for seven occupational areas, including the property sector licensing, with respect to property agents, conveyancers and valuers. The aim of these reforms is to establish a more uniform licensing system within these jurisdictions. In the property sector, reform of licensing measures also entails reform of trust account regulations, which are considered part of licensing requirements.

The purpose of this research paper is to analyse the different State and Territory laws and regulations applicable to property agency trust accounting and to explore appropriate governance requirements for a uniform model of trust accounting.

Keywords: national licensing, trust accounting, governance, property agents.

1. INTRODUCTION

During the late 1800's the various States and Territories of Australia commenced to regulate the property industry. During this time period both State and Federal governments were able to make laws. For example in New South Wales, the Landlord and Tenant Act was passed in 1899. When the Commonwealth Constitution was adopted in 1901, consumer protection was not covered in the Constitution (Office of Fair Trading NSW) which caused difficulties for the consumer and so subsequent legislation was then made under a variety of constitutional powers. So whilst each jurisdiction established regimes that mandated compliance with trust account regulations, each State and Territory also enacted differing provisions, requirements and penalties. At present licensing is managed under the auspices of individual state and territory Offices of Fair Trading and these individual regimes have followed historical patterns reflecting the *ad hoc* and inconsistent development of the regime. It is argued that this lack of consistency is counter productive to the development of a seamless property market throughout Australia and can lead to inefficiencies and gaps in consumer protection.

Consumers engage in property transactions relatively infrequently and therefore have limited knowledge of the property sector industry. In addition property transactions usually involve a monetary sum that represents a large proportion of the consumers' total wealth - with property agents normally holding a percentage of this amount in their trust accounts. Therefore, licensing regulation is regarded as an important way of protecting consumers (The Report – Statutory Review July 2008).

For these reasons, in July 2008, the Council of Australian Governments (COAG) agreed to establish a national licensing arrangement for seven occupational areas, being air conditioning tradespersons, building and building related, electrical, land transport, maritime, plumbing and gasfitting, and property. The property sector included property agents, conveyancers and valuers. The aim of these reforms is to create a more uniform licensing system within all of these jurisdictions. Therefore, the reforms will also impact upon trust account regulations, which are considered part of licensing requirements within the property sector.

The purpose of this research paper is to analyse the different State and Territory laws and regulations applicable to property agency trust accounting and to explore appropriate governance requirements for a

uniform model of trust accounting. The paper commences with a discussion of the purpose and intent of the National Licensing System, and then leads into the next part of the paper which evaluates the current licensing system operating in Australia, highlighting its strengths and weaknesses. Various examples are drawn from the seven specified occupational areas. It is argued that a national model of trust accounting is feasible; however, transitional rules will need to be implemented to allow each jurisdiction the opportunity to phase-in the recommended changes gradually.

2. THE NATIONAL LICENSING SYSTEM - PURPOSE AND INTENT

The Council of Australian Governments (COAG) commenced in 1992 and is the peak intergovernmental forum in Australia. Its members consist of the Prime Minister, the Premiers of each of the six states, the Chief Ministers of the Two Territories and the President of the Australian Local Government Association. The function of COAG, according to their website, “initiates, develops and monitors implementation of policy reforms that are of national significance” and which “require co-operative action by Australian Governments”. Assistance is also given to COAG through institutional arrangements such as Commonwealth-State Ministerial Councils, Intergovernmental Agreements and national strategies. (NLA for Specified Occupations 2008). Together, these arrangements comprise the core of Australia’s governance arrangements for the design and implementation of uniform regulation. According to the business web dictionary, governance is defined as the “establishment of policies and continuous monitoring of their proper implementation”. Hence the forum provided by the COAG facilitates the drawing together of stakeholders such as the State and Territory governments in a way that supports co-operative decision-making.

The COAG has chosen the development of the National Licensing System (NLS) as part of its regulatory reform agenda. As a consequence, the COAG aims to ‘remove overlapping and inconsistent regulation between jurisdictions” (NLA for Specified Occupations 2008) for seven occupational areas, including property sector licensing, with respect to property agents, conveyancers and valuers. It is anticipated that these changes (NLA for Specified Occupations 2008 and 2009), will lead to many positive outcomes, such as

- Improved business efficiency and the competitiveness of the national economy
- Reduced red tape
- Improved labour mobility and enhance productivity

The NLS will be administered by an established National Licensing Board (NLB) which will bear the responsibility of the NLS legislation. All jurisdictions will receive the benefit of the services from the NLB who will delegate the operation of the licensing services. The benefits anticipated with the establishment of the NLB will be to minimise disruptions in the transitional and implementation stages of the proposed reforms. The NLB will be responsible to the Ministerial Council for Financial Federal Relations (Regulation Impact Statement April 2009). Essentially under the new reforms, licensees will be able to operate throughout Australia on a single and uniform license.

Victoria has been selected as the host jurisdiction for the NLS legislation. Therefore, once the legislation has been passed by the Victorian Parliament, the remaining States and Territories will be required to adopt the same laws within their own jurisdictions. Thus it is envisaged that the NLS legislation will define the “structure and functions” of the licensing system operating in Australia’s property sector by means of co operative national legislation (Regulation Impact Statement April 2009).

3. ISSUES WITH THE CURRENT PROPERTY LICENSING SYSTEM

At present, there is little consistency regarding property licensing, and therefore, trust account regulation in the various jurisdictions. Accordingly a licensee is unable to work throughout Australia without holding valid licenses in each jurisdiction. Different State and Territory regulatory bodies are responsible for the administration, entry criteria, and ongoing conduct requirements for licensees. Moreover, each body has varying requirements with respect to fundamental licensing matters such as compliance and disciplinary procedures, updated registers of licensees, and continuing professional development requirements. Importantly licenses which are issued in the property services sector for property agents, business agents, strata managing agents, and stock and station agents have different parameters, scope of work and entry requirements.

For example, the table below, identified as Figure 1, indicates the range of fees applicable to four occupational licenses, across Australia. The fees set out in the table include the cost for a license in the first year and also on a continuing basis. These fees are taken from the highest and lowest cost within each particular license category.

FIGURE 1: Range of fees for licences

Building – Individual building contractor (new)	\$333.00 to \$1,010.65
Electrical – Individual electrician/qualified supervisor electrical (renewal)	\$ nil to \$350.00
Property – Individual real estate agent (new)	\$262.40 to \$1,060.50
Maritime – master Class 3 (new)	\$29.14 to \$304.66

Source: 2009 Offices of Fair Trading within each jurisdiction

As indicated above in figure 1, there is no consistency with the license fee structure and there are similar issues with the license nomenclature and also the duration of the license. The existing license administration fees structure, obviously lends itself to a range of complex and time consuming problems.

Businesses and consumers are ultimately bearing the burden of these various direct and indirect compliance costs and differing regulatory requirements. Some businesses hold multiple licenses across Australia, in order to carry out their work, and these costs can be very significant (NLS for Specified Occupations 2008).

Furthermore, these direct and indirect costs contribute to a greater proportion of the total costs for small to medium sized businesses. The number of businesses affected is growing at a faster rate than the growth of the business economy. For example, in the table below, labeled Figure 2, the construction industry business growth represents a large majority of the people employed in the industry and requiring some form of license within their own jurisdiction.

FIGURE 2: Construction Industry

Dates	Type of employment	Employed staff	Business growth
1 st July 2003 to 30 th June 2007	Tradespeople	Less than 20	45.9%
1 st July 2003 to 30 th June 2007	Licensed Contractors	Less than 20	11.3%

Source: Australian Bureau of Statistics

This table above, labeled figure 2, indicates the fast growth over the last few years for employed tradespeople, who in New South Wales, must hold appropriate licenses for each category of their work. Similarly, if these tradespeople also wish to work in another state or territory, the appropriate license for that jurisdiction must also be held by the tradesperson.

The table below, labeled figure 3, shows the percentage growth of businesses who operate in more than one jurisdiction. Interestingly both Construction and Property indicate a huge growth of businesses who operate in more than one jurisdiction and therefore are burdened with the additional task of licenses and compliance costs for every jurisdiction.

FIGURE 3: Construction and Property Industry

Dates	Industry	Two jurisdictions	More than one jurisdiction
1 st July 2003 to 30 th June 2007	Construction	19.9% growth	30% growth
1 st July 2003 to 30 th June 2007	Property	10.4% growth	22% growth

Source: Australian Bureau of Statistics

It could be reasoned that even though property has sustained a 22% growth (as indicated in figure 3 above) the introduction of “mutual recognition” within the jurisdictions, for property licenses would have eased the burden of compliance and lack of uniformity.

However, a license issued in one jurisdiction can be the equivalent of a number of different licenses in another jurisdiction. For example, in New South Wales there are separate licenses for Real Estate Agent, Business Agent, Strata Managing Agent, Stock and Station Agent, and Auctioneer, yet to undertake the same scope of work in Victoria only one license is required for Real Estate Agent and Business Agent. So whilst mutual recognition does exist, because of the varying licensing regimes, each individual is required to apply for separate licenses, pay the prescribed fee and meet the different skills and non-skill requirements in each jurisdiction. This raises concerns over the unnecessary costs, demanding and repetitive work required to sustain current licenses.

Therefore, businesses working in multiple jurisdictions must comply with the regulatory requirements of each jurisdiction. Below in figure 4, is a summary of the various licenses available to property agents in each of the states and territories.

FIGURE 4: Property Industry- license categories in each jurisdiction

Occupational Area	NSW	VIC	QLD	WA	SA	TAS	ACT	NT	TOTAL
PROPERTY	14	1	10	5	2	4	7	11	54

Source: National Licensing System for Specified Occupations: Consultation Regulation Impact Statement October 2008

The term “property” in figure 4, includes property agents, business agents, strata managing agents, stock and station agents, conveyancers and valuers. This can consist of different license categories, classes and subclasses, and license endorsements.

There are currently 103,435 licenses held in the property area, across Australia. (NLS July 2009). The Productivity Commission has estimated that if the NLS reforms were to proceed there would be an economic benefit of between \$1.5 billion and \$4.5 billion (Regulation Impact Statement April 2009)

Figure 5, below, indicates as at 28th March 2008, a listing of the categories and licenses and/or certificates held in each category for New South Wales, for the property industry.

FIGURE 5: Property Industry- license categories in each jurisdiction

Real Estate Agents	14,821
Stock and Station Agents	2,882
Business Agents	2,748
Strata Managing Agents	1,373
On-Site Residential Property managers	124
Corporations	5,058
Certificate of Registration	17,088

Source: Regulation Impact Statement October 2008 and April 2009

In contrast to the information above for New South Wales in Figure 5, the state of Victoria requires only one license for the category of real estate agent and business agent.

4. A COMPARATIVE ANALYSIS OF TRUST ACCOUNT REGULATION

Trust money is the money that an agent has collected on behalf of their principal. Antoniades 2007. Examples of trust money include deposits on sales, rent from tenants, bonds and prepaid advertising. The Real Estate and Business Agents Supervision Board (REBA) of Western Australian, defines trust money as “the money is received or held by an agent or any member of an agent’s staff on behalf of another person in relation to a real estate or business sales transaction or property management transaction”.

Therefore, trust money can be broadly classified as money held by an agent on behalf of a property owner, tenants, purchasers, and other stakeholders.

Trust Accounting is the recording, classification, reporting and analysis of all trust money received by an agency on behalf of their principal. In addition to mathematical dimensions, trust accounting is also concerned with regulatory compliance. Hence an agency’s books and records must meet the provisions of relevant legislation. Antoniadis, 2007. Below in figure 6, is a compilation of relevant acts and regulations for trust accounting across the Australian jurisdictions.

FIGURE 6: Property Industry- governance for each jurisdiction

JURISDICTION	GOVERNANCE
NSW	Property Stock and Business Agents Act 2002 and the associated Regulations
VIC	Estate Agents Act 1980
QLD	Property Agents and Motor Dealers Act 2000
WA	Real Estate and Business Agents Act 1978 and Regulations 1979
SA	Land Agents Act 1994
TAS	Property Agents and Land Transaction Act 2005
ACT	Agents Act and Regulation 2003
NT	Agents Licensing Act and Regulations 2009

Source: Each jurisdictions Office of Fair Trading

These provisions in trust accounting, are an important governance mechanism that aims to protect consumers. The legislative obligations placed on real estate agents can be enormous and time consuming, however ultimately the licensee of the property agency is held accountable for all trust money held on behalf of the property owner, tenants, purchasers, and other stakeholders with a vested interest.

Each jurisdiction has its own provisions regulating property agents and trust accounting; and these provisions have a mix of similarities and differences with each other. Broad similarities amongst the regimes include the following provisions:

- Licensees are required to notify the authorized deposit-taking institution in writing that the account being opened is a trust account
- The words “trust account” must be included in the title of the trust account

- Receipts are to be issued as soon as the trust funds are received with the information to include the name of the licensee, date of receipt, name of the person on whose behalf the funds have been received, brief description of the transaction, amount received, whether received by cash, cheque or electronic transfer and a signature verifying the receipt.
- Trust records such as consecutively numbered receipt forms in duplicate, trust account deposit book in duplicate, trust account cash book, trust account ledger.
- Trust books and records must be audited annually by an auditor.

It is self-evident from the above, that in every jurisdiction, licensees are required to hold clients funds in a trust account. In addition the account must be kept at an authorized deposit-taking institute in the same jurisdiction where the property agents license was issued. The constraint that the financial institution must be “authorized” stems from the requirement that a proportion of the interest earned on trust accounts is forwarded to the regulators. Financial institutions are required to remit a prescribed interest amount, calculated on monies held in trust, to the property regulator in their jurisdiction. Each regulator lodges this interest component into their Statutory Interest Account (or equivalent account depending on the jurisdiction). The interest computation remitted by the financial institutions comprises the interest calculated for monies held in trust on behalf of landlords and tenants, as well as vendors and purchasers in the licensees’ trust account. However, there are also significant differences amongst the states and territories with respect to the prescribed interest calculations. Set out below in figure 7, is a comparison of the prescribed interest component for each jurisdiction.

FIGURE 7: Property Industry- prescribed interest component

ITEM	NSW	VIC	QLD	WA	SA	TAS	ACT
Statutory Interest Account Prescribed	60%	100%	75% average	70%	100%	70% approx	70%

Source: Statutory Review of Property Stock and Business Agents Act 2002, May 2008

In New South Wales the prescribed rate of interest submitted by financial institutions to the Office of Fair Trading (Property Stock and Business Agents Act 2002), is an amount of 60% of the interest earned on the trust account whereas it is higher in other states. In Victoria (Estate Agents 1980) and South Australia (Land Agents Act 1994) for example, financial institutions are required to remit 100% of the interest

calculation. Therefore the New South Wales prescribed rate is the lowest rate in comparison with all the other jurisdictions. This of course is a benefit to the financial institution with the 40% interest free funds.

While trust funds are held on behalf of the landlord/tenant, vendor/purchaser, these parties do not benefit directly from the use of the money. It is possible within some states and territories to invest the property owners' funds into an account for the "exclusive" benefit of the client. However a disincentive to this opportunity is the relatively short length of time the funds are invested, and the additional burden of bank fee charges, which in some cases could outweigh the interest received, if the funds were invested for a very short term. Again, the requirements for this type of investment are not uniform. In Western Australia (Real Estate and Business Agents Act 1978), for example, clients are not permitted to request separate trust accounts where the interest is for the benefit of the clients, unless the deposit received is greater than \$20,000 or the moneys will be held in trust longer than for 60 days. Queensland (Property Agents and Motor Dealers Act 2000) has adopted a similar approach where the trust funds must be held for a minimum of 60 days. There is no stipulation however, for a minimum amount to be invested. In New South Wales (Property Stock and Business Agents Act 2002) there is no restriction with regards to a minimum amount or the length of time the trust funds are to be invested to earn interest.

From the perspective of the licensee, the procedures involved in investing trust funds make it mandatory to obtain documentation of the identity, and tax file number of all parties on whose behalf the trust funds are invested. These requirements place additional administrative burdens on licensees, particularly compared to the low level of interest earned on the deposits and the recurring bank fees charged to maintain the investment accounts. For these reasons in some overseas jurisdictions, this type of investing is not encouraged. For example, according to the Real Estate Foundation of British Columbia website (2009), they receive the interest that accrues on trust accounts, and they also pay some of the bank fee charges, whereas according to the State of New Jersey, USA, Department of Banking and Insurance website (2009), some of the interest is forwarded to the Department of Banking and Insurance, who is the regulator for property agencies. The benefits here for consumers is similar to the jurisdictions in Australia where Statutory Interest Funds are used to supplement the Compensation Fund (or similar account), provide grants or loans for education or research programs relating to the property services industry, and to meet the costs of administering the property acts under the jurisdiction of the individual state and territory Offices of Fair Trading.

Another major difference in the trust accounting legislation is the "timing" of the requirement to bank trust moneys into approved financial institutions. For example in New South Wales (Property Stock and

Business Agents Act 2002), trust moneys should be banked by the next banking day, or if that is not practical as soon as practical after that. However South Australia (Land Agents Act 1994) is more relaxed with their requirements, simply stating that funds should be banked “as soon as practicable after receiving trust money” (Division 2, Part 13, Land Agents Act 1994). In contrast, Victoria (Estate Agents Act) is more specific specifying that if there is an authorized deposit taking institution available within 16 kilometres of the place of the agents office, then the trust funds must be banked before the end of the next business day after the day on which the trust funds were received. Where the distance exceeds the nominated 16 kilometres then the trust funds must be banked before the end of the third business day after the day on which the trust funds were received. (Section 59 (1) (i) (ii) Estate Agents Act 1980)

Another anomaly relates to the length of time for keeping records. In the last few years, there has been considerable attempt by the regulators to introduce risk management strategies into agency practices. It would therefore be considered very important to have a uniform length of time for the keeping of records. For example in New South Wales (Property Stock and Business Agents Act 2002), books and records must be kept for a period of three years, whilst in Western Australia the requirement is “not less than 6 years” (Clause 6H, Real Estate and Business Agents (General) Regulations 1979) and in Victoria “a period of 7 years” (Section 63 (3) Estate Agents Act 1980). Property agencies are frequently required to access copies of historical records on behalf of their property owners who inadvertently have either misplaced or lost their own records. These historical records are usual required for tax purposes, or simply for keeping a track of the data relevant to their property.

5. CONCLUSION ON A UNIFORM MODEL FOR TRUST ACCOUNTING

This paper has highlighted the important differences between the various jurisdictions trust accounting governance and whilst the majority of the laws and regulations are similar, the preliminary research in this paper has identified three major areas which need to be addressed. Firstly, the prescribed interest amount which the financial institutions must remit to the regulators varies between 60% to 100% across the various jurisdictions. In particular New South Wales has the lowest rate and whilst the rate does not impact on the property agents or their clients, there could be a form of expectation from the financial institutions that there is a benefit of 40% in unremitted interest leveraged into the trust accounts held at their branches on behalf of the property agents. Admittedly financial institutions do charge bank fees on the trust account, which is initially paid for by the property agent, however the bank charges are

eventually passed over to the property owners when the funds held on their behalf are accounted to them by the property agents. Financial institutions in Victoria and South Australia already remit 100% of the prescribed interest, however, if it was suggested in the uniform model for trust accounting that these states should remit a lower percentage, then further research would be required to assess the impact with this decision, bearing in mind that the funds received by the regulators for the Statutory Interest Account, are used to supplement the Compensation Fund, provide grants or loans for education or research programs relating to the property services industry, and to meet the costs of administering the property acts under the jurisdiction of the individual state and territory Offices of Fair Trading.

The second major area with important differences is identified as the banking of trust moneys. As indicated earlier in this research each jurisdiction has modified laws and regulations which stipulate the timing of when a property agent should bank trust funds into a financial institution. It appears that in New South Wales the requirement “to bank by the next banking day or if that is not practical as soon as practical after that” as opposed by Victorian law which details that “trust funds must be banked before the end of the next business day after the day on which the trust funds were received” only if “there is an authorised deposit taking institution available within 16 kilometres” could imply that there are issues in some states and territories with regards to the distances required to travel to bank trust money or perhaps even the availability of authorized deposit financial institutions. Indeed further research would be required to analyse the non metropolitan regions of the various jurisdictions with regards to the distance between the property agents’ place of business, and an available authorized financial institution. However, it could be argued that New South Wales has taken this issue of distance into consideration, by allowing the wording of “if that is not practical as soon as practical after that” to suffice in lieu of Victoria’s specific calculation with the 16 kilometres.

The third major area of difference is the length of time for the keeping of records. Whilst New South Wales is the only state which requires the books and records to be retained for a period of 3 years, most jurisdictions range from 6 years to 7 years. It is surmised that if New South Wales were to implement longer record keeping requirements then the major impact for New South, would centre around storage space, however, with technology today, the space for data storage of records is relatively minute, in comparison to a decade ago.

It is therefore concluded that a uniform model for trust accounting is possible, however, some jurisdictions will undergo major changes, whilst other jurisdictions will only be required to make minor amendments. Transitional rules will need to be implemented to allow each jurisdiction the opportunity to phase-in the recommended changes gradually. Additionally, the NLS should “significantly reduce administrative requirements for industry and government”. Finally, the priority of consumer protection will be at the forefront of any regulatory changes and primarily the cost versus the benefit component would also need to be assessed.

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