

BERR

Department for Business
Enterprise & Regulatory Reform

ESTATE AGENTS

A consultation on proposals for exercising powers in the Consumers, Estate Agents and Redress Act 2007 and other changes to secondary legislation relating to estate agents

Government response to the consultation – Part 1: redress schemes, penalty charges and application fees

JUNE 2008

ESTATE AGENTS: PROPOSALS FOR EXERCISING POWERS IN THE CONSUMERS, ESTATE AGENTS AND REDRESS ACT 2007 AND OTHER CHANGES TO SECONDARY LEGISLATION RELATING TO ESTATE AGENTS

The Government response to the consultation – Part 1: redress schemes, penalty charges and application fees.

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1. Introduction

The consultation

1.1 The Consumers, Estate Agents and Redress Act 2007 (CEARA 07) amends the Estate Agents Act 1979 (EAA 79) by including new provisions to improve the regulation of estate agents.

1.2 BERR launched a public consultation on 9 November 2007 to seek views on proposals for implementing powers in CEARA 07 enabling the Secretary of State to define the scope of estate agents redress schemes, set the penalty charge payable by estate agents for non membership of redress schemes and to prescribe certain requirements relating to the keeping of permanent records by estate agents. The consultation also sought views on reducing the fee to be paid by estate agents when applying to have prohibition orders revoked or varied, whether sellers should be given details of all offers received from prospective buyers and on alternative versions of the statutory definitions of the contract terms 'sole agency', 'sole selling rights' and 'ready, willing and able purchaser' where they are used in estate agents' contracts.

Consultation responses

1.3 The consultation closed on 1 February 2008. Twelve written responses were received from consumer groups, regulatory bodies, ombudsman organisations, trade bodies and individual estate agents.

1.4 Responses showed broad support for the majority of the Government's proposals and provided constructive and insightful contributions to the development of the proposed measures.

1.5 This document provides a summary of the main issues raised in the consultation in respect of redress schemes, penalty charges and application fees and, in these areas, outlines the Government's decisions on the points of substance.

1.6 The Government is still reviewing the responses in respect of record keeping, offer letters and statutory terms. A further response document on these issues will be published shortly.

1.7 We have concentrated on the redress and fee parts of the consultation as they are scheduled for earlier commencement than the record keeping and other parts. The responses on record keeping and, in particular, the statutory definitions are very detailed. We would like to give these the consideration they deserve, while providing early clarity on the provisions scheduled for October commencement. As a result of the responses on statutory definitions, we are likely to want to carry out further consultation and market testing before proposing a way forward. We will also need to consider the implications of the recent Court of Appeal judgment on the use of the statutory definitions. We will set out our proposals for record keeping and the next steps on statutory definitions shortly.

1.8 A list of the respondents who did not request confidentiality is attached at Annex A.

1.9 We would like to thank all those who devoted their time and who gave so generously of their experience and knowledge, to help shape the Government's views on the issues. These contributions are very much appreciated.

2. Redress scheme powers

2.1 EAA 79, as amended by CEARA 07, enables the Secretary of State by order to require persons engaged in estate agency work to join an approved redress scheme dealing with complaints from buyers and sellers of residential property.

2.2 In addition to a general order making power requiring redress scheme membership, Schedule 6 of CEARA 07 introduces into EAA 79 a number of powers enabling the Government to further define the scope of redress schemes:

- a power to specify that the duty to belong to an approved redress scheme only applies to persons of a specified description who engage in estate agency work
- a power to specify the type of estate agency work carried out by persons required to belong to an approved redress scheme
- a power to specify the type of complaint that can be excluded from consideration by an approved redress scheme (which may be framed by reference to a description of person making a complaint)
- a power to exclude land of a specified description from the definition of residential property

2.3 The consultation did not propose to exercise the powers in EAA 79 as amended by CEARA 07, but sought views on the need to limit the scope of redress schemes.

(i) Power to specify that the duty to belong to an approved redress scheme only applies to persons of a specified description who engage in estate agency work

Question 1: Do you agree that all those who engage in estate agency work, as defined in EAA 79, should be required to join an approved redress scheme?

Question 2: If not, what categories of persons of those currently engaged in estate agency work should be exempted from the duty to join an approved redress scheme?

2.4 All respondents who commented agreed that all those who engage in estate agency work, as defined in EAA 79, should be required to join an approved redress scheme.

2.5 None of the respondents who commented called for categories of persons currently engaged in estate agency work to be exempted from the duty to join an approved redress scheme. TSI, however, called for solicitors who engage in estate agency work to be required to join estate agents redress schemes. Solicitors who engage in estate agency work in the course of their profession are exempted from EAA 79.

2.6 A number of respondents also commented on the definition of estate agency work in EAA 79. LACORS, TSNW and TSI sought clarification on the definitions of estate agency work in sections 1(1)(a) and 1(1)(b) of EAA 79 (whether they represented a cumulative test) and the meaning of advertising and the dissemination of information in the exemption under section 1(4), as opposed to effecting an introduction. The enforcers also criticised there being a different definition of estate agent in the Housing Act 2004, which they claimed causes confusion for both industry and enforcers. Which? commented that the definition should be updated to take account of changes brought about by the internet and include properties sold directly by property developers. The NFPP also referred to the definition not taking account of internet agents and stated it should have been extended to include lettings.

2.7 On the basis of the responses received the Government will not exercise the power to exclude categories of persons currently engaged in estate agency work from the duty to join an approved redress scheme. Consequently all persons who engage in estate agency work, as defined in EAA 79, in relation to residential property, will be required to join an approved redress scheme.

2.8 With regard to the definition of estate agency work, this was not the subject of the consultation, and to change it would require primary legislation. This definition was considered prior to and during the parliamentary passage of CEARA 07 and the Government concluded that it was not necessary to change the scope of the definition at this time.

(ii) Power to specify the type of estate agency work carried out by persons required to belong to an approved redress scheme

Question 3: Do you agree that the duty to join an approved redress scheme should apply in relation to all aspects of estate agency work relating to residential property, as defined in EAA 79?

Question 4: If not, what descriptions of estate agency work should be excluded from the duty to join an approved redress scheme?

2.9 All respondents who commented agreed the duty to join an approved redress scheme should apply in relation to all aspects of estate agency work relating to residential property, as defined in EAA 79.

2.10 Some respondees again referred to comments about the definition of estate agency work mentioned in response to Questions 1 and 2.

2.11 None of the respondents who commented called for descriptions of estate agency work to be excluded from the duty to join an approved redress scheme.

2.12 On the basis of the responses received the Government will not exercise the power to exclude descriptions of estate agency work from the duty to join an approved redress scheme. Consequently all types of

estate agency work relating to residential property, as defined in EAA 79, will be covered by the requirement to join an approved redress scheme.

(iii) Power to specify the type of complaint that can be excluded from consideration by an approved redress scheme

Question 5: Do you agree that there should be no exclusions as to the description of complaints, including the description of persons who may bring a complaint, that may be considered by approved redress schemes (in respect of estate agency work in relation to residential property)?

Question 6: If not, what exclusions from consideration by approved redress schemes should there be?

2.13 The majority of respondents who commented agreed that there should be no exclusions as to the description of complaints, including the description of persons who may bring a complaint, that may be considered by approved redress schemes (in respect of estate agency work in relation to residential property).

2.14 The NCF commented that it was not in the interest of the public to place restrictions on the type of complaint or complainant and it was inappropriate at the inception of such an important scheme to limit its operation. The NCF did say, however, that if after the scheme has been in existence for several years there is evidence to support amendments, then a case can be made for the introduction of limitations. LACORS felt that it would be difficult to specify the complaints to be excluded from the scheme, and doing so would result in problems of interpretation.

2.15 There were alternative views from the trade bodies and one of the ombudsmen. TOSL pointed out that the Surveyors Ombudsman Service currently excludes complaints from commercial organisations, but they are willing to extend the terms of reference to cover small businesses. They noted that the terms of reference for other ombudsman services run by them make such a restriction – the Telecommunications Ombudsman Service (OTELO) allows complainants who are small businesses (defined by headcount and expenditure) and CEARA 07 contains provisions to extend redress to small businesses in the energy sector. RICS thought that there should be exclusions in relation to business to business complaints. They commented that ombudsman services are for consumers, not businesses; the majority of firms in the property sector are small and should not provide free redress for big firms; there are Alternative Dispute Resolution (ADR) options for business to business complaints; and the (Surveyors) Ombudsman already has discretion to allow very small businesses to be covered. The NFPP stated that if the Government is minded to allow complaints from commercial organisations, then these should be restricted to small businesses. Complaints from agents against agents should also be excluded.

2.16 The consultation noted that not exercising the power to exclude descriptions of complaints and complainants would in principle enable

commercial organisations to bring complaints about residential property to an approved redress scheme. But it concluded, that as the new provisions only apply to complaints about residential property and that commercial organisations were more familiar with issues arising from buying and selling property and had greater access to professional advice, it was more likely they would seek redress through the courts.

2.17 The Government notes the adoption of restrictions for larger businesses by OTELO. Provisions under the CEARA 07 will extend redress to small businesses in the energy sector. The precise definition of a small business is still being discussed but proposals have centred on small business energy users with annual consumption equivalent to under £5k spend, or 10 employees or fewer, or a turnover of under €2m. Definitions based on usage, however, are not helpful in the case of estate agents; any cut-off point would probably need to be based on a combination of headcount, turnover and balance sheet. Such a combination may be difficult to quantify easily.

2.18 On balance the Government considers that it is not necessary to exclude complaints from commercial bodies or those not originating from private individuals, and will not exercise the power to exclude types of complaint from consideration by approved redress schemes.

We remain of the opinion that few businesses or commercial organisations will make use of redress schemes, and will continue to use the courts to secure redress. We note the concerns of some respondents about complaints from larger businesses. Should this happen in numbers that affect the efficient running of redress schemes to the detriment of consumers, we retain the ability to take action to prevent them using redress schemes in the future.

(iv) Power to specify descriptions of land that can be excluded from the definition of residential property

Question 7: Do you agree that the definition of residential property is adequate to cover the types of property (the buying or selling of) which may be the subject of complaints against persons engaged in estate agency work?

Question 8: If not, what descriptions of land should be excluded?

2.19 The majority of respondents who commented agreed that the definition of residential property is adequate to cover the types of property (the buying or selling of) which may be the subject of complaints against persons engaged in estate agency work.

2.20 The NFPP disagreed and suggested that for consistency the definition for residential property set out in the Housing Act 2004 and HIP Regulations should be used, or the HIP definition changed in line with CEARA 07.

2.21 The OEA commented that consideration should be given to including complaints about overseas property transactions in so far as they concern the dealings of UK located estate agents.

2.22 On the basis of the responses received the Government will not exercise the power to specify descriptions of land that can be excluded from the definition of residential property. Consequently the types of land that can be complained about will be as set out in EAA 79, as amended by CEARA 07.

2.23 A change to the definition of residential property would require primary legislation, as would changes enabling redress schemes to consider complaints about overseas property transactions. Neither can be done by exercising the relevant power. The definition of residential property in the Housing Act and the HIP Regulations are matters for the Department for Communities and Local Government.

2.24 The definition of residential property in CEARA 07 is wider than that contained in Part 5 of the Housing Act 2004 – the main difference being that residential property in the Housing Act is limited in scope to premises in England and Wales, whereas the EAA 79 applies to the UK.

3. Penalty charge for non membership of an approved redress scheme

Question 9: Do you consider that £500 or £1,000 is an appropriate amount for a penalty charge for failing to join an approved redress scheme?

Question 10: If not, at what other level should the penalty charge be set?

3.1 Schedule 6 of CEARA 07 introduces into EAA 79 a power to specify the level of the penalty charge for non membership of an approved redress scheme.

3.2 The consultation proposed that the penalty charge should be set at £500 or £1,000, which is the maximum fee that can be charged under EAA 79.

3.3 The majority of respondents who commented did not consider that either £500 or a £1,000 was an appropriate amount for a penalty charge for failing to join a redress scheme.

3.4 In support of the £1,000 charge was the OEA, RICS and Which? In favour of a higher charge was Buckinghamshire TS (£10,000); NCF (£5,000); LACORS, TSNW and TSI (in line with a Level 5 civil penalty ie £5,000); and NFPP (in excess of £1,000). Only one respondent (Angus Bearn) said that the charge should be lower (£100). Some respondents also thought the penalty charge should be kept under review and altered if there was evidence of non-compliance.

3.5 LACORS, TSNW and TSI raised the issue of redress for consumers who encounter problems at the hands of agents before they join redress schemes. They called for a mechanism or fund to ensure that redress is available for consumers in such circumstances.

3.6 With the majority of respondees who commented calling for a £1,000 penalty charge or higher, the Government has decided to set the charge at £1,000.

3.7 The maximum that can be charged under CEARA 07 is £1,000, so any recommendations for fines above this figure are out of scope as far as the consultation is concerned. It should be noted that a penalty charge is an on-the-spot fine with no opportunity for the estate agent to put his case to an independent person – the appeal process allows the agent to contest the giving of the notice, but not the amount. The higher fines suggested would only be appropriate if imposed by a court or tribunal where individual circumstances could be taken into account to ensure the fine was not excessive; a necessary but more bureaucratic and time consuming process. The penalty charge under CEARA 07 will, in contrast, be the same every time. The aim of the penalty charge regime is to provide a quick and simple mechanism to deter non membership. And it is only the starting point for enforcement action – agents that fail to join approved schemes will ultimately be prohibited from carrying out estate agency work.

3.8 Compliance with the duty to belong to an approved redress scheme is expected to be very high as failure to belong to a scheme will mean that estate agents face the possibility of multiple penalty charges as well as being subject to a warning order or prohibition order. It is a criminal offence for estate agents to continue to practise once they have been banned from engaging in estate agency work by the OFT. Where an agent fails to belong to a scheme and the consumer suffers a detriment, it may be open to the consumer to take court action. Where a consumer has a complaint against an agent dating back to a time when the agent was not a member of an approved scheme, it will be up to the rules of the scheme whether they allow such complaints.

4. Fee for applications to revoke or vary prohibition notices

Question 23: Do you agree that £1,000 is an appropriate amount to charge for applications to have prohibition orders revoked or varied?

Question 24: If not, at what level should the application fee be set?

4.1 Prohibition orders banning an estate agent from carrying out estate agency work are currently revoked automatically when the conviction that caused the ban becomes spent under the Rehabilitation of Offenders Act 1974 (ROA 74) and any Northern Ireland equivalent. Section 55(5) of CEARA 07 removes the references to the ROA 74 (and its NI equivalent) from EAA 79 (as the reference to 'convicted' in EAA 79 is amended to 'committed'). Consequently, all banned estate agents will have to apply to the OFT to have their prohibition order revoked or varied, regardless of the basis on which they have been banned, and pay a non returnable application fee currently set at £2,500. This will apply even if the offence that caused the ban is spent and would previously have been revoked automatically.

4.2 In light of the changes to the revocation process, the consultation sought views on the appropriate fee for applications to have prohibition orders revoked or varied. Views were sought on reducing the application fee to £1,000.

4.3 The majority of respondents who commented did not agree that £1,000 is an appropriate amount to charge for applications to have prohibition orders revoked or varied.

4.4 Consensus among the enforcers and consumer groups was that £1,000 was too low and that the fee should remain at £2,500 (Buckinghamshire TS, TSNW and Which?), but there was also support for setting the figure in line with administrative and investigation costs (NCF, LACORS, TSNW and TSI), in line with inflation (LACORS) or significantly higher than £2,500 (Which?).

4.5 Trade responses were split on the matter. The NFPP agreed that £1,000 was appropriate and Angus Bearn stated that it was wrong to contradict the principle of rehabilitation of offenders and punish people again for an offence by introducing punitive application fees. RICS, on the other hand, did not consider £2,500 an exorbitant sum for most estate agents and stated that the fee should stay at that level.

4.6 With only limited support for reducing the fee charged for applications to have prohibition orders revoked or varied to £1,000, the Government has decided to leave the application fee at its current level of £2,500.

4.7 In considering at what level the application fee should be set, the Government wished to balance the needs of agents who currently don't have to pay a fee to have prohibition orders revoked, with the need that the fee

should go some way to cover the cost of processing applications. Taking into account the uncertainty around the number of applications the OFT is likely to receive, arguments about inflation and the need to put off frivolous applications, the Government accepts that it makes sense to leave the application fee unchanged at this stage.

4.8 The OFT has estimated that it would cost in the region of £2,900 to process an application to have a prohibition order revoked or varied, which is slightly higher than the current application fee. It should be noted that there have been no applications to revoke or vary a prohibition notice since EAA 79 was introduced – the automatic revocation of notices for spent convictions making this unnecessary. It is therefore difficult to state with any certainty what would be an appropriate fee in terms of administrative costs. We will look again at this issue in October 2009, a year after the revocation changes take place, to ensure that the fee is appropriate.

5. Next steps

5.1 Subject to the OFT approving at least one redress scheme open to all estate agents, the Government will make an order requiring persons engaged in estate agency work in relation to residential property work to join an approved redress scheme. In line with better regulation guidelines we expect to commence the order on 1 October 2008, which is the next Common Commencement Date for regulations. The order will not exercise any of the scoping powers in CEARA 07 discussed in Chapter 2 of this document.

5.2 In conjunction with the redress order, the Government will make a further order setting the penalty charge for non membership of redress schemes at £1,000. As with the redress order, the penalty charge order will commence on 1 October 2008.

5.3 The bulk of the enforcement provisions in CEARA 07 will also commence on 1 October 2008. These provisions give enforcers wider powers to require access to premises and the on-site production of records, and expand the circumstances in which the OFT can consider the fitness of an estate agent to practice and issue prohibition or warning notices.

5.4 The Government is still reviewing the responses in respect of record keeping, offer letters and statutory terms in estate agents contracts, and will issue a further response document shortly. It was always envisaged that the record keeping provisions in CEARA 07 would come into force after the redress and other enforcement provisions. These regulations, and any changes to secondary legislation in relation to offer letters and statutory terms, will be subject to further consultation.

Annex A

List of respondents

Angus Bearn
Buckinghamshire Trading Standards (Buckinghamshire TS)
Mike Hewson
Local Authorities Co-ordinators of Regulatory Services (LACORS)
National Consumer Federation (NCF)
National Federation of Property Professionals (NFPP)
Ombudsman for Estate Agents (OEA)
Royal Institution of Chartered Surveyors (RICS)
The Ombudsman Service Ltd (TOSL)
Trading Standards Institute (TSI)
Trading Standards North West (TSNW)
Which?

Glossary of abbreviations and terms used in this response document

BERR – Department for Business, Enterprise and Regulatory Reform
(formerly the Department of Trade and Industry)
CEARA 07 – Consumers, Estate Agents and Redress Act 2007
EAA 79 – Estate Agents Act 1979
HIP – Home Information Pack
OFT – Office of Fair Trading
OTELo – The Telecommunications Ombudsman Service
ROA 74 – Rehabilitation of Offenders Act 1974