

**Consultation on the repeal of
the Property Misdescriptions
Act 1991**

JANUARY 2011

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1. Introduction

Consultation on the repeal of the Property Misdescriptions Act 1991

1.1 This consultation considers options for and issues relating to the possible repeal of the Property Misdescriptions Act 1991 (PMA).

1.2 Buying a property is one of the biggest – if not the biggest - transaction of a consumer's life. An accurate property description is an important first step for consumers considering whether to view a property and to invest time and money in the house buying process. Property descriptions are part of the estate agent's offer and an important tool in building and maintaining their reputation.

1.3 Previous Governments have passed laws that provide protection for consumers and penalties for estate agents who break the law. The PMA¹ made it an offence to make false or misleading statements in the course of an estate agency or property development business about property offered for sale. More recently the Consumer Protection from Unfair Trading Regulations 2008 (CPRs)², which implements the EU Unfair Commercial Practices Directive in the UK, was introduced, which provides similar protections for consumers in a wider range of sectors. Their introduction means that consumers are protected by two broadly equivalent pieces of legislation. This duplication may be unnecessary; putting additional burdens on business, without providing additional protection for consumers. This consultation considers whether the Government should repeal the PMA, now that the CPRs are in place.

1.4 The Government is committed to removing red tape and unnecessary regulation. This consultation considers how best to achieve this in terms of property description, whilst maintaining consumer protection for a major consumer purchase.

1.5 This consultation will be of interest to estate agents, auctioneers (who sell property) and property developers. It will also be of interest to enforcers who enforce the PMA, ombudsman schemes in the property sector and consumer groups.

1.6 Questions about the policy issues raised in the document can be addressed to Graham Noyce, Consumer and Competition Policy Directorate, Department for Business, Innovation and Skills, 1 Victoria Street, London SW1H 0ET; Tel: 020 7215 2135; Fax: 020 7215 0357; E-mail: estate.agents@bis.gsi.gov.uk.

Issued: 11 January 2011
Respond by: 5 April 2011

¹ <http://www.legislation.gov.uk/ukpga/1991/29/contents>

² http://www.opsi.gov.uk/si/si2008/draft/ukdsi_9780110811574_en_1

2. Executive Summary

2.1 The purpose of this consultation is to review whether the Property Misdescriptions Act 1991 (PMA) should be repealed. The Consumer Protection from Unfair Trading Regulations 2008 (CPRs) provide broadly similar protections for business and consumers as the PMA, and it might be argued therefore that there is duplication in the laws that apply to the description of properties that are put up for sale.

2.2 The PMA makes it a criminal offence for estate agents to provide misleading information about property in 33 specified areas. The CPRs implement the EU Unfair Commercial Practices Directive (UCPD)³ and is a broad-based piece of legislation designed to protect consumers from unfair business-to-consumer commercial practices. These include commercial practices which are unfair because they give false or deceptive information or omit important information which consumers need to make informed choices.

2.3 We have considered a number of successful prosecutions that have in the past been brought under the PMA, and analysed whether they might also have been brought under the CPRs. We have concluded that it is likely in these cases that an action could also have been taken under the CPRs had they been in place at the time.

2.4 The Government has considered two options for change:

- Option 0: PMA not repealed - no change
- Option 1: Repeal of PMA - new guidance provided

2.5 Our view is that there are significant overlaps between the CPRs and the PMA that impose duplication of regulation, increasing the burden on business. In addition the scope of the CPRs is potentially wider than that of the PMA and it is therefore possible, in certain cases, that the CPRs give a wider range of protection. While our discussions with enforcement authorities indicate that the PMA is generally valued as a useful piece of consumer legislation because of its specific nature, it is also clear that practical enforcement experience of the CPRs is still developing. We consider there may be a case for providing enforcement authorities and estate agents with further guidance on how the CPRs might apply to the sale of property. In the event the PMA was repealed, this would help bridge the gap until case law develops in this area. The Government's preferred option is therefore option 1.

³ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive')

2.6 In this consultation we are seeking views on:

- The two options;
- Whether the CPRs provide a broadly equivalent level of protection for consumers as the PMA; and
- The analysis of costs and benefits in the attached impact assessment.

2.7 We would be grateful for comments on our proposals together with any supporting evidence that you have. We would also welcome any other ideas or recommendations for change that would assist in meeting the policy objective of this consultation. We would also like to hear about any unintended consequences or other implications that you can see as a result of these proposals.

2.8 A series of questions to help inform this consultation are set out in Chapter 9.

3. How to respond

3.1 When responding please state whether you are responding as an individual or whether you are representing the views of an organisation. If responding on behalf of an organisation, please make it clear who the organisation represents and, where applicable, how the views of the members were assembled.

3.2 The consultation was published on 11 January 2011. The consultation period will run for 12 weeks, and the closing date for responses is 5 April 2011. However, we encourage responses as early as possible to assist us in accelerating the process of considering replies.

3.3 A response can be submitted by letter or fax, but preferably by email to:

Graham Noyce
Consumer and Competition Policy Directorate
Department for Business, Innovation and Skills
1 Victoria Street
London SW1H 0ET
Tel: 020 7215 2135
Fax: 020 7215 0357
E-mail: estate.agents@bis.gsi.gov.uk

3.4 A list of those organisations and individuals consulted is at Annex B. We would welcome suggestions of others who may wish to be involved in this consultation process.

Additional copies

3.5 This consultation can be found at: <http://www.bis.gov.uk/consultations> and is also available from:

BIS Publications Orderline
ADMAIL 528
London SW1W 8YT
Tel: 0845 015 0010
Fax: 0845 015 0020
Minicom: 0845 015 0030

Confidentiality and data protection

3.6 Information provided in response to this consultation, including personal information, may be subject to publication or release to other parties or to disclosure in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004. If you want information, including personal data that you provide, to be treated as confidential, please be aware that under the FOIA, there is a statutory Code of

Practice with which public authorities must comply and which deals among other things with obligations of confidence.

3.7 In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic disclaimer generated by your IT system will not, of itself, be binding on the Department.

Help with queries

3.8 Questions about the policy issues raised in the document can be addressed to Graham Noyce, Department for Business, Innovation and Skills (contact details as above).

3.9 If you have any comments or complaints about the way this consultation has been conducted, these should be sent to:

Sameera de Silva
Consultation Co-ordinator
Better Regulation Team
Department for Business, Innovation and Skills
1 Victoria Street
London SW1H 0ET
Tel: 020 7215 2888
Fax: 020 7215 0235
E-mail: sameera.de.silva@bis.gsi.gov.uk

3.10 The principles of the Code of Practice on Consultations are attached at Annex A.

4. The Property Misdescriptions Act 1991 (PMA)

Background

4.1 The PMA has been in force since 1993. It sets out specific provisions on the way that estate agents⁴ and property developers describe properties for sale. The type of matters covered, which are set out in the Property Misdescriptions (Specified Matters) Order 1992⁵, are wide ranging, and include location or address, aspect, view or outlook; measurements and sizes; and physical or structural changes⁶. This was important in the past as the internet was not widely used to verify information and floor plans were not in common use.

4.2 The PMA applies to any false or misleading statements made in the course of an estate agent's, a property developer's or an auctioneer's business. It therefore applies to adverts targeted at business as well as consumers. The PMA does not cover trivial inaccuracies - the statement must be false to a "material degree". The PMA may also apply where a statement is not itself inaccurate, but where the failure to include certain information would mean that a person's understanding of a statement would be false.

Strict liability and due diligence

4.3 An offence under the PMA is a "strict liability" offence which means that where a false or misleading statement is made; there will be an offence regardless of whether the statement was deliberately false or not. Local Authority Trading Standards Officers (TSOs) prosecuting an offence under the PMA⁷, do not have to show that a statement was made negligently. It is sufficient that, as a matter of fact, the statement was made and that it was false or misleading.

4.4 However, the PMA does allow a defence of "due diligence". A person making a statement will not commit an offence if they can show that they took all reasonable steps and exercised all due diligence to avoid committing the offence. This could include training of staff and putting systems in place to ensure particulars are checked.

Enforcement

4.5 The PMA gives TSOs the power to inspect any goods and enter any premises (unless they are purely residential) to ascertain whether an offence has been committed. If TSOs have reasonable grounds for suspecting that an

⁴ The PMA also applies to solicitors when they provide estate agency services (as defined by section 1 of the Estate Agents Act 1979: <http://www.legislation.gov.uk/ukpga/1979/38>), but does not apply when they provide conveyancing services. All references to estate agents in this document therefore also apply to solicitors.

⁵ <http://www.legislation.gov.uk/ukxi/1992/2834/contents/made>

⁶ Guidance on the PMA: <http://www.bis.gov.uk/files/file25449.pdf>

⁷ In Scotland prosecutions are carried out by the Procurator Fiscal acting under the authority of the Lord Advocate.

offence has been committed, they also have powers to inspect books or documents and take copies of them.

4.6 Many TSOs have significant experience of the PMA and taking action under it. Some TSOs and estate agents have told BIS that they like the PMA because of its specificity. However, the number of cases brought by Trading Standards Departments under the PMA has declined in the United Kingdom over the last decade from 26 in 2001⁸ to three in 2008/09⁹, although it went back up to 12 in 2009/10¹⁰. This general reduction in prosecutions is not unique to the PMA. Over the same period of time there was a similar decrease in prosecutions under the Trade Descriptions Act. There may be a number of reasons for this change unrelated to compliance by estate agents with the PMA, including the changing nature of TSO work (eg greater focus on giving advice) or resource restraints. There may also be under-reporting of cases.

Devolution

4.7 The PMA applies to the whole of the UK, but the legislation is devolved in Northern Ireland. Any changes to the legislation could be made in Great Britain and in Northern Ireland with the agreement of the Northern Ireland Executive.

⁸ http://www.offt.gov.uk/shared_offt/annual_report/2001/.pdf

⁹ http://www.offt.gov.uk/shared_offt/annual_report/644197/hc475e5.pdf

¹⁰ http://www.offt.gov.uk/shared_offt/annual_report/2009/hc301-annual-report2009-10g.pdf

5. The Consumer Protection from Unfair Trading Regulations 2008 (CPRs)

Background

5.1 The CPRs implemented in the UK the EU Unfair Commercial Practices Directive (UCPD) which prohibits unfair business-to-consumer commercial practices and put in place a comprehensive framework for dealing with sharp practices and rogue traders. The CPRs prohibit traders in all sectors from engaging in unfair commercial (mainly marketing and selling) practices against consumers and set out rules that determine when commercial practices are unfair. These rules fall into three categories:

- commercial practices which contravene the requirements of professional diligence (honest market practice/good faith)¹¹;
- commercial practices which are misleading (by action and omission) and aggressive practices; and
- certain specific commercial practices which are always considered to be unfair, for example displaying a trust mark, quality mark or equivalent without having obtained the necessary authorisation.

5.2 The CPRs repealed a number of laws which covered the same subject matter, including most of the Trade Descriptions Act 1968 (TDA) and the provisions on misleading price indications in Part 3 of the Consumer Protection Act 1987. However at the time it was decided not to consult on whether to repeal the PMA, as it benefited from the exclusion in the UCPD from maximum harmonisation for immoveable property. While that is still the case, we think it is time to reconsider whether repeal is possible, given that case law is starting to develop and now that the enforcement community is becoming more familiar with the principles of the CPRs as they are used in this and other areas of consumer protection.

5.3 The CPRs do not apply to misleading statements made by estate agents and property developers to potential **commercial** customers. Businesses to business advertising complaints are dealt with under the Business Protection from Misleading Marketing Regulations 2008.

“Average consumer” and “transactional decision” tests

5.4 The first two categories of commercial practice (in 5.1) that are caught by the prohibition are principle-based; they apply only if the effect of the trader’s practice is likely to alter consumers’ transactional decisions in relation to products. “Transactional decision” is an important concept covering a wide range of decisions that have been or may be taken by consumers in relation to products. This is likely to include the decision whether to purchase a property and could also include actions such as visiting it to view it, entering an estate agents shop or paying for a survey.

¹¹ This was designed as a safety-net to catch practices that were not specified elsewhere in the Regulations.

5.5 The normal benchmark for assessing the likely effect of the practice is the “average consumer”. The CPRs also contain two variations of the average consumer test. They apply:

- where a practice is directed at a particular group of consumers; or
- where a practice is likely to affect only a clearly identifiable group of vulnerable consumers in a way which the trader could reasonably be expected to foresee, by virtue of mental or physical infirmity, age or credulity.

5.6 In either case the likely effect of the practice is then assessed from the perspective of the average member of that group. The test is what impact the misleading action or omission would have on the average consumer. It is not necessary therefore to show that a specific individual has made a different transactional decision. These variations of the average consumer test are intended to provide additional protections for vulnerable consumers. By contrast, because the third type of practice (final bullet in 5.1) is specific and therefore not principle-based, it is treated as always unfair under the Regulations.

Enforcement

5.7 The powers that are available to TSOs under the CPRs are similar to those under the PMA. In particular TSOs may inspect any goods and enter any premises (unless they are purely residential) to ascertain if an offence has been committed, and they may inspect books or documents if there is a reasonable cause to suspect that a breach has been committed.

5.8 In FY 2009/2010 OFT received notice of five prosecutions (in three Local Authority areas) under the CPRs in relation to estate agency and house purchase services. These were all around false or unauthorised displays of logos.

Devolution

5.9 Consumer protection is devolved to Northern Ireland, but the CPRs apply UK wide.

6. Comparison of PMA and CPRs

6.1 This chapter looks at the similarities and differences between the PMA and the CPRs and whether the CPRs provide broadly similar protections.

Regulatory burdens and scope

6.2 Repealing the PMA is an attractive proposition from a regulatory point of view. Estate agents and property developers would only need to follow one set of regulations. In addition, being principle-based, the CPRs have the advantage of being less likely to become out-of-date. The CPRs, which focus on whether there would be any harm when considering whether there is an offence, are potentially lighter in regulatory touch than the PMA, which takes a formulaic approach in relation to whether there is an offence.

6.3 The CPRs may also provide wider protection than the PMA to consumers. The general nature of the CPRs may mean that a broader range of situations might fall within the CPRs than are provided for under the specific provisions of the PMA. For example, the requirement on “misleading omissions” will cover material information not covered in particulars that might otherwise have influenced the decision of the consumer to purchase the property in question.

Operation and application

6.4 The PMA and CPRs can both be used to deal with inaccurate property particulars. While the protections provided are broadly equivalent, the regulations operate quite differently.

6.5 The Property Misdescriptions (Specified Matters) Order which is made under the PMA identifies the matters that, if they are not accurately described, will give rise to an offence. The list is specific and contains a wide range of matters that relate to property. Where a statement is false or misleading in relation to any of those matters and the statement is not trivial there will be an offence.

6.6 The CPRs is principle-based legislation which prohibits unfair commercial practices against consumers that distort the economic behaviour of the average consumer (the transactional decision test). In particular, the CPRs make it an offence for there to be a misleading action or omission. This is the area with the most overlap with the PMA. As with the PMA, the CPRs identify matters that should be accurately described. However, unlike the PMA this is a general list; it is not specific to property. Where a statement is false or misleading in relation to those matters there will be an offence if that statement causes or is likely to cause the average consumer to take a different transactional decision.

6.7 So, for example, if property particulars describe a property as having four bedrooms when in fact it only has three that would be a false and misleading statement under both the PMA and the CPRs. Under the PMA the

estate agent would have committed an offence as long as the misleading statement was not trivial. Under the CPRs the estate agent will have committed an offence if the statement that there are four bedrooms rather than three, causes or is likely to cause the average consumer to take a different transactional decision. This would apply to the decision to purchase a property, but also to obtaining a survey, instructing solicitors, visiting a property and even entering a shop. We do not think it will be sufficient for an estate agent to argue that information can be corrected before the consumer actually purchases a property.

6.8 In both cases, it does not matter whether or not a specific individual has in fact seen the particulars and acted upon it. However in practice under the PMA the majority of cases will come to light only when a consumer has seen the particulars concerned and we would also expect that to be the case under the CPRs.

Complaints

6.9 The OFT Market Study into Home Buying and Selling published in February 2010 considered the PMA and CPR cases that had been investigated by TSOs. As part of this study, OFT conducted a survey of Trading Standards Services in June 2009 which had the following conclusion:

“The most common category of complaints received by respondents about estate agents related to allegations of consumer protection law infringements, for example the Property Misdescriptions Act 1991 (PMA) and the Consumer Protection from Unfair Trading Regulations 2008 (CPRs). These accounted for 585 of complaints to respondents, equivalent to 44 per cent of categorised complaints received.”¹²

6.10 It was not possible for OFT to separate the PMA from the CPR cases. When explaining the way that these complaints were handled the OFT reported:

“The most common outcome from the TSOs investigations into estate agents...was informal resolution through the provision of advice to the business (42 per cent). In almost half of cases no further action was taken, due to insufficient evidence (26 per cent) or because there was no case being found to answer (21 per cent). In seven per cent of cases an informal warning was given, and in only one per cent of cases was a criminal case brought by TSS. The pattern in investigation outcomes was very similar within each of the UK’s countries.

Where enforcement action was taken, the most commonly used legislation, accounting for 11 cases, was the PMA.”¹³

¹² Section 1.4: http://www.of.gov.uk/shared_of/reports/property/Trading-Standards-Survey.pdf

¹³ Sections 3.13 and 3.14: *ibid.*

Review of actual PMA cases against CPR principles

6.11 It is not possible to directly map the provisions of the PMA to those of the CPRs. It has however been possible to carry out a comparative analysis of some of the PMA cases that have come before the courts to consider whether the protection provided by the CPRs would in theory have been any less than that available under the PMA.

6.12 We were provided with summaries of cases brought in the Magistrates Court¹⁴ by TSOs under the PMA. In most cases the summaries set out the nature of the misleading statement, whether or not there was a guilty plea and penalty (if any). We looked at a total of 30 cases from 2005 to 2009. At least 24 of those cases involved a guilty plea.

6.13 The cases covered a wide range of factual scenarios and applied to both estate agents and property developers. In order to consider whether the types of statements that have been successfully prosecuted under the PMA in the past, would also be likely to cause an average consumer to take a different decision, we have considered how important the statement might be to a potential purchaser. We have also considered whether the purchaser is likely to rely on that statement in deciding whether to view a property, instructing solicitors or surveyors or to purchase a property.

Property developers cases

6.14 This included cases where statements about whether the property complied with building regulations or was covered by a particular scheme or warranty were said to be false or misleading. Under the CPRs, some types of statement are deemed to be automatically unfair and the impact on the purchaser is irrelevant. In particular, using trade or quality marks without authorisation is prohibited and statements about particular schemes or warranties applying to a property could come within this.

6.15 However, even if these statements were not automatically unfair, we consider that statements about whether a property complies with building regulations or is covered by a particular scheme are likely to influence a purchaser when they are considering whether to purchase a property and the price they are likely to pay.

Estate agents cases

Key features of the property

6.16 There were a wider range of cases in relation to estate agents. These include statements that we think most consumers would consider to be describing key features of the property such as:

- number of rooms

¹⁴ In Scotland by the Sheriff Court

- size of rooms
- size of a garden
- that planning permission was sought for an extension that has already been built
- that the property comes with planning permission for future development
- that planning permission has or has not been obtained for particular developments to the surrounding area

6.17 It will of course depend on the specific circumstances – for example room measurements that are marginally wrong may not be sufficiently material to impact on the average consumer’s decision making. However, generally we think that misleading statements or omissions about property features such as these would be likely to influence a purchaser. In some cases the purchaser may not rely solely on the information they receive from the estate agent in making their decision – for example they may view the property themselves or instruct surveyors or solicitors to carry out checks for them. However, viewing the property or instructing solicitors are likely to be transactional decisions.

Other features

6.18 Other cases that have been brought in the past include statements about additional features of the property such as whether or not there is double glazing or parking spaces. These are of course important issues to many consumers but it is less easy to assess whether any given statement would be deemed to be such that it would cause an average consumer to take a different transactional decision.

Enforcement

6.19 In terms of enforcement, the PMA is a tried and trusted piece of legislation for all concerned. The CPRs are still relatively new and initially, at least they may require more time for TSOs to consider cases; however over time we expect this to diminish. Evidence from TSOs indicate that the average time to conduct a check on an estate agent under the PMA takes around five hours, including preparation and the inspection. A full investigation leading up to a court case is estimated to take at least 50 hours depending upon the complexity of the case (complex cases can exceed this by a factor of at least four or five), not including Counsel’s time. BIS has been informed by a number of TSOs that the cost of a prosecution¹⁵ starts at circa £15,000.

6.20 TSOs have provided BIS with differing views on the time it might take to prepare a prosecution under the CPRs. Some have informed us that it will take no longer than under the PMA, whilst others have indicated that it will take longer. Although it may initially take TSOs more time to determine which part of the CPRs have been breached (for example identifying whether a breach would fall under regulation 5(4), (5) or (6), BIS believes that over time

¹⁵ In England and Wales.

as the scope and application of the CPRs become more familiar and as case law develops, any difference should be insignificant.

Conclusion

6.21 Based on our analysis of these cases and statements we think that in the majority of cases it is likely that an offence under the PMA would also be an offence under the CPRs. It seems likely that the more serious the misleading statement (i.e. the more likely it is that a consumer will rely on a statement to their detriment) the more likely it is that the CPRs will cover the situation. The Government has concluded that the CPRs do provide a broadly equivalent level of protection to the PMA, and that if the PMA is repealed there will not be a negative impact on consumer protection in the property sector and that it should not significantly affect enforcement. The provision of specific guidance on the application of the CPRs to estate agency issues will help smooth the changeover.

7. Costs of the PMA

Summary

7.1 There is a detailed breakdown of how the costs below were calculated in the accompanying Impact Assessment (IA) at Annex D. Table 1 below sets out a summary of costs that relate to the PMA.

Table 1 Summary of costs

| Cost type | Body on whom costs fall | £000,s |
|--|--------------------------------|---------------|
| Providing information relating to the offence of property misdescription and in defence of charges related to that offence | Estate agents | 677 |
| Ensuring property particulars comply with the PMA | Estate agents | 4,131 |
| Training staff on the PMA | Estate agents | 106 |
| TSOs inspections | TSOs | 83 |
| TSOs court cases | TSOs | 165 |
| Total | | 5,162 |

Costs to estate agents

7.2 We have built up a picture of the overall costs to estate agents by using figures from a variety of sources. There is no convenient centrally held database, so in some cases we have had to make broad assumptions or use averages in order to estimate costs.

7.3 The costs associated with providing information relating to the offence of property misdescription and charges related to that offence, comes from research by PricewaterhouseCoopers in 2006 on administrative burdens on business across all of Government. Further information on the admin burdens exercise is contained in the IA.

7.4 The costs for ensuring that property particulars comply with the PMA and training estate agency staff on using the PMA, build on a survey of its members by the National Federation of Property Professionals (NFoPP). The costs are variable as they depend on the number of houses coming onto the market each year and the number of estate agency staff needing training. The NFoPP survey results and calculations/assumptions based on it are set out in the IA.

Costs to TSOs

7.5 The costs to TSOs of inspecting estate agents' premises build on information provided by Local Government Regulation, which oversees local authority regulatory work in the UK. Further details on these costs and calculations are set out in the IA.

Potential for cost overlap

7.6 The PMA and CPRs currently operate side by side. In calculating the costs and benefits we have assumed that regulatory costs associated with the PMA and CPRs are separate, and that if the PMA is repealed there will be no knock on effect on the CPRs. This assumes that estate agents spend time separately assessing property particulars under the CPRs, training staff and dealing with TSO enforcement activity. Likewise that TSOs also spend time carrying out inspections and taking cases to court. We know that the PMA is better understood at present than the CPRs, by agents and enforcers alike.

7.7 There is a risk therefore that more time is spent on the PMA than should be the case and that some of the costs associated with the PMA will transfer to the CPRs, reducing the benefits of repeal. But assessing these costs is extremely difficult. If agents and enforcers were fully conversant with the CPRs, the overlap would be much reduced. Over time as the CPRs become better understood the differential will even itself out. Better guidance will speed up the process. There are also potential gains; the CPRs through its general nature and ability to deal with misleading omissions, has the potential to provide more effective consumer protection than the PMA. While we think it sensible to consider the costs of the PMA and CPRs separately, we are seeking more information on the time spent on the regulations to help inform the IA.

8. Regulatory options

8.1 There are two possible options, both of which are also discussed in further detail in the Impact Assessment.

Option 0: PMA not repealed - no change

8.2 This would leave the current situation unaltered: two pieces of overlapping legislation with different tests for determining whether or not a misleading property description gives rise to an offence. The costs for this option would remain unchanged from those at present – in chapter 5 we estimate this as in the region of £5.2M million per annum.

8.3 No change would prevent us reducing the regulatory burdens on business, a key aim of the Government, as set out in the Coalition Agreement.

Option 1: PMA repealed and guidance on the application of the CPRs provided

8.4 The PMA and CPRs provide broadly equivalent protections for dealing with the misdescription of property for sale, and it is the Government's view that this duplication is unnecessary. The CPRs have the potential to provide wider protection in that the general nature of the regulations may cover a broader range of situations than is the case under the prescriptive provisions of the PMA.

8.5 Repeal would simplify the legislation and reduce the burdens on estate agents and enforcers. Enforcement under the CPRs is likely to target only those offences that are likely to affect a consumer's economic behaviour and therefore that are more likely to cause significant harm to consumers.

8.6 The CPRs are relatively new and we recognise that some estate agents and enforcers may need assistance in considering their application to estate agency. The OFT have kindly offered to produce guidance on the CPRs and estate agency.

9. Questions for consultees

Question 1

The Government's view is that the CPRs provide a broadly equivalent level of protection to the PMA. Do you agree?

Question 2

If your view is that the CPRs provide substantially more or less protection, please provide examples where this might be the case.

Question 3

Which of the two regulatory options would you choose – no change or repeal with guidance? Please explain why. The Government's favoured option is repeal with guidance.

Question 4

Do you have any comments on the Impact Assessment and on the costs and benefits we have identified?

Question 5

Do you have any other comments that might aid the consultation process as a whole?

For estate agents, property developers and auctioneers only:

Question 6

How much time is spent ensuring that property particulars comply with the CPRs? Is the time additional to that spent on the PMA?

Question 7

How much time is spent training staff to comply with the CPRs (in relation to property particulars)? Is the time additional to that spent on the PMA?

For Trading Standards only:

Question 8

Are there differences in the amount of time it takes to carry out enforcement related work under the PMA as opposed to the CPRs. If so please describe them?

Question 9

If the PMA was repealed, would there be a similar amount of enforcement work under the CPRs (in relation to property particulars) as takes place under the PMA?

Question 10

Assuming there was detailed guidance on the CPRs and estate agency, would there be similar number of inspections and court cases (in relation to property particulars) under the CPRs, as currently takes place under the PMA?

10. Next steps

10.1 The results of this consultation exercise, including a summary of the views expressed, will be published within 12 weeks of the closing date of the consultation. See BIS website <http://www.bis.gov.uk/consultations>.

10.2 Subject to the outcome of this consultation and Ministerial approval, Regulations repealing the PMA will be laid before Parliament. A minimum of three months notice will be given before implementation.

10.3 If legislation is taken forward we will review how enforcement is being tackled when the CPRs are themselves reviewed. We expect this to take place during 2011 and possibly later when the review of the UCPD is carried out.

Annex A - The Consultation Code of Practice Criteria

1. Formal consultation should take place at a stage when there is scope to influence policy outcome.
2. Consultation should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible.
3. Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals.
4. Consultation exercise should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach.
5. Keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained.
6. Consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.
7. Officials running consultations should seek guidance in how to run an effective consultation exercise and share what they have learned from the experience.

The complete code is available on the Better Regulation Executive's web site, address: <http://www.bis.gov.uk/files/file47158.pdf>.

Annex B - List of Organisations consulted

Association of Residential Managing Agents (ARMA)
Consumer Focus
Consumer Focus Scotland
Consumer Focus Wales
Department for Communities and Local Government
Department for Enterprise, Trade and Investment (Northern Ireland)
Douglas and Gordon Estate Agents
Feather, Smailes and Scales Estate Agents
Federation of Master Builders
General Consumer Council for Northern Ireland
Home Builders Federation
Homes for Scotland
Law Society
Law Society of Northern Ireland
Law Society of Scotland
Local Government Regulation (formerly LACORS)
Marsh and Parsons Estate Agents
National Federation of Builders
National Federation of Property Professionals (NFoPP)
Office of Fair Trading
Ombudsman Services: Property
Royal Institution of Chartered Surveyors (RICS)
RICS Scotland
Scottish Government
Society of Chief Officers of Trading Standards in Scotland
The Property Ombudsman
Trading Standards Institute
Wales Heads of Trading Standards
Welsh Assembly Government
Westminster Trading Standards
Which?
Which? Scotland

Annex C - Links to legislation and guidance

Property Misdescriptions Act 1991:

<http://www.legislation.gov.uk/ukpga/1991/29/contents>

Property Misdescriptions (Specified Matters) Order 1992:

<http://www.legislation.gov.uk/uksi/1992/2834/contents/made>

Guidance on the main provisions of the Property Misdescriptions Act 1991 and the Property Misdescriptions (Specified Matters) Order 1992:

<http://www.bis.gov.uk/files/file25449.pdf>

Consumer Protection from Unfair Trading Regulations 2008:

http://www.opsi.gov.uk/si/si2008/draft/ukdsi_9780110811574_en_1

Guidance on the Consumer Protection from Unfair Trading Regulations 2008:

http://www.offt.gov.uk/shared_offt/business_leaflets/cpreqs/oft1008.pdf

Annex D - Impact Assessment


| Title: Repeal of the Property Misdescriptions Act 1991 Lead department or agency: Department for Business, Innovation and Skills Other departments or agencies: | Impact Assessment (IA) |
|---|---|
| | IA No: BIS0031 |
| | Date: 30/11/10 |
| | Stage: Consultation |
| | Source of intervention: Domestic |
| | Type of measure: Secondary legislation |
| Contact for enquiries: Graham Noyce, Tel: 020 7215 2135, Email: graham.noyce@bis.gsi.gov.uk | |

Summary: Intervention and Options

| | |
|--|-----------------------------------|
| What is the problem under consideration? Why is government intervention necessary? The Property Misdescriptions Act 1991 (PMA) and the Consumer Protection from Unfair Trading Regulations 2008 (CPRs) both potentially cover the regulation of property descriptions by estate agents. This Impact assessment considers the costs of the PMA, in the light of the objective to consider its repeal. | |
| What are the policy objectives and the intended effects? There are two policy objectives: 1. To remove any overlap in the legislation that applies to the description of property by estate agents and others, whilst still maintaining existing levels of consumer protection; and 2. To contribute to the Government's aims to reduce the burden of legislation on business. | |
| What policy options have been considered? Please justify preferred option (further details in Evidence Base) We have considered: 1. Not repealing the PMA and leaving two pieces of legislation covering the description of property; and 2. Repealing the PMA leaving just the CPRs to regulate the description of property for sale. | |
| When will the policy be reviewed to establish its impact and the extent to which the policy objectives have been achieved? | 2011 (when the CPRs are reviewed) |
| Are there arrangements in place that will allow a systematic collection of monitoring information for future policy review? | Not applicable |

Ministerial Sign-off For consultation stage Impact Assessments:

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Signed by the responsible Minister:  Date: 7 December 2010

Summary: Analysis and Evidence

Policy Option 1

Description: To repeal the PMA and to provide guidance on the CPRs

| Price Base Year 2010 | PV Base Year 2010 | Time Period Years 10 | Net Benefit (Present Value (PV)) (£m) | | |
|-------------------------|----------------------|-------------------------|---------------------------------------|-------|----------------|
| | | | Low: | High: | Best Estimate: |

| COSTS (£m) | Total Transition (Constant Price) | Years | Average Annual (excl. Transition) (Constant Price) | Total Cost (Present Value) |
|---------------|--------------------------------------|-------|--|-------------------------------|
| Low | | 1 | | |
| High | | | | |
| Best Estimate | 0 | | -£5.2m | -44.5 |

Description and scale of key monetised costs by ‘main affected groups’

By repealing the PMA, costs totalling £5.2m will be saved. As this is a deregulatory measure, the costs are presented as negative costs.

- £680k to estate agents in providing information to Trading Standards Officers in relation to offences under the PMA and providing information in defence of such charges.
- £4.13m to estate agents in preparing property particulars to comply with the PMA.
- £106k to estate agents in training new entrants on the PMA.
- £83k to Trading Standards Departments in inspection costs.
- £165k to Trading Standards Departments in bringing cases to court.

Other key non-monetised costs by ‘main affected groups’

The OFT estimate that non-staff costs in producing guidance and holding a workshop on the CPRs would be in the region of £4k. We consider these costs to be negligible.

| BENEFITS (£m) | Total Transition (Constant Price) | Years | Average Annual (excl. Transition) (Constant Price) | Total Benefit (Present Value) |
|---------------|--------------------------------------|-------|--|----------------------------------|
| Low | | 1 | | |
| High | | | | |
| Best Estimate | 0 | | 0 | 0 |

Description and scale of key monetised benefits by ‘main affected groups’

By reducing the amount of regulation in the industry, there will be benefits to estate agents and Trading Standards Departments of £5.2m as per the costs detailed above.

Other key non-monetised benefits by ‘main affected groups’

The provision of targeted guidance on the CPRs will help improve understanding of the Regulations. This will help the sector to make better use of them and produce more consistent regulation.

| | | |
|--|--------------------------|-----|
| Key assumptions/sensitivities/risks | Discount rate (%) | 3.5 |
|--|--------------------------|-----|

The PMA is a well understood by both the industry and enforcers. The CPRs in contrast is less well understood, being both relatively new and principles based legislation affecting all sectors. Case law is also currently limited. There is a risk that the repeal of the PMA at this stage may lead to some confusion about regulating property descriptions exposing consumers to reduced consumer protection. The provision of guidance by the OFT is designed to address this issue.

| | | | | | |
|--|------------------|-----------|--|--|-----------------|
| Impact on admin burden (AB) (£m): | | | Impact on policy cost savings (£m): | | In scope |
| New AB: 0 | AB savings: 0.68 | Net:-0.68 | Policy cost savings: 3.5 | | Yes |

Enforcement, Implementation and Wider Impacts

| | | | | | |
|---|-----------------------|-----------------------|---------------------------|----------------------|---------------------|
| What is the geographic coverage of the policy/option? | United Kingdom | | | | |
| From what date will the policy be implemented? | 1 October 2011 | | | | |
| Which organisation(s) will enforce the policy? | TSDs and OFT | | | | |
| What is the annual change in enforcement cost (£m)? | 0.25 | | | | |
| Does enforcement comply with Hampton principles? | Yes | | | | |
| Does implementation go beyond minimum EU requirements? | N/A | | | | |
| What is the CO ₂ equivalent change in greenhouse gas emissions? (Million tonnes CO ₂ equivalent) | Traded: N/A | | Non-traded: N/A | | |
| Does the proposal have an impact on competition? | No | | | | |
| What proportion (%) of Total PV costs/benefits is directly attributable to primary legislation, if applicable? | Costs: 100 | | Benefits: | | |
| Annual cost (£m) per organisation (excl. Transition) (Constant Price) | Micro N/A | < 20 N/A | Small N/A | Medium N/A | Large N/A |
| Are any of these organisations exempt? | No | No | No | No | No |

Specific Impact Tests: Checklist

Set out in the table below where information on any SITs undertaken as part of the analysis of the policy options can be found in the evidence base. For guidance on how to complete each test, double-click on the link for the guidance provided by the relevant department.

Please note this checklist is not intended to list each and every statutory consideration that departments should take into account when deciding which policy option to follow. It is the responsibility of departments to make sure that their duties are complied with.

| Does your policy option/proposal have an impact on...? | Impact | Page ref within IA |
|--|--------|--------------------|
| Statutory equality duties ¹⁶ Statutory Equality Duties Impact Test guidance | No | 20 |
| Economic impacts | | |
| Competition Competition Assessment Impact Test guidance | No | 19 |
| Small firms Small Firms Impact Test guidance | No | 19 |
| Environmental impacts | | |
| Greenhouse gas assessment Greenhouse Gas Assessment Impact Test guidance | No | 20 |
| Wider environmental issues Wider Environmental Issues Impact Test guidance | No | 20 |
| Social impacts | | |
| Health and well-being Health and Well-being Impact Test guidance | No | 20 |
| Human rights Human Rights Impact Test guidance | No | 20 |
| Justice system Justice Impact Test guidance | No | 20 |
| Rural proofing Rural Proofing Impact Test guidance | No | 20 |
| Sustainable development Sustainable Development Impact Test guidance | No | 20 |

¹⁶ Race, disability and gender Impact assessments are statutory requirements for relevant policies. Equality statutory requirements will be expanded 2011, once the Equality Bill comes into force. Statutory equality duties part of the Equality Bill apply to GB only. The Toolkit provides advice on statutory equality duties for public authorities with a remit in Northern Ireland.

Evidence Base (for summary sheets) – Notes

Use this space to set out the relevant references, evidence, analysis and detailed narrative from which you have generated your policy options or proposal. Please fill in **References** section.

References

Include the links to relevant legislation and publications, such as public impact assessment of earlier stages (e.g. Consultation, Final, Enactment).

| No. | Legislation or publication |
|-----|--|
| 1 | Property Misdescriptions Act 1991: http://www.legislation.gov.uk/ukpga/1991/29/contents |
| 2 | Property Misdescriptions (Specified Matters) Order 1992: http://www.legislation.gov.uk/uksi/1992/2834/contents/made |
| 3 | Guidance on the Property Misdescriptions Act 1991 and the Property Misdescriptions (Specified Matters) Order 1992: http://www.bis.gov.uk/files/file25449.pdf |
| 4 | Consumer Protection from Unfair Trading Regulations 2008: http://www.opsi.gov.uk/si/si2008/draft/ukdsi_9780110811574_en_1 |
| 5 | OFT Annual Reports 2005/06 to 2009/10: http://www.of.gov.uk/OFTwork/publications/publication-categories/corporate/annual-report/ |
| 6 | OFT home buying and selling market study: http://www.of.gov.uk/shared_of/reports/property/OFT1186.pdf |
| 7 | OFT survey of local authority Trading Standards Services: http://www.of.gov.uk/shared_of/reports/property/Trading-Standards-Survey.pdf |
| 8 | ONS Annual Survey of Hours and Earnings (2009) Table 14.7a: http://www.statistics.gov.uk/downloads/theme_labour/ASHE-2009/2009_occ4.pdf |

Evidence Base

Ensure that the information in this section provides clear evidence of the information provided in the summary pages of this form (recommended maximum of 30 pages). Complete the **Annual profile of monetised costs and benefits** (transition and recurring) below over the life of the preferred policy (use the spreadsheet attached if the period is longer than 10 years).

The spreadsheet also contains an emission changes table that you will need to fill in if your measure has an impact on greenhouse gas emissions.

Annual profile costs and benefits - (£m) present value

| | Y ₀ | Y ₁ | Y ₂ | Y ₃ | Y ₄ | Y ₅ | Y ₆ | Y ₇ | Y ₈ | Y ₉ |
|----------------------------------|----------------|----------------|----------------|----------------|----------------|----------------|----------------|----------------|----------------|----------------|
| Transition costs | | | | | | | | | | |
| Annual recurring cost | -5.2 | -5.02 | -4.84 | -4.67 | -4.51 | -4.35 | -4.20 | -4.05 | -3.91 | -3.77 |
| Total annual costs | -5.2 | -5.02 | -4.84 | -4.67 | -4.51 | -4.35 | -4.20 | -4.05 | -3.91 | -3.77 |
| Transition benefits | | | | | | | | | | |
| Annual recurring benefits | | | | | | | | | | |
| Total annual benefits | | | | | | | | | | |

* For non-monetised benefits please see summary pages and main evidence base section

EVIDENCE BASE (for summary sheets)

Regulatory Policy Committee opinion and response

This Impact Assessment (IA) was reviewed by the Regulatory Policy Committee (RPC) on 18 November 2010. The RPC's overall assessment was as follows:

"The benefits of the repeal of Property Misdescriptions Act 1991 (PMA) are adequately identified. However, the estimates of the monetised benefits cannot be considered reliable and will need to be strengthened during the consultation process."

The RPC had specific concerns about the reliability of the monetised benefits set out in the IA:

1. When estimating the cost to estate agents of complying with the PMA regulation, the IA does not consider non-wage costs in its calculations.
2. It appears incorrect to claim a benefit from the reduced court costs associated with the PMA as, presumably, at least some of these claims will be made under the Consumer Protection from Unfair Trading Regulations 2008 (CPRs) instead.
3. It appears to be questionable to claim full administrative cost savings for all estate agents (£3.4m) especially since the majority of them, as the IA claims, consider the associated compliance costs as *"business-as-usual rather than a regulatory burden"*.

In response we make the following comments and observations:

1. The cost to estate agents of complying with the PMA now includes a figure for non-wage costs, which increases the total from £3.4m to £4.1m.
2. The consultation document addresses the RPC's concerns about court costs associated with the CPRs by asking Trading Standards questions about the time taken to enforce the PMA and CPRs. We expect the answers to these questions to clarify the extent of the cost savings.
3. We consider that all of the £3.4m (now £4.1m) cost savings attributable to estate agents preparing property particulars to comply with the PMA, should be considered an administrative cost saving. The cost figure is based upon survey data from estate agents who were asked how long they spent on the PMA for each set of particulars drawn up - the average figure was 10 minutes. While it is possible that some agents through long familiarity with the Act and habit may consider the compliance cost to be business-as-usual, they are a regulatory cost.

Context

The consumer needs to feel confident that descriptions of property for sale are accurate. This has not always been the case and past Governments have made laws that provide protection for consumers and penalties for estate

agents and others¹⁷ who misdescribe property. In 1991 the Property Misdescriptions Act (PMA)¹⁸ was introduced that made it an offence to make false or misleading statements in the course of an estate agency or property development business about property offered for sale. More recently the Consumer Protection from Unfair Trading Regulations 2008 (CPRs)¹⁹, which implements the EU Unfair Commercial Practices Directive in the UK, was introduced, which provides wide reaching protections for consumers, and potentially covers the same ground as the PMA. As they derive from a Directive, the CPRs are an unavoidable obligation. Their introduction means that consumers are protected by two broadly equivalent pieces of legislation. This duplication may be unnecessary; putting additional burdens on business, without providing additional protection for consumers. The accompanying consultation considers whether the Government should repeal the PMA, now that the CPRs are in place.

Property Misdescriptions Act 1991

The PMA has been in force since 1993. It sets out specific provisions on the way that estate agents and property developers describe properties for sale. The type of matters covered, which are set out in the Property Misdescriptions (Specified Matters) Order 1992²⁰, are wide ranging, and include location or address; aspect, view or outlook; measurements and sizes; and physical or structural changes²¹. At the time of its inception, the internet was not widely used and floor plans were not in common use. It is a well-established and understood piece of legislation by both business and enforcers.

The PMA applies to false or misleading statements made in the course of an estate agent's, a property developer's or an auctioneer's business. It does not cover trivial inaccuracies - the statement must be false to a "material degree". The PMA may also apply where a statement is not itself inaccurate, but where the failure to include certain information would mean that a person's understanding of a statement would be false.

An offence under the PMA is a "strict liability" offence which means that where a false or misleading statement is made, there will be an offence regardless of whether the statement was deliberately false or not. Local Authority Trading Standards Officers (TSOs) prosecuting an offence under the PMA²², do not have to show that a statement was made negligently. It is sufficient that, as a matter of fact, the statement was made and that it was false or misleading. However, the PMA does allow a defence of 'due diligence'. A person making a statement will not commit an offence if he can show that they took all reasonable steps and exercised all due diligence to avoid committing the

¹⁷ The PMA applies to solicitors, property developers and auctioneers who market property in the course of an estate agency or property development business. The PMA does not apply to solicitors when they provide conveyancing services.

¹⁸ <http://www.legislation.gov.uk/ukpga/1991/29/contents>

¹⁹ http://www.opsi.gov.uk/si/si2008/uksi_20081277_en_1

²⁰ <http://www.legislation.gov.uk/uksi/1992/2834/contents/made>

²¹ Guidance on the PMA: <http://www.bis.gov.uk/files/file25449.pdf>

²² In Scotland prosecutions are carried out by the Procurator Fiscal acting under the authority of the Lord Advocate.

offence. This could include training of staff and putting systems in place to ensure particulars are checked.

The PMA gives TSOs the power to inspect any goods and enter any premises (unless they are purely residential) to ascertain whether an offence has been committed.. If TSOs have reasonable grounds for suspecting that an offence has been committed, they also have powers to inspect books or documents and take copies of them.

Many TSOs will have significant experience of the PMA and taking action under it. But the number of cases brought by Trading Standards Departments under the PMA has declined in United Kingdom over the last decade from 26 in 2001²³ to 3 in 2008/09²⁴, although it went back up to 12 in 2009/10²⁵. This reduction in prosecutions is not unique to the PMA. Over the same period of time there was a similar decrease in prosecutions under the Trade Descriptions Act. There may be a number of reasons for this change, unrelated to compliance by estate agents with the PMA, including the changing nature of TSO work – with more emphasis given to giving advice – to resource restraints. There may also be under reporting of cases.

The Consumer Protection from Unfair Trading Regulations 2008

The CPRs implemented in the UK the EU Unfair Commercial Practices Directive which prohibits unfair business-to-consumer commercial practices and put in place a comprehensive framework for dealing with sharp practices and rogue traders. The CPRs prohibit traders in all sectors from engaging in unfair commercial (mainly marketing and selling) practices against consumers and set out rules that determine when commercial practices are unfair. These rules fall into three categories:

- commercial practices which contravene the requirements of professional diligence (honest market practice/good faith);
- commercial practices which are misleading (by action and omission) and aggressive practices; and
- certain specific commercial practises which are always considered to be unfair.

The first two categories of commercial practice which are caught by the prohibition are principles-based; they apply only if the effect of the trader's practice is likely to alter consumers' "transactional decisions" in relation to products. The normal benchmark for assessing the likely effect of the practice is the "average consumer". However, the CPRs contain two variations of the average consumer test. These apply:

- where a practice is directed at a particular group of consumers;

²³ http://www.offt.gov.uk/shared_offt/annual_report/2001/.pdf

²⁴ http://www.offt.gov.uk/shared_offt/annual_report/644197/hc475e5.pdf

²⁵ http://www.offt.gov.uk/shared_offt/annual_report/2009/hc301-annual-report2009-10g.pdf

- where a practice is likely to affect only a clearly identifiable group of vulnerable consumers in a way which the trader could reasonably be expected to foresee, by virtue of mental or physical infirmity, age or credulity.

In either case the likely effect of the practice is then assessed from the perspective of the average member of that group. These variations of the average consumer test are intended to provide additional protections for vulnerable consumers. By contrast, the third type of commercial practice caught by the prohibition is not principles based, and is always unfair.

Under the CPRs a misleading action or omission must also cause or be likely to cause the average consumer to take a different transactional decision in relation to the product. Transactional decision is an important concept covering a wide range of decisions that have been or may be taken by consumers in relation to products. This might include the decision whether to purchase a product, how much to pay and whether to seek a refund. The test is what impact the misleading action or omission would have on the average consumer. It is not necessary therefore to show that a specific individual has made a different transactional decision.

The CPRs repealed a number of laws which covered the same subject matter including most of the Trade Descriptions Act 1968 (TDA) and the provisions on misleading price indications in Part 3 of the Consumer Protection Act 1987. However, at the time it was decided not to consult on whether to repeal the PMA, as it benefitted from the exclusion in the UCPD from maximum harmonisation for immovable property. While that is still the case, we think it is time to reconsider whether repeal is possible, given that case law is starting to develop and the CPRs are now being more widely used by the enforcement community.

PMA/CPRs comparison

The PMA and CPRs can both be used to deal with inaccurate property particulars. While the protections provided are broadly equivalent, the regulations operate quite differently.

The PMA is prescriptive in the types of matters that must be accurately described in property particulars, whereas the CPRs is principles based legislation which prohibits all unfair commercial practices against consumers provided they distort the economic behaviour of the average consumer (transactional decision test). In the context of property particulars, a description would be unfair if it persuaded an average buyer to inspect a property, which he would not have done if he knew the information was incorrect ie there was not a parking space. In the case of the PMA, an offence is committed if the property is described in a manner that breaches the requirements of the Act – it makes no difference if those particulars have not been seen by any prospective buyer, although in practice the majority of cases will come to light only when a consumer has seen the particulars concerned. Whereas under the CPRs, a property description is only

misleading (by action or omission) if “it causes or is likely to cause the average consumer to take a transactional decision he would not have taken otherwise”. A trader could argue in his defence that the consumer did not take a ‘transactional decision’ when he viewed an advert, for example in an estate agent’s window, and that any false or deceptive information contained in the advert would be corrected in good time before the consumer made an actual purchase. Such a defence could not be used under the PMA.

The CPRs also do not apply to misleading statements made by estate agents and property developers to potential commercial customers. Business to business advertising complaints are dealt with under the Business Protection from Misleading Marketing Regulations 2008.

The OFT Market Study into Home Buying and Selling published in February 2010 considered the PMA and CPR cases that had been investigated by TSOs. As part of this study, OFT conducted a survey of Trading Standards Services in June 2009 which had the following conclusion:

“The most common category of complaints received by respondents about estate agents related to allegations of consumer protection law infringements, for example the Property Misdescriptions Act 1991 (PMA) and the Consumer Protection from Unfair Trading Regulations 2008 (CPRs). These accounted for 585 of complaints to respondents, equivalent to 44 per cent of categorised complaints received.”²⁶

It was not possible for OFT to separate the PMA from the CPR cases. When explaining the way that these complaints were handled the study also reported:

“The most common outcome from the Trading Standards Services investigations into estate agents ... was informal resolution through the provision of advice to the business (42 per cent). In almost half of cases no further action was taken, due to insufficient evidence (26 per cent) or because there was no case being found to answer (21 per cent). In seven per cent of cases an informal warning was given, and in only one per cent of cases was a criminal case brought by TSS. The pattern in investigation outcomes was very similar within each of the UK’s countries.

Where enforcement action was taken, the most commonly used legislation, accounting for 11 cases, was the PMA.”²⁷

Implications of repealing the PMA and relying on the CPRs

Repealing the PMA is an attractive proposition from a regulatory point of view. Estate agents and property developers would only need to abide by one set of

²⁶ Section 1.4: http://www.of.gov.uk/shared_of/reports/property/Trading-Standards-Survey.pdf

²⁷ Sections 3.13 and 3.14: *ibid*.

regulations. In addition, being principle based, the CPRs have the advantage of being future proofed.

There is also potential for the CPRs to provide wider protection to consumers. The general nature of the provisions may mean that a more broad range of situations might fall within the CPRs than are provided for under the specific provisions of the PMA. The requirement on “misleading omissions” will cover material information not covered in particulars that might otherwise have influenced the decision of the consumer to purchase the property in question.

However, the requirement for a transactional decision test under the CPRs means that the PMA and the CPRs are not easily comparable – it is not possible to directly map the provisions of the PMA to those of the CPRs. It is therefore difficult to judge if repealing the PMA and relying solely on the CPRs would have a negative impact on consumer protection. To address these concerns we carried out a comparative analysis of some of the PMA cases to have come before the courts to consider whether the protection provided by the CPRs would in theory have been any less than that which was available by the PMA. While it was not possible to directly map the provisions of the PMA to those of the CPRs, or to be sure what would have happened if the case had been brought under the CPRs, we were able to make a number of comparisons, based on certain types of misleading statements brought before the courts. This is dealt with further in the accompanying consultation.

Based on our analysis of these cases and statements we think that in the majority of cases it is likely that an offence under the PMA would also be an offence under the CPRs. It seems likely that the more severe the consumer detriment the more likely it is that the CPRs will cover the situation. The Government has concluded that the CPRs do provide a broadly equivalent level of protection to the PMA, and that if the PMA is repealed there will not be a negative impact on consumer protection in the property sector. The accompanying consultation sets out the Government’s case for repeal.

Rationale for intervention

The aim of recommending the repeal of the PMA is to reduce burdens on business in relation to describing property particulars.

Estate agents and property developers are currently required to follow requirements in the PMA and CPRs when describing properties for sale. The Government considers that the two sets of regulations provide broadly equivalent protections and that this duplication is unnecessary. Repealing the PMA will reduce the administrative burden on business (for example by removing the training required on the PMA) without having a negative impact on consumer protection in the property sector.

It is also arguable that the CPRs provide more effective consumer protection than the PMA in relation to property descriptions. The general nature of the provisions under the CPRs, in particular its ability to deal with misleading omissions, means that a wider range of situations may fall within its scope.

But the PMA is a well understood by enforcers and is generally their preferred course of action for dealing with property misdescription, as they are more familiar with it. That said, since the CPRs came into force there have been several cases involving property descriptions that have been brought by TSOs under the CPRs. Following repeal of the PMA, we would expect enforcers to become more familiar with CPRs and, in time, make full use of its wider coverage to the benefit of consumers.

Policy objective

The objective is to repeal the Property Misdescriptions Act 1991 so that estate agents and property developers are regulated in the way they describe properties for sales by one set of regulations; the CPRs.

The intervention will have succeeded if the level of consumer protection provided under CPRs is broadly similar to that provided by the PMA and CPRs combined.

Options considered

This IA considers the costs and benefits of repealing the PMA leaving just the CPRs to regulate the description of property for sale.

Option 0: Do nothing

Under this option the PMA would not be repealed. This would leave the current situation unaltered with two pieces of overlapping legislation with different tests for determining whether a property description is misleading.

Option 1: Repeal the PMA and provide guidance on the CPRs

Under this option the PMA would be repealed leaving the CPRs to regulate the description of property particulars, thereby removing the duplication between the PMA and CPRs. Detailed guidance would be provided to enforcers and business on the operation of the CPRs, which together with training, would help familiarise them with its operation. This would enable enforcers to be able to make better use of the CPRs and more effectively regulate property particulars, and help businesses comply with what is still a relatively new set of regulations.

The Government's preferred option is option 1. This will reduce burdens on business without impacting on consumer protection. As the CPRs become better known and used more effectively there may be a net improvement in consumer protection.

Business sectors affected

The main impact of reduced costs or benefits arising from the repeal of the PMA is for estate agents, property developers and auctioneers who sell property. In February 2010 the Office of Fair Trading estimated there were

approximately 14,500 traditional estate agency offices in the UK²⁸. 75% of the market is made up of small chains of offices (below 50 branches) and independents²⁹. The average number of full-time employees per branch was four in 2009³⁰. New build property tends to be sold directly by property developers.

The other main sector affected is the enforcement community; in England and Wales and Scotland local authority TSDs and in Northern Ireland the Department for Enterprise, Trade and Investment.

Devolution

The PMA applies UK wide, but is a devolved matter in Northern Ireland. Any changes affecting the Act in England, Wales and Scotland, will need to be agreed by the Northern Ireland Executive.

The CPRs also apply UK wide. The Northern Ireland Executive was required to implement the UCPD, which it did via the CPRs.

Risks and assumptions

Option 0: Do nothing

The chief risk from not repealing the PMA is that business continues to be burdened by unnecessary regulation. They would be left with two pieces of overlapping legislation with different tests for determining whether a property description is misleading, with the associated costs of checking property particulars against both sets of regulations.

The Government considers the CPRs to provide broadly equivalent protection to the PMA and that the Act's repeal would not have a negative impact on consumer protection. In view of the CPRs potentially greater coverage, consumer protection could improve as enforcers become more familiar with the regulation and use them more effectively.

Option 1: Repeal the PMA and provide new guidance on the CPRs

Repealing the PMA will leave the CPRs to regulate the description of property particulars, thereby reducing the administrative burden on business.

The main risk from option 1 is any potential for consumer protection to be reduced. Relying on a relatively new set of regulations, which are less well understood than the PMA, risks exposing consumers to reduced consumer protection. There is also a relatively small pool of case law to guide enforcers.

²⁸ OFT home buying and selling market study – paragraph 3.28:
http://www.offt.gov.uk/shared_offt/reports/property/OFT1186.pdf

²⁹ OFT home buying and selling market study – paragraph 3.29

³⁰ OFT home buying and selling market study – paragraph 3.31

The provision of guidance on the CPRs will help to address this lack of familiarity enabling enforcers to make better use of the CPRs and more effectively regulate property particulars. It will also help business understand how the CPRs work in relation to property transactions.

The Government considers the CPRs to provide broadly equivalent protection to the PMA and does not consider the repeal of the PMA to negatively impact on consumer protection provided familiarity issues are addressed. The greater coverage of the CPRs may actually result in improved consumer protection.

The PMA and CPRs currently operate side by side. In calculating the costs and benefits we have assumed that regulatory costs associated with the PMA and CPRs are separate, and that if the PMA is repealed there will be no knock on effect on the CPRs. This assumes that estate agents spend time separately assessing property particulars under the CPRs, training staff and dealing with TSO enforcement activity. Likewise that TSOs also spend time carrying out inspections and taking cases to court. We know that the PMA is better understood than the CPRs by agents and enforcers alike. There is a risk therefore that more time is spent on the PMA than should be the case and that some of the costs associated with the PMA will transfer to the CPRs, reducing the benefits of repeal. But assessing these costs is extremely difficult. If agents and enforcers were fully conversant with the CPRs, the overlap would be much reduced. Over time as the CPRs become better understood the differential will even itself out. Better guidance will speed up the process. There are also potential gains; the CPRs through its general nature and ability to deal with misleading omissions, has the potential to provide more effective consumer protection than the PMA. While we think it sensible to consider the costs of the PMA and CPRs separately, we are seeking more information on the time spent on the regulations in the accompanying consultation.

Costs and benefits

Option 0: Do nothing

This option is cost neutral – there would be no change in the existing costs to business and the enforcement community. Currently, the annual costs to both business and the enforcement community relating to the PMA are estimated to be £4.4m. Detailed analysis of these costs is outlined further in option 1 below.

Option 1: Repeal the PMA and provide guidance on the CPRs

This is the Government's preferred option.

The OFT have offered to provide guidance on the CPRs in relation to estate agency if the PMA were repealed. The Government welcomes this offer, which should provide TSOs and business useful information on the application of the CPRs to the sector.

Repeal of the PMA would mean that estate agencies would be able to concentrate on ensuring their practices comply with the CPRs, rather than both the CPRs and the PMA. There would be a saving on the costs of training for new recruits. It would still be necessary to check particulars for compliance with the CPRs, but this should be happening already. We estimate that this option would remove a regulatory burden of £4.4m per year on business and enforcement authorities combined. Detailed analysis of the likely cost reduction is set out below.

The costs that the PMA imposes on the estate agency, property development and auctioneering industries are difficult to determine with precision. As it has been in operation for nearly 20 years, and because it is good business practice not to mislead consumers, the great majority of estate agents are very familiar with it and costs associated with ensuring compliance are seen by some as business-as-usual rather than a regulatory burden³¹. We have considered a number of ways of calculating the costs of the PMA. There are four elements that build up the full picture. These are the Admin Burdens Exercise from 2006, the costs to estate agents of compliance (based on survey data from agents) and the costs of TSOs in inspections and bringing cases. In addition there would be a cost in producing and disseminating guidance by the OFT. The OFT estimate that non-staff costs in producing guidance and holding a workshop would be in the region of £4k³². These costs are negligible and are not included in the overall cost-benefit calculations at the end of this document.

Admin burdens 2006

In 2006 PricewaterhouseCoopers carried out an exercise to assess the regulatory burden of Regulations across the whole of Government, on behalf of the Government at the time. The regulatory costs estimated for the PMA in this exercise are set out in table 1 below.

Table 1: Admin Burdens Exercise costs

| Cost description | £000's |
|---|---------------|
| Providing information to enforcement officers | 520 |
| Due diligence | 157 |
| Total | 677 |

This study covered only the costs to estate agents of providing information to Trading Standards Officers in relation to offences under the PMA and providing information in defence of such charges.

Estate agents costs

As part of calculating the costs to estate agents, we undertook a survey of estate agents, with the assistance of the National Federation of Property

³¹ The text submitted to the RPC excluded the words “by some”.

³² Design costs £2,850 and workshop costs £840

Professionals (NFoPP) who surveyed their members, the results of which are at Annex 4. From the results we have been able to make calculations about both the ongoing costs to estate agents of ensuring compliance with the PMA, and of the one-off training costs for new members of staff. The calculations are summarised below. We estimate that the total costs of compliance with the PMA for estate agents are:

| | |
|--|---------|
| Cost per annum of preparing particulars to comply with the PMA | £4.1m |
| Cost per annum of training new entrants | £0.106m |

Ensuring particulars comply with PMA

Estate agents have to spend time considering the PMA every time they prepare a property description, or a “particular”. In order to work out the time spent on this, we have first calculated the cost of preparing a particular. This is based on information about average estate agents salary, the number of house sales and the time it takes to put a particular together. The calculation is made up in the following way.

An average estate agents salary (from the Office for National Statistics ASHE database³³) is £25,994. The average hourly rate is £15.17 (salary / number of working days). This calculation is set out in detail in Annex 3. We also know from the NFoPP survey that the average amount of time taken considering the PMA on any given particular is 10 minutes.

Therefore the cost of compliance with the PMA when preparing each particular is 10 x 25.23p equalling £2.53 per particular.

The number of house sales in 2009 was 675,132. It is acknowledged by estate agents that they do not sell all of the properties that they market. There is a high drop out rate and we have been told by some estate agents that this is in the region of 50%.

The cost to estate agents therefore of complying with the PMA is £2.53 multiplied by the number of house sales (675,132) multiplied by 2 as there are approximately twice as many particulars produced as house sales.

We have multiplied the total by 21% to take account of non-wage costs such as employers’ National Insurance and pension costs.

The total cost in 2009 of ensuring particulars complied with the PMA is therefore estimated at £4.1m.

This cost is a variable one and will depend on the number of houses coming onto the market each year. The number of sales in 2009 was particularly low and therefore the cost above could be regarded as a conservative one.

³³ Source: ONS Annual Survey of Hours and Earnings (2009) Table 14.7a:
http://www.statistics.gov.uk/downloads/theme_labour/ASHE-2009/2009_occ4.pdf

Estate agents training costs

The NFoPP Survey estimates that estate agents spend an average of two hours training new staff on the PMA. The OFT Home Buying and Selling Market Study of 2010 estimated that there are 14,500 estate agents in the UK. The NFoPP survey indicated that, out of those who replied, there was a turnover in the industry of 5%. This equates to approximately 2,900 new staff per year based on there being four full-time employees per branch. It may be that some of these new staff will have simply transferred from another estate agent and will therefore be experienced in the PMA and will not need training. However, it is difficult to be sure what percentage of “new staff” there may be. The figures below therefore represent a likely maximum of time spent on training.

The hourly rate for an estate agent (see above) is £15.17. The NFoPP survey shows that new estate agents receive two hours training in the PMA. The costs of training estate agents in the PMA is therefore 2,900 (no of new entrants) multiplied by £30.34 (the cost of two hours work).

| | |
|------------------------------------|--|
| Number of estate agents | 14,500 |
| Number of staff per branch | 4 |
| Turnover in industry | 5% |
| New entrants | $725 \times 4 = 2,900$ |
| Time taken to train new recruits | 2 hours |
| Estate Agent hourly rate | £15.17 |
| Estimated training cost in the PMA | $= 2,900 \times 2 \times £15.17 = £87,986$ |
| 21% uplift for non-wage costs | = £106,463 |

The calculations for these figures are provided in Annex 3.

Trading Standards Officers costs

In addition to the time spent by estate agents on the PMA there is also the enforcement aspect which is performed by Trading Standards Officers (TSOs). We have sought views from TSOs as to how much time they spend enforcing the PMA. The answers that they have provided have varied, as each case is different in its complexity and therefore any costings are approximate.

We have identified two sets of costs that involve TSOs and the PMA. The cost of inspecting estate agents is estimated as £83k. The cost of bringing a case to court is estimated as £50k. The detailed calculations are set out below.

Inspections - Local Government Regulation (formerly LACORS) have provided the salary costs for a TSO. In addition to this TSOs have provided estimates for the amount of time it takes to work with the PMA. In relation to the number of annual inspections, the Admin Burdens exercise estimated 500 and the OFT Market Study on Home Buying and Selling estimated 545, but this included the CPRs as well. TSOs have told BIS that the time it takes to prepare and undertake an inspection varies from five to seven hours. LGA

have told us that the average annual salary for a TSO is £57,159. The hourly cost is therefore £33.36. The number of inspections per year is around 500. This gives total inspections costs of around £83,000 (the cost a TSO per hour (£33.36) multiplied by five (how long an inspection takes) multiplied by 500 (the number of inspections)).

Cost of bringing a case to court - TSOs have informed us that the number of hours it takes to bring a case to court can vary widely from 50 to 150 hours (and could be many more if it is a complicated case). For the purposes of this exercise we have taken 100 as the number of hours. Also TSOs have told us that court cases³⁴ on average cost around £15,000 (excluding TSO time). In view of the fluctuation in PMA court cases in recent years we have calculated the average number of cases going back over five years from 2005/06 to 2009/10³⁵, which comes to nine. This data is set out in the table below.

Table 2: PMA court cases reported to the OFT 2005/06 to 2009/10

| Year | Court cases |
|----------------|-------------|
| 2005/06 | 13 |
| 2006/07 | 10 |
| 2007/08 | 8 |
| 2008/09 | 3 |
| 2009/10 | 12 |
| Average | 9.2 |

- The cost of a TSO per hour is £33.36. Multiplied by 100 (the mid-range) hours it will give us the cost of each court case in TSO time. This equals £3,336.
- Each court cases costs £15,000. Therefore the cost of each prosecution is £18,336 being £15,000 (court cases costs) plus costs of TSO time (£3,336).
- There are nine court cases per year. The costs therefore are £18,336 multiplied by nine which equals £165,000.

The consultation document seeks further details from Trading Standards on enforcement work and court costs.

Summary of option analysis

| Cost type | £000's |
|----------------------|--------------|
| Admin Burdens | 677 |
| Cost of descriptions | 4,131 |
| Cost of training | 106 |
| TSOs inspections | 83 |
| TSOs court cases | 165 |
| Total | 5,162 |

³⁴ In England and Wales

³⁵ From OFT Annual Reports

One In, One Out

Under the 'One In, One Out' rule, whereby a measure that has a net cost to business must have a measure or measures of equivalent cost removed in order to be implemented, the PMA represents a saving to business of £4.9m³⁶ to be banked as a One Out.

Administrative burden and policy savings

The Government is of the opinion that the CPRs provides broadly equivalent protection to consumers in relation to the description of property particulars, as that provided by the PMA. The CPRs derive from the UCPD so are an unavoidable obligation. Repealing the PMA is therefore both a deregulatory and simplification measure.

Wider impacts

Both the PMA and the CPRs are enforced by the local authority TSDs. The CPRs are also enforced by the Office of Fair Trading. The PMA is better understood by Trading Standards Officers than the CPRs and generally their preferred course of action for dealing with property misdescription. But their use of the CPRs will improve over time as they become more familiar with it. The repeal of the PMA and better guidance will speed this process.

Small firms impact test

The majority of estate agency firms are small businesses – 75% of the market is made up of small chains of offices (below 50 branches) and independents. The average number of full-time employees per branch was four in 2009.

The costs and benefits from repealing the PMA and relying on the CPRs to regulate the description of property particulars fall equally on large and small estate agency firms. Both currently have to consider property particulars in relation to the PMA and CPRs. Repealing the PMA will leave all types businesses having to meet the requirements of the CPRs only.

Competition test

Repealing the PMA and relying solely on the CPRs to regulate the description of property particulars is unlikely to raise any competition concerns. All estate agents and property developers that advertise properties for sale must currently comply with the PMA and CPRs. Removing the requirement to comply with the PMA will leave businesses needing to comply with the CPRs only. The effect will be a level playing field, albeit one where the administrative burdens on business are reduced.

³⁶ Savings as above less cost savings to TSOs

Other tests

We do not believe that there will be any impacts in the areas of equality, greenhouse gas, wider environmental issues, health and well being, human rights, rural proofing and sustainable development.

In respect to the justice system, there will no longer be any convictions under the PMA, but these seem likely to be offset by increased convictions under CPRs. In terms of court time spent dealing with property misdescription cases; the overall impact will be neutral.

Enforcement and sanctions

Both the PMA and the CPRs are enforced by local Trading Standards Departments.

Many TSOs will have significant experience of the PMA and taking action under it. But the number of cases brought by Trading Standards Departments under the PMA has declined in Great Britain over the last decade.

In contrast many TSOs have less experience in dealing with the CPRs. This is mainly due to the short period the Regulations have been in existence and familiarity with their principles based nature. There is at present only a small amount of case law in relation to property and the CPRs.

Regardless of the repeal of the PMA, TSO confidence and experience in using the CPRs will grow over time, as will the availability of case law. Repealing the PMA will speed up the process, as TSOs are forced to use the CPRs to address property description concerns. Providing new guidance on the CPRs will help smooth the transition to the new environment.

Summary and preferred option

The PMA and CPRs provide broadly equivalent protections for dealing with the misdescription of property for sale, and it is the Government's view that this duplication is unnecessary. The CPRs have the potential to provide wider protection in that the general nature of the regulations may cover a broader range of situations than is the case under the prescriptive provisions of the PMA.

The accompanying consultation recommends the repeal of the PMA (option 1) leaving the CPRs to deal with the misdescription of property.

Subject to the outcome of the consultation we aim to repeal the PMA in October 2011.

Annexes

Annex 1 should be used to set out the Post Implementation Review Plan as detailed below. Further annexes may be added where the Specific Impact Tests yield information relevant to an overall understanding of policy options.

Annex 1: Post Implementation Review (PIR) Plan

A PIR should be undertaken, usually three to five years after implementation of the policy, but exceptionally a longer period may be more appropriate. A PIR should examine the extent to which the implemented regulations have achieved their objectives, assess their costs and benefits and identify whether they are having any unintended consequences. Please set out the PIR Plan as detailed below. If there is no plan to do a PIR please provide reasons below.

| |
|---|
| <p>Basis of the review: [The basis of the review could be statutory (forming part of the legislation), it could be to review existing policy or there could be a political commitment to review]; The policy of repealing the PMA and relying on the CPRs to regulate the description of property will be considered as part of the wider review of CPRs scheduled for 2011.</p> |
| <p>Review objective: [Is it intended as a proportionate check that regulation is operating as expected to tackle the problem of concern?; or as a wider exploration of the policy approach taken?; or as a link from policy objective to outcome?] The review of the CPRs will apply to all areas affected by the Regulations and not just the description of property.</p> |
| <p>Review approach and rationale: [e.g. describe here the review approach (in-depth evaluation, scope review of monitoring data, scan of stakeholder views, etc.) and the rationale that made choosing such an approach]</p> |
| <p>Baseline: [The current (baseline) position against which the change introduced by the legislation can be measured]</p> |
| <p>Success criteria: [Criteria showing achievement of the policy objectives as set out in the final impact assessment; criteria for modifying or replacing the policy if it does not achieve its objectives]</p> |
| <p>Monitoring information arrangements: [Provide further details of the planned/existing arrangements in place that will allow a systematic collection systematic collection of monitoring information for future policy review]</p> |
| <p>Reasons for not planning a PIR: [If there is no plan to do a PIR please provide reasons here] A review of the CPRs is already scheduled for 2011.</p> |

ANNEX 2: Comparison of PMA and CPRs

This annex looks at the similarities and differences between the PMA and the CPRs. It is the Government's contention that the PMA and CPRs cover broadly the same ground and that there is therefore duplication of regulation in this area.

Considering the impact of the 'transactional decision'

When considering whether to repeal the PMA it is important to consider any impacts on consumer protection. In particular we have considered whether repeal of the PMA would be likely to result in cases that are currently successfully prosecuted, not being successfully prosecuted in the future. However, while there is a difference between the "materiality" test of the PMA (looking at whether the false or misleading statement in the particulars was trivial or not) and the "transactional decision" test of the CPRs (looking at the potential impact of the statement) - in most cases we consider that the outcome of applying these tests are likely to be very similar.

Review of PMA cases with CPR principles

Although there are not many reported cases on the PMA in law journals we have reviewed those that were available to us, including cases that are brought by TSOs in the Magistrates Court³⁷. We have also looked at the details of cases provided to us by the OFT. It is not possible to be certain what would have happened if the case had been brought under the CPRs, but we have looked at them with a view to considering how the protection provided by the CPRs could compare to that provided by the PMA.

The cases covered a wide range of factual scenarios and applied to both estate agents and property developers. In order to consider whether the types of statements that have been successfully prosecuted under the PMA in the past would be likely to cause an average consumer to take a different decision, we have considered how important the statement might be to a potential purchaser and whether the purchaser is likely to rely on that statement in deciding whether to view a property, to instruct solicitors or surveyors or to purchase a property.

Property developers

This included cases where statements about whether the property complied with building regulations or was covered by a particular scheme or warranty were said to be false or misleading. Under the CPRs, some types of statement are deemed to be automatically unfair and the impact on the purchaser is irrelevant. In particular, using trade or quality marks without authorisation is prohibited and statements about particular schemes or warranties applying to a property could come within this.

³⁷ In Scotland by the Sheriff Court.

However, even if these statements were not automatically unfair, we consider that statements about whether a property complies with building regulations or is covered by a particular scheme are likely to influence a purchaser when they are considering whether to purchase a property and the price they are likely to pay.

Estate agents

Key features of the property

We have been provided with a wider range of cases in relation to estate agents. These include statements that we think most consumers would consider to be describing key features of the property such as:

- number of rooms
- size of rooms
- size of a garden
- that planning permission was sought for an extension that has already been built
- that the property comes with planning permission for future development
- that planning permission has or has not been obtained for particular developments to the surrounding area

It will of course depend on the specific circumstances – for example room measurements that are marginally wrong may not be sufficiently material to impact on the average consumer's decision making. However, generally we think that misleading statements or omissions about property features such as these would be likely to influence a purchaser. In some cases the purchaser may not rely solely on the information they receive from the estate agent in making their decision – for example they may view the property themselves or instruct surveyors or solicitors to carry out checks for them. However, viewing the property or instructing solicitors are likely to be transactional decisions

Other features

Other cases that have been brought in the past include statements about additional features of the property such as whether or not there is double glazing or parking spaces. These are of course important issues to many consumers but it is less easy to assess whether any given statement would be deemed to be such that it would cause an average consumer to take a different transactional decision.

ANNEX 3: Calculation of costs

Admin burdens

Table 3: Admin burdens identified by PricewaterhouseCoopers

| Admin burden (£) | Obligation |
|-------------------------|--|
| 520,257 | Providing information to an authorised officer of an enforcement authority in relation to the offence of property mis-description. Including: - any book or document relating to the business - any electronically stored information relating to the business - permitting physical inspection of the premises. |
| 156,694 | Providing information in defence of charges relating to the offence of property mis-description, indicating that all reasonable steps were taken and identifying or assisting in the identification of the person who committed the act. |

Explanation of estate agent's time costings

The ASHE Database for 2010 gives us an average cost of £25,994 for estate agents. Assuming a statutory minimum of four weeks and two days annual leave, gives us a working year of 47.6 weeks (52 – statutory holiday of four weeks two days).

If we assume a 36 hour working week, then we can multiply this by 47.6 to get a yearly total of 1714 (47.6 multiplied by 36). We can then get to an hourly rate by dividing the salary by the number of hours worked. £25,994 divided by 1,714 giving a figure of 15.17. To get the minutes we can divide this by 60 equalling 0.253.

For the costs of an agent's time on preparing a particular, which takes 10 minutes, we can multiply this by 10 to make £2.53.

For the costs in an agent's time on training the hourly rate can be multiplied by 2 to get 30.34 (£15.17 x 2).

Table 4: Inspection costs

| | |
|-------------------------------------|------------------|
| Number of inspections ³⁸ | 500 |
| Time spent per inspection (hours) | 5 |
| TSO salary (£) | 33.36 |
| Total costs (£) | 83,390.23 |

³⁸ Mirroring Admin burdens exercise from 2006

Table 5: Time taken by a TSO takes to produce a court case (100 hours)

| | Costs (£) | | |
|-------------------------------------|------------------|-------------|-------------|
| TSO Salary (£) ³⁹ | | 57,159 (pa) | 33.36 (p/h) |
| Number of hours to bring case | | 100 | |
| TSO cost per case | 3,3336 | | |
| Costs of prosecution | 15,000 | | |
| Cost Per case | 18,336 | | |
| No of court cases | | 9 | |
| Cost of Prosecution per year | 165,024 | | |

Table 6: TSO hourly wage calculation

| | | | |
|-----------------------------|--------------|------|-----|
| Weeks per year | | | 52 |
| Weeks annual leave per year | | | 4.4 |
| Weeks worked per year | | 47.6 | |
| Hours worked per week | | 36 | |
| Hours worked per year | 1714 | | |
| Estate agent salary (£) | 57,159 | | |
| Hourly cost (£) | 33.36 | | |

Table 7: Total cost of compliance with the PMA for the sector

| Source of Cost | Cost (£) |
|-----------------------|---------------------|
| Admin Burdens | 676,951.00 |
| Cost of descriptions | 4,130,631.66 |
| Cost of training | 106,457.70 |
| TSOs inspections | 83,390.23 |
| TSOs court cases | 165,024 |
| Total | 5,162,454.59 |

³⁹ Source Local Government Regulation

Annex 4: NFoPP survey on the PMA

Question responses

Q1. How long do you spend on PMA for each set of property particulars that you draw up?

| Answer | Number of Respondents | Response Ratio |
|------------------|-----------------------|----------------|
| No time at all | 6 | 8.45% |
| Up to 1 minute | 5 | 7.04% |
| Up to 3 minutes | 5 | 7.04% |
| Up to 5 minutes | 16 | 22.54% |
| Up to 10 minutes | 26 | 36.62% |
| Other | 13 | 18.31% |

71 responses

Q2. For each new member of staff that you employ (with no previous experience of estate agency) how many minutes are spent training them on the PMA?

| Answer | Number of Respondents | Response Ratio |
|-----------------------------|-----------------------|----------------|
| No time at all | 2 | 2.90% |
| Up to 60 minutes (1 hour) | 22 | 31.88% |
| Up to 120 minutes (2 hours) | 12 | 17.39% |
| Up to 180 minutes (3 hours) | 4 | 5.80% |
| Up to 240 minutes (4 hours) | 9 | 13.04% |
| Up to 300 minutes (5 hours) | 5 | 7.25% |
| Up to 360 minutes (6 hours) | 9 | 13.04% |
| Other | 6 | 8.70% |

69 responses

Q3. How many minutes each year are spent on repeat training on the PMA for current staff members?

| Answer | Number of Respondents | Response Ratio |
|-----------------------------|-----------------------|----------------|
| No time at all | 6 | 9.23% |
| Up to 60 minutes (1 hour) | 32 | 49.23% |
| Up to 120 minutes (2 hours) | 14 | 21.54% |
| Up to 180 minutes (3 hours) | 2 | 3.08% |
| Up to 240 minutes (4 hours) | 2 | 3.08% |
| Up to 300 minutes (5 hours) | 1 | 1.54% |
| Up to 360 minutes (6 hours) | 3 | 4.62% |
| Other | 5 | 7.69% |

65 responses

Q4. What is the % staff turnover for your business per annum?

| Answer | Number of Respondents | Response Ratio |
|---------------|------------------------------|-----------------------|
| 0% | 27 | 38.57% |
| <5% | 20 | 28.57% |
| <10% | 12 | 17.14% |
| <20% | 8 | 11.43% |
| <30% | 1 | 1.43% |
| <40% | 0 | 0.00% |
| <50% | 1 | 1.43% |
| <60% | 0 | 0.00% |
| <70% | 0 | 0.00% |
| <80% | 0 | 0.00% |
| <90% | 1 | 1.43% |

70 responses

Q5. How many staff are you currently recruiting (additional or replacement)?

| Answer | Number of Respondents | Response Ratio |
|---------------|------------------------------|-----------------------|
| None | 37 | 52.11% |
| 1 | 15 | 21.13% |
| 2 | 9 | 12.68% |
| 3 | 2 | 2.82% |
| 4 | 2 | 2.82% |
| 5+ | 6 | 8.45% |

71 responses

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