

Discussion paper

National Competition Policy Review of the
Land Agents Act 1994
- Final Report

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Government
of South Australia



Office of
Consumer and
Business Affairs

National Competition Policy Review
Land Agents Act 1994

Table of Contents

PART A: INTRODUCTION	1
1. PURPOSE OF THE REVIEW	1
2. SCOPE OF THE REVIEW	2
3. THE REVIEW PANEL.....	2
4. THE REVIEW PROCESS	3
PART B: OVERVIEW AND DISCUSSION POINTS OF LEGISLATION	4
1. HISTORY.....	4
2. CURRENT OPERATION OF THE ACT	4
2.1 What is the relevant market?	4
2.2 Provisions of the Act.....	5
2.3 Registration and Management of an Agent’s Business.....	5
2.4 Operation, maintenance and inspection of trust accounts	7
2.5 Establishment and operation of the Indemnity Fund	8
2.6 Disciplinary Proceedings	8
2.7 What are the objectives of the Act?	9
2.8 Is the continuation of regulation of the real estate industry justified?	10
2.8.1 Risk of market failure	10
2.8.2 Provider Failure.....	12
2.9 Do the benefits of regulation outweigh the costs?	14
2.10 What are the alternatives?	15
2.10.1 Deregulation	15
2.10.2 Self-regulation.....	18
2.10.3 Negative Licensing.....	18
2.10.4 Co-regulation	19
2.10.5 Certification	20
2.10.6 Restriction of title.....	20
2.11 Recommendation.....	21
3. RESTRICTIONS ON COMPETITION - BARRIERS TO ENTRY	21
3.1 Scope of work for which a licence or registration is required	21
3.1.1 Land Agents.....	21
3.1.2 Land.....	22
3.1.3 Businesses	22
3.1.4 Other occupations	23
3.1.5 What are the benefits of the restriction?	33
3.1.6 What are the costs of the restriction?	34
3.1.7 What are the alternatives?	34
3.2 Qualifications	36
3.2.1 Land Agents.....	36
3.2.2 What are the benefits of requiring land agents to hold prescribed qualifications?	36
3.2.3 What are the benefits of this restriction?	37
3.2.4 What are the costs of this restriction?	39
3.2.5 A cost/benefit analysis.....	39

3.2.6 <i>Is the current level appropriate?</i>	40
3.2.7 <i>Sales Representatives</i>	43
3.2.8 <i>Implications of the requirement for competition</i>	43
3.2.9 <i>Are current requirements justified?</i>	44
3.3 Reputation	46
3.3.1 <i>General reputation</i>	46
3.3.2 <i>Financial reputation</i>	46
3.3.3 <i>Implications of the requirement</i>	47
3.3.4 <i>What are the alternatives?</i>	49
4. RESTRICTIONS ON COMPETITION - CONDUCT RESTRICTIONS	52
4.1 Compliance with trust account provisions	52
4.2 Implications of the trust accounting requirements for competition	53
4.2.1 <i>Additional costs from record keeping</i>	53
4.2.2 <i>Restrictions on the use of electronic commerce</i>	53
4.2.3 <i>Requirement to hold money in a prescribed financial institution</i>	54
4.2.4 <i>Requirement to have accounts audited by a registered company auditor</i>	54
4.2.5 <i>Restrictions on the investment of trust money</i>	56
4.3 Disciplinary Provisions	62
4.3.1 <i>Implications of the provisions</i>	62
APPENDIX 1 - CONCLUSIONS AND RECOMMENDATIONS	63
APPENDIX 2 - TERMS OF REFERENCE.....	66
1. METHODOLOGY AND TIMETABLE FOR REVIEW	67
2. CONSULTATION	68
3. THE REVIEW PANEL.....	68
4. CONTACT OFFICER.....	68
APPENDIX 3 - CONSULTATION LIST	69
APPENDIX 4 - SUBMISSIONS RECEIVED.....	70

National Competition Policy Review
Land Agents Act 1994

Executive Summary

In 1995 the Council of Australian Governments entered into three agreements to give effect to national competition policy objectives. As part of their obligations under these agreements, each State and Territory Government gave an undertaking to review existing legislation that potentially restricts competition. The Office of Consumer and Business Affairs is reviewing the *Land Agents Act 1994* ("the Act") as part of this process.

Land agents and their sales representatives provide a range of services to both vendors and purchasers in relation to the sale of land and businesses in South Australia. However, only registered conveyancers and legal practitioners can convey property in this State. The market for the provision of services (other than conveyancing) relating to the sale of land and businesses in South Australia is the relevant market for the purposes of this Review.

Land agents have been subject to regulation since 1925. Licensing was introduced at that time to address problems with the honesty of persons holding themselves out as land agents.

Land agents are involved directly in one of the most important and expensive transactions - the purchase of real estate or a business - that a consumer is likely to encounter. The objective of the current legislation is to protect consumers by setting minimum qualifications, and by providing for disciplinary proceedings against land agents and sales representatives who pose a threat to consumers.

The Review Panel concludes that there is continuing justification for the continued regulation of land agents. Consumers are placed at risk of significant financial loss if agents or sales representatives are incompetent, negligent or dishonest. While complaints against land agents have been few in number, the extent of losses suffered by consumers as a result of the actions of agents or sales representatives is usually significant.

The Review Panel has considered various less regulatory alternatives, including complete deregulation, self-regulation by industry bodies, co-regulation by industry bodies and government, a system of certification, and restriction of title legislation. The Review Panel concludes that these alternatives are not viable for ensuring that the current level of consumer protection is maintained.

The Act contains a number of restrictions, in the form of barriers to entry and conduct restrictions. The definition of the scope of work is a barrier to entry, as it reserves a body of work to a particular class of person (that is, those who meet the requirements of the Act). Nonetheless, the Review Panel has concluded that the current scope of work for which prescribed qualifications is appropriate and can be justified.

The requirement to hold qualifications is the most significant barrier to entry in the legislation, however the Review Panel concludes that it is a justifiable one. A significant risk would be posed to the community if incompetent agents were permitted to operate within South Australia. The Review Panel considers that the sale of land and businesses involves tasks which require some form of training to be performed competently.

However, the Review Panel also concludes that the current qualification requirements are perhaps too onerous, and seek to impose an industry “best practice” standard, rather than reflecting an appropriate community standard, whereby the risks sought to be addressed by the qualification requirement are addressed in the least restrictive fashion. This is true of the qualification requirements for both agents and sales representatives. Further, the Review Panel recommends that consideration be given to re-examining the current requirements, and also to broadening the number and type of acceptable qualifications.

In this regard, the Review Panel has concluded that legal practitioners possess sufficient competency to enable them to provide real estate services without significantly increasing the risks to consumers. Similarly, the Review Panel concludes that accountants holding certain qualifications possess appropriate knowledge to competently sell businesses.

The Review Panel notes, however, that the necessary skill set for these professions may be lacking in certain respects. For example, legal practitioners do not generally possess competency in the skill of appraising property, so any move to allow legal practitioners to sell land would require them to use the services of another licensed agent to conduct any necessary appraisals, or alternatively, the legal practitioner could undertake the necessary additional study to satisfy this requirement.

Rather than exempt these professions from the requirement to hold the appropriate licence, the Review Panel recommends that their qualifications be recognised for the purposes of licensing. The Act is directed at regulating the conduct of all those involved in the sale of land and/or businesses. Having all these persons regulated under the one system ensures that the same standards are applied to all persons providing these services, thus guaranteeing that all compete on “a level playing field”.

Ensuring the fitness and propriety of an agent is a prime objective of the Act. Currently, a person must not have been convicted of an offence of dishonesty if they wish to hold either an agent licence or if they wish to operate as a sales representative. The Review Panel is firmly of the view that the probity requirement must remain, but acknowledges that “an offence of dishonesty” has a broad meaning in law, and may act to exclude a person from operating in the market, even where the offence bears little relevance to the work of an agent. The Review Panel therefore has recommended that convictions for summary offences of dishonesty should exclude someone from obtaining or holding a licence for a period of ten years, while others of a more serious nature would continue to impose a permanent prohibition.

The Act provides comprehensive controls over the operation of trust accounts by an agent. Many of these controls have been assessed by the Review Panel as trivial in nature. The major restriction relates to the investment of trust money outside the trust account, a practice which is currently prohibited. The benefits of the restriction are the reduced risk of fiduciary default and protection of the Agents Indemnity Fund, while the prime cost is borne by purchasers who are deprived of the benefit of interest on their trust monies. The Review Panel has concluded that the benefits of the restriction outweigh the costs, but that the Commissioner for Consumer Affairs should investigate whether a scheme similar to that in place under the *Legal Practitioners Act 1981*, which allows for the establishment of a separate trust account for the exclusive benefit of a particular client, would be an appropriate less restrictive alternative.

The Act provides for disciplinary measures to be taken against an agent or a sales representative under a range of circumstances. Disciplinary measures may result in a reduction in the number of persons who can provide services within the market, and may therefore be seen as a mechanism by which competition within the marketplace can be restricted. However, normal competitive behaviour within the marketplace is unaffected by the operation of the Act, and the disciplinary procedures only operate to remove from the market those who engage in conduct which is against the interests of consumers generally. For these reasons, the Review Panel sees any restriction which may arise from the operation of the disciplinary provisions to be justified as being in the public interest.

The Review Panel therefore concludes that there is a clear public benefit in the retention of regulatory control of the market for land and business sales services, and that the current legislation is the least restrictive and most effective means of achieving the objective of consumer protection.

PART A: INTRODUCTION

1. PURPOSE OF THE REVIEW

On 11 April 1995 the Council of Australian Governments ("CoAG") entered into three inter-governmental agreements to facilitate the implementation of national competition policy objectives.

One of these agreements was the Competition Principles Agreement ("the Agreement"). As part of its obligations under the Agreement, State and Territory governments gave an undertaking to review existing legislation that restricts competition. The Office of Consumer and Business Affairs has reviewed the *Land Agents Act 1994* (SA) as part of this process. The Terms of Reference for the Review are located at Appendix 2.

National competition policy ("NCP") is about

*"ensuring that the way markets work serves the whole community, rather than resulting in back-room deals which benefit a few. It is about improving efficiency of the public sector to provide better services at lower prices. And it is about ensuring that legal protections from competition genuinely promote the welfare of all Australians, rather than the narrow interests of the businesses protected. The policy doesn't prevent governments guaranteeing desirable social objectives."*¹

The guiding principle² of competition policy is that legislation (including Acts, enactments, ordinances or regulations) should not restrict competition unless it can be demonstrated that:-

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

All existing legislation that restricts competition should be reviewed and, where appropriate, reformed. Any necessary reforms should be implemented by the end of the year 2000³.

Legislation identified as restricting competition should be systematically reviewed at least once every ten years thereafter⁴.

The procedure for reviewing legislation is contained in clause 5(9) of the Agreement. A review should:-

- clarify the objectives of the legislation;
- identify the nature of the restriction on competition;
- analyse the likely effect of the restriction on competition and on the economy generally;
- assess and balance the costs and benefits of the restriction; and

¹ Mr G. Samuel, President, National Competition Council, *Australian Financial Review*, 22 June 1998, p. 20

² Clause 5(1), Competition Principles Agreement

³ Clause 5(3), Competition Principles Agreement

⁴ Clause 5(6), Competition Principles Agreement

- consider alternative means for achieving the same result including non-legislative approaches.

Where there is a requirement to balance the benefits of a policy or course of action against its costs, or to assess the most effective means of achieving a policy objective, the following matters⁵ should be taken into account where relevant:-

- Government legislation and policies relating to ecologically sustainable development;
- social welfare and equity considerations, including community service obligations;
- Government legislation and policies relating to matters such as occupational health and safety, industrial relations and access and equity;
- economic and regional development, including employment and investment growth;
- the interests of consumers generally or a class of consumers;
- the competitiveness of Australian business; and
- the efficient allocation of resources.

2. SCOPE OF THE REVIEW

As noted above, the Agreement requires that legislation (including Acts, enactments, ordinances or regulations) be reviewed.

Accordingly, this Review applies to:-

Land Agents Act 1994 ("the Act"); and
Land Agents Regulations 1994 ("the regulations")

3. THE REVIEW PANEL

The review was conducted by a review panel consisting of the following persons:-

- Ms Margaret Cross, *Deputy Commissioner (Policy & Legal), Office of Consumer and Business Affairs;*
- Mr Alan Sharman, *Registrar-General, Land Services Group, Department for Administrative and Information Services;*
- Mr Matthew Bubb, *Senior Policy Officer (Competition Policy), Office of Consumer and Business Affairs (until 8 September 1999);*
- Mr Adam Wilson, *Senior Policy Officer (Competition Policy), Office of Consumer and Business Affairs (from 13 September 1999);*
- Ms Kate Tretheway, *Legal Officer, Policy & Legislation, Attorney-General's Department*

⁵ Clause 1(3), Competition Principles Agreement

4. THE REVIEW PROCESS

In February 1999 the Commissioner for Consumer Affairs wrote to key industry and consumer groups advising them of the upcoming review of legislation within the Consumer Affairs portfolio. These groups were invited to attend one of a number of briefing sessions in March 1999, during which representatives of the Office of Consumer and Business Affairs and the Department of Premier and Cabinet outlined the basis and structure of the review process.

An Issues Paper was released for public consultation on 15 March 1999. Seven submissions were received by the Review Panel. A schedule showing the distribution of Issues Papers can be found in **Appendix 3**. A schedule of submissions received can be found in **Appendix 4**.

As a result of information provided in submissions and further research by the Review Panel, a Draft Report was prepared. The purpose of the Draft Report was to present the preliminary conclusions and recommendations of the Review Panel.

The Draft Report was released on 5 July 1999. Submissions were again invited, and the Review Panel allowed six weeks for responses. Nine submissions were received by the Review Panel. A schedule of submissions received can be found in **Appendix 4**.

This Final Report has been prepared based on the information provided in submissions and research conducted by the Review Panel. It contains the findings and recommendations of the Review Panel.

PART B: OVERVIEW AND DISCUSSION POINTS OF LEGISLATION

1. HISTORY

Land agents were first regulated in 1925. A boom in suburban land had led to an increase in the number of people acting as land agents, and a number of so-called 'reckless Get-Rich-Quick-Wallingford⁶' people who employed 'shady methods to secure business'⁷ had entered the industry. These people had been involved in a number of schemes, especially related to the subdivision of land, which had caused considerable detriment to consumers. As a result of these activities, it was decided that the activities of land agents needed to be regulated.

Land agents were required to be licensed, although where two or more persons were acting in partnership, only one partner was required to be licensed. The entrance criteria were that the person was a fit and proper person to hold a license, and the lodgement of an approved fidelity bond in the sum of five hundred pounds. Dishonest or fraudulent conduct would be grounds for an objection to the grant of a license.

In 1973, the regulation of land agents, business agents and conveyancers was brought under the one Act - the *Land and Business Agents Act 1973*. Then, in 1984, the licensing of land valuers was brought under that Act, which was renamed the *Land Agents, Brokers and Valuers Act 1973*.

This regime continued until 1994 when, following a review of the *Land Agents Brokers and Valuers Act 1973*, the Government decided to repeal the *Land Agents, Brokers and Valuers Act* and create three separate Acts to deal with the occupational licensing of the three occupations governed by that Act, as well as a fourth Act to deal with certain conduct issues relating to those occupations. This decision was based on a recognition that the interests of consumers in relation to those three occupations varied considerably: although all related to interests in real estate, the types of interests involved and the way those interests could be affected by the conduct of agents, conveyancers and valuers respectively were distinct.

2. CURRENT OPERATION OF THE ACT

2.1 What is the relevant market?

The market for the purposes of this review is the market for the provision of services other than conveyancing relating to the sale of land and businesses in South Australia.

In South Australia, these services are provided by land agents and their sales representatives. As at 30 June 1998, there were 2435 registered land agents, of which 620 were bodies corporate and 1815 were natural persons.

The only class of persons beyond land agents and sales representatives who may offer similar services are legal practitioners who are exempt from the requirement to be registered, insofar as they provide such services in the course of their legal practice.

⁶ *South Australian Parliamentary Debates*, December 11, 1925, p2146

⁷ *Ibid.*

There is currently no exemption for persons such as accountants from the application of the Act.

It should also be recognised that under mutual recognition legislation, trades and professions regulated in one jurisdiction have the ability to obtain registration in another jurisdiction by means of administrative process. It may be appropriate to consider that the market for these services extends beyond the boundaries of South Australia.

Conclusion

The relevant market is the market for the provision of services other than conveyancing relating to the sale of land and businesses in South Australia.

2.2 Provisions of the Act

The Act deals with four main areas:-

1. registration and management of an agent's business
2. operation, maintenance and inspection of trust accounts
3. establishment and operation of the indemnity fund; and
4. discipline of agents.

2.3 Registration and Management of an Agent's Business

The provisions dealing with the registration and management of an agent's business are found in Part 2 of the Act. The Act requires all agents to be registered. An agent is defined in section 4 of the Act as:-

“[a] person [who] carries on a business that consists of or involves:
(a) selling or purchasing or otherwise dealing with land or businesses on behalf of others, or conducting negotiations for that purpose; or
(b) selling land or businesses on his or her own behalf, or conducting negotiations for that purpose.”

However, the definition of agent expressly excludes legal practitioners acting in the course of legal practice, persons selling land or business through the instrumentality of an agent and persons engaging in mortgage financing⁸.

This definition of an agent has caused some dispute between agents and other occupational groups, such as accountants, who believe themselves to be able to assist clients in the sale of their businesses. There has been significant debate as to whether the conduct of accountants in this area falls within the definition of an agent (in which case the accountants are breaching the Act).

⁸ Note that the Act only provides that the person does not act as an agent in so far as the person acts in that capacity. Thus a person who engages in mortgage financing and also engages in the sale of land will act as an agent in relation to the second transaction.

In order to register, a land agent must apply to the Commissioner for Consumer Affairs in the manner and form prescribed and pay a fee set by regulation (section 7). The criteria for registration are set out in section 8. To be registered, a natural person must hold the qualifications required by regulation, or qualifications considered appropriate by the Commissioner, and must not:-

- a) have been convicted of an offence of dishonesty;
- b) be suspended or disqualified from practising or carrying on an occupation, trade or business under a law of this State, the Commonwealth, another State or a Territory of the Commonwealth;
- c) be an undischarged bankrupt or subject to a composition or deed or scheme of arrangement with or for the benefit of creditors; or
- d) during the period of five years preceding the application for registration, have been a director of a body corporate wound up for the benefit of creditors-
 - i) when the body was being so wound up; or
 - ii) within the period of six months preceding the commencement of the winding up.

The objective of the qualifications requirement is to ensure that land agents possess basic knowledge and skills in areas such as contract law, fair trading/trade practices/misrepresentations law and basic real estate skills required to appraise a property. Ensuring that agents possess that knowledge and skill should help to protect consumers from the actions of unskilled or unknowing agents. The objective of the requirement is not to ensure that agents possess marketing or sales skills. Such matters are for the industry to facilitate.

The objective of the remaining criteria is to prevent people with a history of dishonesty, demonstrated untrustworthiness or inability to handle their finances from entering an industry which involves handling large amounts of other people's money. Preventing such persons from entering the industry is thought to reduce the risk of fiduciary default, as those who have shown a predilection for a particular kind of vice are considered more likely to repeat that vice.

The provisions applicable to bodies corporate are similar. To be registered, a body corporate must not be suspended from carrying on an occupation in South Australia, the Commonwealth of Australia, another State or a Territory of the Commonwealth. It must also not be in the process of winding up.

Additionally, the Act specifies criteria for directors of the company. These are equivalent to the requirements for registration of a natural person as an agent, with the exception that a director does not need to hold qualifications. The objective of these criteria is, once again, to protect consumers from the risk of financial loss through the mismanagement or defalcation of funds of an agent.

It is possible for an applicant to appeal the decision to the District Court (section 8A). This accords natural justice to the applicant.

Once an agent is registered, the agent must provide an annual return accompanied by a fee (section 9). This fee is currently \$190.00 for a natural person and \$285.00 for a body corporate. The objective of the annual return requirement is to maintain the integrity of the register. It also enables the Commissioner for Consumer Affairs to become aware of any

misconduct which has occurred during the year. The fee helps to cover the costs of administering this provision. There is a penalty for failure to lodge a return, but the Commissioner is required to give the agent a chance to lodge the form, and must give notice to the agent. Ultimately, an agent's registration may be cancelled if the agent fails to lodge the return.

Special provisions relate to the management of corporations that are agents. A corporate agent must ensure that their business is properly managed and supervised by a registered agent who is a natural person. The objective of this provision is to prevent the use of the corporate structure to evade the provisions of the Act. Without this section, it would be possible for someone who did not fulfil the criteria for registration (in particular the educational criteria) to set up a corporation and use that corporation to carry on business, without the consumer protection which results from the educational qualifications. The requirement in section 10 should ensure that the standard of service is maintained, provided that the agent-manager does his or her job properly.

Sales representatives are regulated by section 11. This section provides that a sales representative must either possess the qualifications required by the regulations or be registered as an agent or have been registered as a sales representative under the former Act. Additionally the sales representative must not have been convicted of an offence of dishonesty or have been disqualified or suspended from practising a trade or occupation.

There are no registration requirements for sales representatives. It is a system of negative licensing. Employers are prohibited from employing persons as sales representatives unless they fulfil the criteria outlined above, and there is a general prohibition on working as a sales representative without fulfilling the criteria.

The objective of this section is again to protect consumers by ensuring that sales representatives possess certain knowledge and skill and by preventing the entry into the industry of those who have demonstrated untrustworthiness.

2.4 Operation, maintenance and inspection of trust accounts

As in most industries where money is held on trust, the trust accounts of land agents are heavily regulated. The objective of trust accounting provisions is generally to ensure that there is a clear audit trail and to reduce the possibility of misappropriation of funds.

The trust accounting provisions are fairly standard, equivalent to the trust account provisions found in most legislation regulating occupations which involve trust monies. Agents are required to deposit all trust money⁹ in an approved account¹⁰ as soon as practicable after receiving the money. No other money is to go into the account, and the money may not be withdrawn except in certain circumstances, which are outlined in section 14 and include, *inter alia*, payment to the person entitled to the money or payment of fees and disbursements. The interest on trust accounts is paid to the Commissioner.

⁹ Defined as money received by the agent when acting as an agent to which the agent is not wholly entitled in law and in equity.

¹⁰ Accounts are approved by the Commissioner for Consumer Affairs, and may be at a bank, building society or credit union.

The Act gives the Commissioner power to appoint an administrator or a temporary manager in certain circumstances.

The records to be kept by the agent are detailed in section 21 and the regulations.

2.5 Establishment and operation of the Indemnity Fund

The Act provides for the establishment and operation of an indemnity fund. The objective of this is to protect consumers who may lose money as a result of the default of an agent and are unable to recover that money because the agent has gone bankrupt or has absconded.

The indemnity fund is comprised of the interest paid to the Commissioner on agents' trust accounts, any money recovered by the Commissioner from an agent in relation to that agent's default, fines recovered from disciplinary proceedings, interest accruing from investment of the fund, and other money required to be paid into the fund under the Act or any other Act, as well as the money which was standing to the credit of the fund kept under the *Land Agents Brokers and Valuers Act 1973*.

Consumers can make a claim for compensation from the fund where they have suffered loss as a result of the fiduciary default of an agent and there is no reasonable prospect of recovering that loss from the agent. Additionally, partners of an agent who find themselves vicariously liable for their partner's wrongdoing may be able to make a claim on the fund, provided they themselves acted honestly and reasonably in all the circumstances. Money from the fund may also be used for educational programs for agents or members of the public, the costs of investigating and disciplining agents and other relevant costs.

It should be noted that the fund, although constituted under this Act, operates in relation to both this Act and the *Conveyancers Act 1994*.

The fund is not available to consumers who have suffered a loss where the agent was acting as a mortgage financier.

2.6 Disciplinary Proceedings

The Act prescribes certain situations in which disciplinary action can be taken. The objective of these provisions is to provide remedies over and above those which exist under other Acts and at common law. They provide a way of excluding persons from the industry who have demonstrated that they pose a risk to consumers.

Disciplinary action may be taken against an agent under five circumstances:-

- (a) the registration of the agent was improperly obtained;
- (b) the agent has acted contrary to an assurance accepted by the Commissioner under the *Fair Trading Act 1987*;
- (c) the agent or any other person has acted contrary to the Act or the *Land and Business (Sale and Conveyancing) Act 1994* or otherwise unlawfully, or improperly, negligently or unfairly, in the course of conducting, or being employed or otherwise engaged in, the business of the agent;

- (d) in the case of an agent who has been employed or engaged to manage and supervise an incorporated agent's business - the agent or any other person has acted unlawfully, improperly, negligently or unfairly in the course of managing or supervising, or being employed or otherwise engaged in, that business; or
- (e) events have occurred such that:-
 - (i) the agent would not be entitled to be registered as an agent if he or she were to apply for registration; or
 - (ii) the agent is not a fit and proper person to be an agent; or
 - (iii) in the case of an incorporated agent, a director is not a fit and proper person to be the director of a body corporate that is registered as an agent.

Disciplinary action may be taken against sales representatives if they have acted unlawfully, improperly, negligently or unfairly in the course of acting as a sales representative.

Action may be taken against each director of a body corporate where there is proper cause for disciplinary action against the body corporate.

If the Court is satisfied on the balance of probabilities that there is proper cause for disciplinary action against a person, the Court has the power to:-

- (a) reprimand the person
- (b) impose a fine not exceeding \$20 000 on the person
- (c) in the case of a person registered as an agent -
 - (i) suspend the registration for a specified period or until the fulfilment of stipulated conditions or until further order
 - (ii) cancel the registration
- (d) in the case of a person whose registration is suspended - impose conditions as to the conduct of the person or the person's business as an agent after the end of the period of suspension;
- (e) disqualify the person from being registered under the Act
- (f) prohibit the person from being employed or otherwise engaged in the business of an agent
- (g) prohibit the person from being a director of a body corporate that is an agent.

These orders are not mutually exclusive. The Court may make orders for more than one of them.

The grounds for disciplinary action are quite extensive, as are the types of disciplinary action which may be taken. This allows flexibility in the treatment of agents, and enable proportionality in the action taken against agents, while concurrently ensuring that consumers are properly protected.

2.7 What are the objectives of the Act?

The stated purpose of the Act is 'to regulate land agents and their sales representatives'. The second reading speech for the Act gives little indication of why regulation is considered necessary, beyond stating a 'recognition of the legitimate public interest in the continued imposition of education and probity standards for agents'. In order to understand why such

regulation is considered necessary, therefore, it is necessary to consider the nature of the work undertaken by land agents.

Land agents are involved directly with consumers in one of the most important and expensive transactions in the life of a consumer - the purchase of real estate. Large sums of money in the form of deposits change hands between consumers and land agents, and the contracts drawn up by the agent frequently represent one of the most important contracts a consumer will enter into. By virtue of this fact, there are risks to the consumer in the actions of the land agents. It is considered appropriate therefore that there is a need to regulate the occupation of land agent.

The Act seeks to address these risks in a number of ways. By imposing educational criteria on agents, the Act seeks to ensure that land agents have a basic understanding of the law relating to contracts and misrepresentation. By imposing strict trust accounting mechanisms, the Act seeks to limit the chance of agents defaulting on their trust accounts. The creation and operation of an indemnity fund seeks to offer consumers some protection in the event of a fiduciary default. Other entrance criteria (including restrictions on the registration of persons with a history of financial impropriety) seek to limit the chance of consumers losing money through trust account misconduct or business failure.

2.8 Is the continuation of regulation of the real estate industry justified?

It is inevitable that Government intervention in an industry will result in some costs. These costs may arise through two main factors; reduced competition or contestability in the industry resulting in less incentive to innovate, increase efficiency or keep prices down; and costs of complying with requirements of the regulation, both financial and otherwise.

Both of these costs are relevant to the real estate industry. While there is some evidence before the Review Panel that the market for real estate services is a relatively competitive one, it is nonetheless not one which is fully contestable. Legislatively based barriers to entry prevent any person who has not completed a prescribed course or fails to fulfil other criteria from competing in the market for real estate services. This can have the flow on costs outlined above. Additionally, the Act imposes certain practices and standards that must be followed by agents and sales representatives. Compliance with these provisions will impose further costs.

For the ongoing regulation of the real estate industry to be justified, therefore, it is clear that there must be some public benefit derived from such regulation which outweighs these costs.

The public benefit is to be found in the addressing of two main risks:-

- risk of market failure
- risk of provider failure

2.8.1 Risk of market failure

Market failure may arise from:-

- high transaction costs

- information asymmetry; and
- externalities.

2.8.1.1 *Transaction Costs*

Transaction costs are costs incurred in doing business with a service provider, including the costs of:-

- locating a service provider
- reaching agreement on the price and other aspects of the exchange; and
- ensuring that the terms of the agreement are fulfilled, including resort to legal advice and court action.

Market failure may occur where consumers experience search costs in a market with which they are unfamiliar and therefore abandon the search or make a less than optimal decision.

The market for real estate services is one in which many consumers only participate once or twice in their lives. As a result, most consumers are unfamiliar with the market, and face significant transaction costs in seeking a service provider. Consumers will generally only search out and utilise information so long as the costs of doing so are lower than the savings they expect to make as a result. Thus consumers of real estate services are less likely to undertake such searches. Licensing¹¹ seeks to provide information about land agents. The fact that a person has satisfied required standards is an indication to the consumer (although not a guarantee) of the quality of service that will be provided. This can decrease the cost to consumers of individually measuring the quality of services. The Government is also in a better position to undertake such assessment on behalf of consumers, at significantly lower cost than if consumers were to individually undertake such searches.

2.8.1.2 *Information Asymmetry*

Once a consumer has located a service provider, they must then determine whether that provider offers an appropriate price/quality mix for their purposes. Information asymmetry occurs when there is a disparity between information at the disposal of the consumer on the one hand, and the service provider on the other. Consumers have a natural incentive to buy services with a price/quality combination they desire. However, it is difficult for them to do so where the supplier has much more knowledge about the quality of the service that is being offered. Consumers may be at a disadvantage in:-

- assessing the need for the service or the type and quality of service required;
- distinguishing the competent service provider from the incompetent; and
- assessing the quality of services rendered and whether they are excessive or inadequate for their needs.

This is particularly relevant in relation to services because generally these factors can only be assessed after the service has been provided, by which time it may be too late.

¹¹ In whatever form, ie licensing, registration, negative licensing.

Regulatory intervention can provide consumers with additional confidence in the service provider, instead of exposing them to the risk of inappropriate selection of service and the possibility of exploitation by the provider.

Consumers in general suffer from a significant level of information asymmetry in relation to real estate services. They are frequently not in a position to assess for themselves the quality or appropriateness of the service provided, and generally not until after the service has been provided in any case. Land agents are used by most consumers at some point in their lives, but generally on an infrequent basis. The most frequent transaction in which consumers will make use of land agents is in the sale of their home, or in the purchase of a new home. This is a transaction of significant importance to the consumer, but one which is often carried out no more than three or four times in the consumer's lifetime. Thus consumers generally are at a significant disadvantage in relation to the information of which the consumer is aware and the information of which the land agent is aware.

Requiring all land agents to be registered, and to comply with all the requirements which accompany such registration, is one way of addressing this information asymmetry. Consumers can be assured that a person providing 'land agent' services to them is qualified to do so, without the consumer being required to undertake extensive searches to discover the relevant information. This reduces the need for the consumer to obtain further independent assurance that the land agent is competent; the Government has performed that task for the consumer. It also reduces the likelihood of unqualified persons entering the market and providing an inferior service at equivalent cost, which would be a misallocation of resources, because these people are prevented from entering the industry.

2.8.1.3 Externalities

Externalities are costs to parties not directly involved in the transaction - sometimes referred to as 'spillovers'. There are no significant externalities in relation to the market for real estate services.

2.8.2 Provider Failure

There are four main risks arising from provider failure, which regulation of the real estate industry may seek to address. These are risks:-

- of financial loss
- of substandard work being performed
- to health and safety; and
- of criminal activity.

2.8.2.1 Risk of financial loss

Real estate and businesses are worth considerable amounts of money. They often represent a large proportion of a person's assets. Although land agents generally only hold deposits, these deposits may be large. There is thus significant financial risk posed to the consumer if an agent is fraudulent or otherwise dishonest.

There is also the risk of a misapplication of funds which occurs through the behaviour of the agent which, while not fraudulent, falls below the standard of conduct which would be expected of someone in that position.

The Act deals with this risk in six ways.

- (1) it creates a barrier to entry for those who have previously been convicted of an offence of dishonesty or have a history of personal bankruptcy or association with wound up companies.
- (2) it creates strict rules governing trust accounts, which determine what money must be paid into trust accounts and how that money may and may not be dealt with.
- (3) it creates mechanisms to ensure compliance, including audits and the provision for the appointment of managers and administrators if there are demonstrated problems.
- (4) it provides for the discipline of agents and ultimate removal from the industry of those who have demonstrated that they are unfit to be members of the industry.
- (5) it supports this process by requiring an annual return to be made by each agent every year. This return must be in the form set by the Commissioner for Consumer Affairs. Currently, the form includes current business name and address requirements and statements regarding convictions for criminal offences or involvement in bankruptcy or winding up. This provides a means of tracing holders of trust accounts, ensuring trust accounts are properly managed, and discovering information which may lead to disciplinary action being taken.
- (6) when all these measures fail to protect the consumer, the Act provides for compensation from the indemnity fund.

2.8.2.2 Risk of substandard work being performed

There are a number of risks involved in real estate transactions. Lack of knowledge or understanding of laws relating to misrepresentation on the part of the agent may lead to significant consumer detriment. Agents may misrepresent a property to a purchaser, leading the purchaser to make an offer based on the false assumptions.

An agents appraisal of the property may be too high or too low if the agent lacks knowledge of property values and the skills required to make an accurate appraisal. Appraising the property at too high a value may lead to failure to sell the property, resulting in detriment to the vendor. Setting too low a value, on the other hand, may lead to a vendor selling the property for less than the market value, resulting in a considerable loss to the consumer.

The two areas where consumers are likely to suffer the most significant detriment, however, are the areas of contracts and deposits.

In South Australia, unlike many other jurisdictions, land agents may draft the contract for the sale of land or a business. For a land agent to be able to draft such a contract, however, an understanding of the principles of contract and property law is essential. Failure to take these principles into account may result in a contract that is unenforceable, unclear or one that does not reflect the intention of the parties to the contract. The potential for consumer detriment as a result of such contracts is considerable. A vendor may lose the sale if the contract proves to be unenforceable (a result which is intensified in a depressed property market). Alternatively, the vendor may suddenly discover that they have lost their entitlement to aspects of the property which they understood they were able to keep

(fixtures, etc). A purchaser may discover that the property does not include aspects which the purchaser believed it included. Uncertainty may result in invalidity of the contract or may lead to lengthy and expensive litigation to determine the meaning of the terms of the contract.

Regulation of the industry helps to reduce the incidence of such provider failure.

2.8.2.3 Risks to health and safety

These risks are not relevant in relation to the market for real estate services.

2.8.2.4 Risk of criminal activity

There is some risk of fraudulent conduct in the real estate industry. This risk arises because agents hold large amounts of money on trust.

The Act tries to address this risk by preventing those with a history of dishonesty from entering the industry.

2.9 Do the benefits of regulation outweigh the costs?

There is a clear cost in restricting the practice of negotiating, selling etc of land to registered land agents. These costs flow from the reduction of competition in the marketplace. Incumbents have less incentive to innovate, to increase efficiency and to reduce cost. Despite the submission from REISA that the market for real estate services is already a competitive one, the Review Panel accepts the submission of the Law Society that there may be areas in which other service providers may provide a more innovative, cost-efficient service.

Nonetheless, the Review Panel acknowledges that there are a number of benefits which flow from restricting real estate practice to registered land agents.

It can be seen that there are four main benefits of regulation of the real estate industry: reduction of transaction costs and information asymmetry, reduce risk of financial loss through misapplication of trust monies and reduced risk of substandard performance of work where the consequences of such substandard performance could be serious.

The Review Panel considers that, in principle, these benefits outweigh the general costs of regulation.

It is therefore the conclusion of the Review Panel that the ongoing regulation of the market for real estate services is justified. While individual restrictions must be analysed on a case by case basis, the Review Panel remains of the opinion that regulation of the real estate industry in some form is necessary.

2.10 What are the alternatives?

2.10.1 Deregulation

Whenever alternatives to regulation of an occupation are considered, complete de-regulation is an option which must be considered. In the case of land agents and sales representatives, complete deregulation is considered undesirable. If the industry were completely deregulated, there would be reliance solely on common law remedies and consumer protection laws. The real estate industry is one where there is the potential for significant consumer detriment. In the complete absence of regulation, it is probable that incompetent and possibly dishonest practitioners would enter the industry.

The consequences of such a situation would be twofold. Firstly, consumers would be faced with the risk of significant financial loss, remembering that for the "Mum and Dad" type consumer, the family home is the most significant asset owned. Placing consumers at this kind of risk is undesirable both from a social and from an economic perspective.

Secondly, consumer confidence in the real estate industry as a whole would diminish. Such a crisis in consumer confidence would lead to consumers either opting to "do it themselves" with little knowledge of the aspects which need to be included in such a significant transaction, or resorting to the use of legal practitioners in all cases, which would lead to a significant increase in the cost of buying or selling real estate.

Additionally, consumers would incur greater search costs in identifying an appropriate service provider, and are at a significant disadvantage through information asymmetry.

The Review Panel acknowledges that complete deregulation would not leave consumers with no protection. A number of statutory requirements would still apply to the relationship between agent and client, including a number of contractual remedies available under consumer protection legislation.

2.10.1.1.1 *Fair Trading Act 1987*

The *Fair Trading Act 1987* (SA) prohibits misleading and deceptive advertising and other conduct. The more general sections read as follows:-

Misleading or deceptive conduct

56. (1) A person shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

Misleading conduct in relation to services

64. A person shall not, in trade or commerce, engage in conduct that is liable to mislead the public as to the nature, the characteristics, the suitability for their purpose or the quantity of any services.

Real estate services are subject to these laws because the definition of services in section 46 of the *Fair Trading Act 1987* is very wide; it includes any rights (including rights in relation to, and interests in, real or personal property), benefits, privileges or facilities that are, or are

to be, provided, granted or conferred in trade or commerce, including rights benefits, privileges or facilities that are or are to be provided, granted or conferred under a contract for or in relation to the performance of work, including work of a professional nature. Therefore real estate services will fit into the category of "services" for the purposes of the *Fair Trading Act*.

2.10.1.1.2 *Trade Practices Act - Implied Terms*

The *Trade Practices Act 1974* (Cth) implies standard terms that cannot be excluded into contracts for the purchase of goods and services. Those terms stipulate that services purchased will be rendered with due care and skill and fulfil their purpose. Failure to do so will be a breach of contract, which may be taken to court.

Section 74 of the *Trade Practices Act 1974* (Cth) reads:-

Warranties in relation to the supply of services

74. (1) In every contract for the supply by a corporation in the course of a business of services to a consumer there is an implied warranty that the **services will be rendered with due care and skill** and that any materials supplied in connexion with those services will be reasonably fit for the purpose for which they are supplied.

(2) Where a corporation supplies services (other than services of a professional nature provided by a qualified architect or engineer) to a consumer in the course of a business and the consumer, expressly or by implication, makes known to the corporation any particular purpose for which the services are required or the result that he desires the services to achieve, there is an implied warranty that the services supplied under the contract for the supply of the services and any materials supplied in connexion with those services will be reasonably fit for that purpose or are of such a nature and quality that they might reasonably be expected to achieve that result, except where the circumstances show that the consumer does not rely, or that it is unreasonable for him to rely, on the corporation's skill or judgment.¹²

The section only implies these terms into contracts for the supply of services struck between a corporation and a consumer. A land agent carrying on business as a sole trader or in partnership with another does not have these terms implied into their dealings with consumers.

However, the conduct of the directors, servants or agents of the corporation acting within the scope of their actual or apparent authority may be taken into account to ascertain whether a breach of the implied term has been committed.¹³ A land agent working for a corporation may make it liable if their services are not rendered with due care and skill, or if the services do not fulfil their requested purpose.

¹² Emphasis added.

¹³ *Trade Practices Act 1974* (Cth), section 84(2).

Although section 68 of the *Trade Practices Act* prohibits the exclusion of these warranties from the contract, section 68A modifies this prohibition so that a corporation may limit its liability to the supplying of the services again or the payment of the cost of having the services supplied again, provided it is fair and reasonable to do so.

In the case of land agents, it would generally not be fair and reasonable to limit the liability to the resupply of the services of the cost of having the services supplied again. This is because the damage suffered by the consumer will usually arise from the consumer's reliance on the land agent's work. Resupply of the service would not repair the damage done to the consumer. The only appropriate remedy in such a case will be damages.

2.10.1.1.3 *Consumer Transactions Act 1974 (SA) - Implied Terms*

South Australian law has a similar set of terms that are implied into contracts for the performance of services.¹⁴ However, it only applies to a limited range of services, which are defined in that Act and its regulations. Real estate services are not a "service" for the purposes of that Act¹⁵. In a deregulated market, it would therefore be desirable to prescribe real estate services as a service under the *Consumer Transactions Act*.

If real estate services were prescribed as a service under the *Consumer Transactions Act*, then consumers would have access to the remedies under that Act. The main benefit for consumers would be that the warranty under section 7 would be implied into their contract with the land agent. This warranty is that "the services will be rendered with due skill and that any materials supplied in connection with those services will be reasonably fit for the purpose for which they are supplied".

The benefit of this is that consumer would have a remedy in contract.

Although the consumer protection laws tend to operate reactively (ie they are only available to the consumer once substandard work has been performed), they still offer some protection to clients of land agents. In addition they have some deterrent effect, because land agents know that they may face legal action if substandard work is performed.

However, there is a difficulty in relying on either common law remedies or consumer protection laws to the exclusion of other protection. While they can be effective in some instances, in others they may offer little protection to consumers. If, for example, the agent is insolvent, or if the loss incurred as a result of the conduct of the agent is large and the agent does not hold professional indemnity insurance, then while the consumer may be able to establish a claim against the agent, recovering any form of compensation will be difficult if not impossible. Thus any victory will be a moral one only, and will still leave the consumer out of pocket. Further, the costs of pursuing such remedies may deter some consumers from taking any action. Finally, if litigation increased as a result of a lowering of standards in the real estate industry, there would be significant public costs which would follow through the increased costs to the courts, longer lists and the many other costs involved in litigation.

Thus complete deregulation of the industry is not considered to be a viable alternative.

¹⁴ *Consumer Transactions Act 1972 (SA)*, section 7(1), (2).

¹⁵ See discussion of the possibility of prescribing real estate services under the Act in section 0, below.

2.10.2 Self-regulation

Self-regulation involves an industry body taking responsibility for the regulation of a trade or profession. Generally this will take place without any form of legislative backing. Sometimes such a body will receive Government funding, while at other times it is completely self-supporting.

An example of self-regulation is accountants. There is no legislation regulating accountancy as a profession, but most accountants are members of the various industry bodies, including the Institute of Chartered Accountants, the Australian Society of Certified Practising Accountants and the National Institute of Accountants. Each of these groups promotes high standards within the industry, including strict trust account requirements.

Strong publicity has ensured public awareness of members of these bodies as practitioners of the highest standard. This enables the general public to make an informed choice in their use of accountant.

For an industry to self-regulate, there needs to be an industry body or bodies with broad industry coverage.

In the real estate industry, the Real Estate Institute estimates its current membership at 70% of employees and 95% of trading entities. Thus this is a body with fairly broad industry coverage.

However, it may be argued that industry groups may have a tendency towards engaging in anti-competitive behaviour rather than promoting competition. Thus resorting to self-regulation may not increase the level of competition within the industry - indeed it could potentially have the opposite effect.

Another problem with self-regulation is that the industry body has very little control over members of the industry who are not members of the association. Such practitioners could well engage in conduct which is detrimental to the interests of consumers. This is particularly a problem in the long term, as more people enter the industry (under a self-regulatory system) who do not possess the qualifications or fulfil the other criteria of the industry association.

The Review Panel notes that sales representatives (who do not have trust accounting obligations) are negatively licensed in South Australia.

Thus self-regulation is not considered to be a viable alternative at this stage.

2.10.3 Negative Licensing

Negative licensing eliminates the requirement for a person to be registered. Instead, it replaces the registration system with a requirement that a person hold prescribed qualifications before practising a particular occupation. It is generally accompanied by a means of removing unfit persons from the industry - usually by means of disciplinary action.

Examples of the use of negative licensing are the *Land Valuers Act 1994* and the *Hairdressers Act 1988*. Additionally, sales representatives are negatively licensed under the *Land Agents Act*.

Although negative licensing controls entry to the industry to some extent, it is an inadequate way of regulating industries where significant amounts of money are held on trust. In the absence of registration or licensing requirements, it is difficult for an inspecting body to know the identity and location of all participants in the industry. Searches of publications such as the Yellow Pages may offer some assistance but will not necessarily be accurate or complete, and are time-consuming in any event.

2.10.4 Co-regulation

In recent years, the Government has developed a new regime of occupational licensing in which provision has been made for increased industry involvement. The Commissioner for Consumer Affairs now has the power to enter into agreements under which groups or organisations associated with certain regulated industries undertake a specified role in the administration and enforcement of a particular Act. Delegations to a particular industry group must be recorded in a formal agreement which must be laid before Parliament.

Agreements will be dependent on industry groups demonstrating their capacity to achieve certain outcomes required by law. The Government must be satisfied that, in any industry seeking delegated authority and an industry agreement, there is a degree of maturity and an ability to look objectively at itself.

Under an agreement, elements of the enforcement and administration of the relevant Act may be delegated to key industry groups. However, certain functions cannot be delegated. These include the registration/licensing function, the power to request the Commissioner of Police to investigate and report on matters, the power to commence prosecutions under the Acts and some aspects specific to the individual Acts. In all cases, the industry group will be required to establish a code of conduct, observance of which may be made mandatory under the *Fair Trading Act 1987*.

Typically, the industry group will participate in an informal way in dispute resolution and giving consumers advice. In some industries, it has become the practice for disputes to be referred first to the relevant industry group before it is brought to Consumer Affairs. However, such groups will not be able to make a final determination in a dispute; their role will be to conciliate or mediate the dispute only.

As prerequisites to an industry agreement, the Government will need to be assured that the industry group already demonstrates certain capabilities, including:-

- a sufficient legal basis for the group to undertake the responsibilities proposed;
- the industry as a whole is supportive of the proposed role;
- the group has significant coverage of the industry concerned;
- evidence of public and consumer consultation;
- sufficient reporting procedures are in place; and
- evidence of the capacity to handle the delegations, including such issues as staffing, access to the proposed dispute resolution process, customer feedback proposals, etc.

The *Land Agents Act* currently contains provisions which could lead to the development of a co-regulatory system. Some delegations have already occurred, including the inspection of trust accounts. While this may reduce the costs to government, it does not necessarily make any difference to the restrictions on competition. It is more of a cost-shifting exercise.

Additionally, many of the criticisms of self-regulation are equally applicable to co-regulation. It is more prone to industry capture, which may result in anti-competitive behaviour being engaged in.

2.10.5 Certification

A system of certification is a form of partial deregulation. Such systems involve two main aspects: the elimination of the offence of practising without a license, registration or prescribed qualifications, and the introduction of a certificate of qualification.

On completion of a course of instruction, a person is given a certificate specifying that they have achieved a certain level of expertise, to be displayed prominently in their work premises. A publicity campaign may be undertaken to inform the public that only those practitioners who hold certificates have been fully trained in their trade.

Only those who held certificates could call themselves "qualified". Uncertified or unregistered professionals are prohibited from using the title of certified or registered professional, or otherwise indicating to the public that they have the same standing.

Certification is often used in the regulation of professions. Certified professionals are those who have been issued with certificates by educational institutions, industry associations or other regulatory bodies certifying that the holder has passed certain examinations or possesses certain practical experience.

The advantage of such a system is that it provides the consumer with a choice. It is expected that those who were fully qualified would charge more than an untrained person, but with this increased price would come a guarantee of quality.

There are a number of disadvantages to such a system, however. It would be very difficult to monitor those who were not certified. This is of particular concern where large amounts of money are being held on trust. It would be easier for such agents to misbehave with their trust accounts if they were not being properly scrutinised.

Certification may also be misleading to consumers where it is based on a one-off award of a certificate of competence. Current competence levels will not be the same as they were ten years previously and will not be the same ten years hence. In some cases, skills will have improved, but in others, skills may have declined.

2.10.6 Restriction of title

Under this option, any person would be allowed to be involved in the sale of land or businesses, but only those holding prescribed qualifications and fulfilling other criteria could call themselves a land or business agent. In some ways, this option resembles certification and negative licensing, but there could potentially be greater control over who could call themselves an agent.

The advantage of this option is that it would lead to an increase in competition as other occupational groups entered the industry. This could potentially lead to lower prices for real estate services.

There are a number of objections to this option however. The most significant one is that it would make it very difficult to keep track of trust money. As with certification, only those who were allowed to call themselves land agents would be under any form of control. It would be very difficult to monitor the trust accounts of others.

There would also be difficulties in ensuring that all persons acting as agents were properly trained. As indicated above, there are a number of risks which are posed to consumers if a person without knowledge of the relevant law is involved in real estate and business transactions.

If this option were pursued, it would also make it very difficult to control sales representatives.

2.11 Recommendation

The Review Panel has determined that the benefits of regulation in principle outweigh the costs. There are no viable alternatives. It is therefore the recommendation of the Review Panel that the *Land Agents Act* be retained.

Recommendation

The Review Panel finds that the benefits of regulation outweigh the costs and there are no viable alternatives to regulation.

The Review Panel therefore recommends that the *Land Agents Act* be retained.

3. RESTRICTIONS ON COMPETITION - BARRIERS TO ENTRY

Having determined that the Act in principle should be retained, the Review Panel will now examine each restriction in detail and determine whether the restrictions are justified, and whether there are any specific alternatives to the current regulation.

3.1 Scope of work for which a licence or registration is required

3.1.1 Land Agents

All land agents are required to be registered under the Act. The Act defines an agent as any person who carries on a business that involves:-

- (a) selling or purchasing or otherwise dealing with land or an interest in land or businesses on behalf of others, or conducting negotiations for that purpose; or
- (b) selling land or businesses on his or her own behalf, or conducting negotiations for that purpose.

However, the definition excludes legal practitioners, those who use agents to act on their behalf, and the practice of mortgage financing.

In addition, the sheriff, deputy sheriff and sheriff's officers are exempted from compliance with the Act when selling real or personal property in pursuance of the process of a court by section 15 of the *Sheriff's Act 1978*.

3.1.2 Land

This aspect of the definition of an agent does not appear to be overly restrictive of competition. However, it may include developers selling their own properties, property managers who negotiate leases and retirement villages. Some of these groups have indicated that they believe that they should be able to carry on business in these areas without being registered as land agents.

The Law Society submitted that:-

"[I]t should be permissible for developers to sell their own properties and property managers who negotiate retirement villages to sell land. Given that property managers are required to be registered under the Act, even though they only manage rental properties means that there is no restriction on them selling real estate. If property managers did not have to be registered under the Act for the purpose only of managing rental properties, then they should not be permitted to sell real estate as the educational qualifications would be insufficient and the risk of the consumer greater."

REISA (whose comments were endorsed by the AIC) felt that the abovementioned parties should be required to be registered land agents. They submitted this for two reasons:-

- (a) *salespeople may have little or no understanding of the nature of the product they are selling or their legal obligations unless properly qualified.*
- (b) *history has shown that there are considerable risks to members of the public when dealing with property sales through some property developers.*

CASA submitted that:-

"developers who sell their own property, property managers who negotiate leases and retirement villages possibly should be licensed under this Act if their actions fall within the scope of dealing with land and no other statutory regulation exists. Consumers must be protected from these types of dealings as the risk of loss involved is just as great as with land agents... this type of purchase, being one of such significance, must be regulated specifically from the outset."

It appears that the risks associated with developers selling their own property and property managers who negotiate leases are the same as those associated with land agents. On this basis, there does not appear to be any justification for differentiation between these groups.

3.1.3 Businesses

This aspect of the definition of an agent has caused some dispute between agents and other occupational groups, such as accountants, who believe themselves to be able to assist clients in the sale of their businesses.

There has been significant debate as to whether the conduct of accountants in this area falls within the definition of an agent (in which case the accountants are breaching the Act). Arguably, where an accountant arranges the sale of the business in the course of general practice, the accountant is in breach of the Act. However, that where the accountant is exercising powers given under the Corporations Law or the Bankruptcy Act, those laws will override the provisions of the Act where the accountant engages in the sale of land or a business. In all other States, liquidators are specifically exempted from the relevant Acts when acting in that capacity. The question of whether accountants generally should be permitted to sell land and businesses is considered in section 3.1.4.2 below.

3.1.4 *Other occupations*

There are some other occupations which may be able to carry on a business involving some or all of the skills presently related to land agents with little risk to consumers. Where this is possible, the foregoing analysis does not apply. The benefits of the restriction are significantly reduced, as a similar level of protection is offered to consumers in the absence of the restriction. In other words, as the risk to consumers is reduced, so is the level of benefit which may arise from the restriction.

3.1.4.1 *Legal Practitioners*

The Review Panel has considered whether legal practitioners should be able to perform the work of land agents. The Review Panel has made a number of findings in relation to this issue, as follows.

3.1.4.1.1 *The systematic selling of real estate is not part of traditional legal practice.*

In its initial submission to the Review Panel, the Law Society submitted that while in the course of their practice solicitors prepare contracts, leases etc, attend to conveyancing and negotiate the private sale of land and businesses on behalf of their vendor clients who approach them for that purpose, it would not be normal for solicitors to:-

- advise on sale prices;
- conduct auctions;
- employ sales persons;
- attend to open inspections;
- advertise properties for sale; and
- advertise for listings.

The submission of the Law Society was that

on the law as it currently stands, solicitors are not legally allowed to engage in the systematic selling of real estate in competition with land agents. They are merely entitled to sell real estate where it is a normal adjunct to their traditional legal activities.

In its second submission, the Law Society referred to the decision of the New Zealand Court of Appeal in *Lewis v Real Estate Institute of New Zealand*, and noted that this decision “makes it

quite clear that the organised selling of real estate by solicitors is not an activity that is ancillary or incidental to practice as a legal practitioner”.

However, later in that same submission, the Law Society contends that *“there is no logical reason to require solicitors to be registered under the Land Agents Act when they have never been so required in such activity in the past”*. The Review Panel considers that the true position is not that solicitors have never been so required in such activity in the past; rather it is that solicitors have not engaged in this activity in the past, and thus there has never been a need to consider whether they should be required to be registered or not. This is supported by the Law Society’s submission that *“the extension by legal practitioners into the organised selling of real estate is indeed a recent Australia wide, and indeed world wide, trend”*.

The Review Panel therefore finds that the systematic selling of real estate is not part of traditional legal practice.

3.1.4.1.2 The systematic selling of real estate is a separate field, which has been conducted by land agents under various licensing regimes

In South Australia, the systematic selling of real estate has traditionally been carried on by land agents. This has been conducted under various regimes, as outlined in the history of regulation (see section 1). It is clear that this has always been regarded as a separate field of work, subject to its own, industry specific, regulation. Although non-agents have been able to perform certain areas of agent work in certain contexts (for example, insolvency practitioners selling land or businesses in the course of that practice, and legal practitioners doing likewise), the systematic selling of land and business has been reserved to land agents (and their sales representatives).

3.1.4.1.3 The Act currently restricts the legal practitioners from the systematic selling of real estate.

It follows from the above that the Land Agents Act constitutes a restriction on legal practitioners participation in the market.

3.1.4.1.4 The training of legal practitioners provides them with sufficient knowledge of the legal aspects of land agents’ work

All legal practitioners undergo extensive training in commercial, contract and real property law. Indeed, the Review Panel considers that legal practitioners are at least as competent in the legal aspects of land and business transactions as land agents are. The Review Panel accepts the submission of the Law Society that:-

“ever-increasingly, the selling of real estate is involved in the preparation of complex legal documentation. Solicitors are better trained than any other group in our society for the preparation of such contract documentation.”

REISA in its initial submission agreed that the general contractual principles and training of legal practitioners are *‘probably adequate’*. In its second submission, REISA indicated that, in relation to aspects of the transaction other than appraisal and marketing, *“legal practitioners qualifications would... provide adequate consumer protection”*.

Thus in terms of the risks relating to the legal aspects of the transaction, the Review Panel considers that legal practitioners are sufficiently competent to be able to provide the service without these risks.

3.1.4.1.5 Legal practitioners are not adequately trained in appraisal

The Review Panel agrees with REISA's concerns that legal practitioners generally are not sufficiently trained in appraisal to provide these services, which are considered integral to the role of a land agent, without risk to the consumer. The Law Society conceded that legal practitioners have no formal training in appraisals.

3.1.4.1.6 There would be a number of benefits in enabling legal practitioners to operate in the same area as land agents

The Law Society submitted that there would be a number of benefits in opening up the market for real estate services to legal practitioners. These benefits include:-

- improvement of competition;
- better contract preparation; and
- cost competition.

The Law Society submitted that there were further benefits in that consumers would have access to the Legal Practitioners Guarantee Fund. However, this would require amendments to the *Legal Practitioners Act*, and the Review Panel is not convinced that such amendments would inevitably follow a decision to allow legal practitioners complete exemption from the *Land Agents Act*. Many legal practitioners who do not wish to open up their own practices to this area may be reluctant to see their fund exposed to the risks of additional claims by clients of legal practitioners acting, in effect, as land agents. Therefore the Review Panel does not consider that this can reasonably be considered to be a benefit of allowing legal practitioners complete exemption. Further, clients of land agents currently have recourse to the Agents Indemnity Fund, which provides equivalent consumer protection.

It was further submitted that the requirement for legal practitioners to hold professional indemnity insurance is another potential benefit of opening up the market completely to legal practitioners. However, as professional indemnity insurance is not a requirement for land agents, because the benefits of professional indemnity insurance are not considered to outweigh the costs in that industry, the Review Panel does not consider that the professional indemnity insurance of legal practitioners is a relevant benefit.

Nonetheless, the Review Panel accepts that opening up the market to legal practitioners could result in greater competition, with the possibility of lower costs, greater efficiency and innovation. The Review Panel also considers that legal practitioners would provide a service in relation to the drafting of contracts that is at least as competent as that provided by agents.

3.1.4.1.7 Legal practitioners qualifications should be recognised for the purposes of registration as a land agent, subject to completion of an approved course in appraisal

The Review Panel considered two options, both of which would enable legal practitioners to provide real estate services on the same basis as registered land agents. These are:-

- exempt all legal practitioners from the *Land Agents Act* (ie extend the current exemption)
- prescribe the qualifications held by legal practitioners as sufficient for registration as an agent.

(1) Exempt all legal practitioners from the Land Agents Act

The Review Panel considered the possibility of exempting legal practitioners completely from compliance with the Act. Currently the Act provides that a person does not act as an agent, and hence fall within the jurisdiction of the remainder of the Act, where that person:-

“sells or purchases or otherwise deals with land or businesses on behalf of others, or conducts negotiations for that purpose, in the course of practice as a legal practitioner.”

However, while this definition exempts legal practitioners from the Act insofar as they provide real estate services that are ancillary or incidental to their practice as a legal practitioner, it does not exempt them from compliance with the Act where their activities go beyond 'the course of practice as a legal practitioner'.

The Review Panel considered that it would be possible for either regulations to be made exempting legal practitioners from compliance with Act or for the Act itself to be amended so as to provide that legal practitioners are not bound by the Act.

If legal practitioners were exempted from the Act, they would not be required to comply with any other requirements of the Act, such as trust accounting requirements, nor would they be subject to the disciplinary regime under the Act. Additionally, were any Code of Conduct developed under the Act, they would not be bound by such a code.

The Review Panel notes that legal practitioners are currently subject to trust accounting requirements that are substantially the same as those for land agents. It is also noted that legal practitioners are subject to their own ethical constraints under the Legal Practitioners Conduct Rules. Further, consumers have access to the Legal Practitioners Guarantee Fund in the event of fiduciary default by the legal practitioner.

Despite this, the Review Panel does not consider that a blanket exemption is warranted in this instance. There are concerns about the extent to which consumers would be protected in the event of fiduciary default, as the Legal Practitioners Guarantee Fund, in its current form, would not support such claims in relation to the provision of services which fell outside the ambit of 'the course of legal practice'. Such concerns could be dealt with if the *Legal Practitioners Act* was amended to encompass such activities. However, the Review Panel is not certain that such an extension would be widely accepted by legal practitioners, as it would involve exposing their guarantee fund to new and potentially significant claims, in an area in which many legal practitioners may not be interested in practising. It may be perceived within the legal profession as being something for the benefit of a few practitioners who are interested in this area, but imposing costs on the whole profession.

Despite submissions from the Law Society that this move has the support of the profession as a whole, the Review Panel remains unconvinced. Further, any amendment to the scope of the guarantee fund would need to be made under the *Legal Practitioners Act* and it is beyond the scope of this review to make such a recommendation.

However, even if the Review Panel was provided with convincing evidence that a move to include wider real estate transactions within the ambit of the 'legal practice' was acceptable to the legal profession as a whole, and that there would be no obstacles to the amendment of the *Legal Practitioners Act*, the Review Panel would still hold some concerns about a blanket exemption for legal practitioners. The *Land Agents Act* is directed towards regulating the conduct of all those involved in the sale of land and/or businesses. Having all these people regulated under the one system means that compliance issues such as codes of conduct can be dealt with and made applicable to all those providing those services. Conversely, having different regulation for land agents, legal practitioners and any other service providers who may be deemed to possess necessary skills¹⁶ may result in different standards being applied to different service providers, all of whom are competing in the same market and providing essentially the same¹⁷ service. Consumers may have different protection depending on whether they deal with a land agent, a legal practitioner or some other service provider. It is more sensible to bring all service providers in this market under the one regulatory scheme, with the same standards being applied to all.

(2) Prescribe the qualifications held by legal practitioners as sufficient for the purposes of registration as a land agent

This leads naturally to the second option, which was preferred by the Review Panel, which is to prescribe the qualifications held by legal practitioners as sufficient for the purposes of registration as an agent. This would enable those legal practitioners who wished to operate in this market to obtain registration, without requiring them to duplicate, unnecessarily, the qualifications required to be held by registered land agents generally.

The Review Panel considers that all those working as land agents should be regulated under the one Act.

The Review Panel has concluded that, other than the lack of training in appraisal, the qualifications of legal practitioners demonstrate sufficient competency to be recognised as adequate for the purpose of registration as a land agent. The Review Panel does not, however, accept that systematic involvement in land transactions (other than conveyancing) is or ever has been part of legal practice in South Australia. While legal practitioners may be competent in this area, it does not mean that the work is legal work. Some aspects of the work are legal work (for example, the drafting of contracts). Other aspects (and it is these aspects which the Law Society wants to be pursuing) are clearly not legal work (marketing, appraisal, conducting auctions, etc). Knowledge of the law may be helpful (for example, the law relating to misrepresentation and misleading and deceptive conduct), but this does not make it legal work.

The distinction which needs to be drawn is between work that legal practitioners may be competent to perform, and work which in its nature is inherently legal work. The Review Panel's finding is that the work of land agents is the former (subject, of course, to the qualification that legal practitioners are not necessarily competent to perform appraisals).

¹⁶ For example, accountants, as discussed below.

¹⁷ In terms of type of service, not in terms of quality.

The Review Panel therefore considers that while legal practitioners' qualifications should be recognised for licensing purposes, legal practitioners should not be exempt from compliance with the Act altogether. The *Legal Practitioners Act* regulates the work of legal practitioners *as* practitioners. If legal practitioners choose to act as land agents, they will be acting not in their capacity as legal practitioners but as land agents.

Benefits of the one Act approach

There are a number of benefits in having a one Act approach. The first of these is consistency. The same standards are applied to all people working in the industry. While some may have greater qualifications in some areas than others, all will be required to have the same minimum competency. Likewise, the same standards of conduct are applied to all.

The second benefit is that one body with expertise in the area is responsible for discipline. The Office of Consumer and Business Affairs has staff members with expertise in the area of real estate. They have knowledge of the industry, of types of transactions, etc. Such officers are better equipped to prosecute disciplinary matters than the various legal practitioners disciplinary bodies whose expertise lies in a different area.

The third benefit is that if a Code of Conduct is developed, it will apply to all people operating in the real estate industry, irrespective of their background. While the Law Society argued that legal practitioners are already subject to the profession's Professional Conduct Rules, and doubted that any "higher standards" would be contained in a Code under the Land Agents Act, the Review Panel rejects this argument. It fails to take into account the possibility of industry specificity within such a code. The standards promulgated may be no "higher" than those under the Professional Conduct Rules, but they will almost certainly cover different ground. There may be considerably more detail in certain areas of such a code than in the Professional Conduct Rules. In some areas, the requirements of such a code may well be different, simply because the Professional Conduct Rules have not been required to traverse such an area before. The Review Panel considers that any Code should apply to all people operating in the market, to ensure the protection of consumers.

It may be argued that an inconsistency exists in relation to legal practitioners and conveyancers in so far as separate disciplinary regimes exist for each occupation. However, a distinction must be drawn between conveyancing and the work of land agents. Conveyancing has always been a part of legal practice, and non-solicitor conveyancing has always been seen as the opening up of an area of legal practice to non-lawyers. What the Law Society proposes is to expand legal practice to incorporate an area which has not traditionally been part of legal practice.

Conveyancing is only one arm of legal practice. Thus non-solicitor conveyancers should only be subject to similar requirements to those which would be applicable to the conveyancing aspects of legal practitioners work were the requirements to be apportioned in this way. The Law Society proposes that legal practitioners be permitted to perform the whole of the work that land agents currently perform. The ability to do this should logically carry with it all the requirements of such work.

This option imposes slightly higher private costs on those legal practitioners wishing to operate in this market than the first option does. Any legal practitioner who wishes to

provide the services of a land agent will be required to hold registration as an agent. Thus they will have to pay a registration fee and lodge an annual return accompanied by a fee each year. However, in general terms, this is not considered to be a significant cost; indeed the conclusion of the Review Panel in relation to the requirement to pay fees is that it is a trivial restriction on competition.

In addition, those legal practitioners who register as agents will have to comply with the requirements of the Act in relation to trust accounts. This will involve the establishment of a second trust account for those transactions relating to the practitioner's registration as an agent. While there may be some slight additional expense associated with this, the Review Panel understands that many registered agents currently hold multiple trust accounts in relation to the various types of transactions in which they are involved (eg sales, rentals, etc). This does not appear to be imposing a significant cost on these agents, and the Review Panel does not consider it likely that it would impose significant costs on those legal practitioners registered as agents if they had to comply with the same trust accounting requirements. While the Law Society submitted that it this would involve unnecessary duplication, the Review Panel does not agree that such duplication is unnecessary.

The benefit of requiring legal practitioners to maintain a separate trust account for work carried on as land agents is that the interest on these trust accounts would accrue to the Agents' Indemnity Fund, rather than the Legal Practitioners Guarantee Fund. This would then obviate the need for extending the scope of coverage of the Legal Practitioners Guarantee Fund, and thus reduce the exposure of that fund to claims arising out of real estate transactions.

The Review Panel notes that adoption of this proposal means a legal practitioner who is also a registered land agent will be subject to the provisions of Part 5 of the *Land and Business (Sale and Conveyancing) Act 1994*. Of particular relevance in such a case will be the prohibition set out in section 28 against the preparation of conveyancing instruments by agents and persons in prescribed relationships to agents.

3.1.4.1.8 Legal Practitioners should be required to undertake training in appraisal before their qualifications are recognised for licensing purposes

The Review Panel identified the risk of an inaccurate appraisal as a risk against which some protection should be afforded. As legal practitioners have no training in appraisal, it would be inappropriate for legal practitioners qualifications to be recognised for registration purposes without requiring some form of training in appraisal.

The Review Panel does not consider that a requirement for legal practitioners to be trained in property appraisal would be overly onerous. The Property Appraisal unit in the current TAFE Certificate course takes only twenty hours, although the Review Panel acknowledges that there may be underlying knowledge for this subject which a Legal Practitioner may not have. There would also be scope for the Commissioner for Consumer Affairs to approve courses in appraisal provided by authorised training providers.

Conclusion

The qualifications held by legal practitioners provide adequate protection for consumers in relation to the contractual and legal aspects of the transaction.

Recommendation

The best alternative is to prescribe the qualifications held by legal practitioners for the purposes of registration, subject to legal practitioners demonstrating competency in appraisal.

3.1.4.2 Accountants

A further occupational group which is restricted from selling land and businesses but which may be competent to do so is accountants.

The only submission which addressed the costs of this restriction was received from CASA, which submitted that:-

"restricting the sale of land and business to land agents and lawyers results in less consumer choice."

The Review Panel considers that there are additional costs which were not raised by the submissions. If accountants were able to compete in this market, they may be able to offer an efficient service, and the increased competition may drive prices down and encourage present participants in the industry to increase their efficiency.

A number of submissions highlighted perceived benefits in preventing accountants selling businesses. Accountants were perceived by the majority of submissions as lacking the necessary skills to sell businesses. The Law Society submitted that:-

"there is insufficient training and/or qualification in legal issues arising from these transactions to justify the broad exemption of accountants. It could lead to increases in financial loss by consumers through inaccurate or negligent advice about the consumer's rights and projections;"

while REISA submitted that:-

"Accountants... are not trained in marketing or other aspects of selling a business... Although an accountant may be an expert in providing accountancy advice, he or she is not trained in real property law, the legislation governing transactions for land and business... or the drawing of contracts."

The Review Panel has examined these submissions and considers that these concerns are unwarranted. Members of the peak accounting bodies, the Institute of Chartered Accountants in Australia and the Australian Society for Certified Practising Accountants, are required to have significant training in commercial law, and, indeed, may be considered to have more extensive training in relation to the situations arising with businesses than many registered land agents, who are currently permitted to sell businesses.

The Law Society also considered that there was a further risk to consumers, namely that:-

“it could lead to influence being exerted on consumers to use their existing accountant to undertake this task rather than a free and informed choice as to the best service/quality and price available in the market place for such services.”

However, the Review Panel does not accept that this is a significant risk. If accountants are considered to be competent to sell businesses, then there should be no concerns about consumers being unduly influenced. While there may be a risk of influence occurring, this risk is not significant enough to warrant exclusion from the market. It is inevitable that when a professional participates in more than one market, there will be a risk that the professional will influence clients in one market to use the professional's services in another market. However, provided no restrictive trade practices are engaged in, this is considered to be part of the normal competitive market. There is no difference between an accountants influencing a client to use the accountant's services to sell a business and a legal practitioner influencing a client in the same manner.

However, two further risks were highlighted by the Law Society, namely that:-

“while solicitors and land agents have well established procedures in terms of managing trust accounts,...this is not the case with accountants”

and:-

“the accounting profession has no equivalent to the Indemnity Fund maintained by real estate agents, or the Guarantee Fund maintained by solicitors.”

The Review Panel accepts that these risks are relevant in relation to some accountants, and that in so far as the restriction protects consumers from these risks, there is a relevant public benefit. However, provided all other factors were addressed, this would be easily addressed by adopting a procedure similar to that recommended for legal practitioners - that is, recognising the qualifications held by appropriate accountants as sufficient for the purposes of registration (which would result in a requirement to comply with all other aspects of the Act, including trust accounting requirements).

There are however concerns inherent in treating accountants in the same way as has been recommended for legal practitioners. Unlike legal practitioners, accountants have no specialist training in real property law and it is this which has implications in the area most likely to affect accountants, namely, the sale of businesses. The reality is that the purely “business” side of a business is rarely separate from its real estate. Although accountants may possess competency to deal with the purely “business” side of the sale (ie the goodwill, stock in trade, etc), accountancy qualifications do not provide sufficient competency in relation to the real property aspects of the transaction. The Review Panel considers knowledge of both elements of the transaction to be essential in most cases. As accountants lack such knowledge, simply recognising accountancy qualifications will present risks to consumers which, upon analysis, outweigh any competitive benefits which may arise on the rare occasion of a “business side only” sale. Therefore, the Review Panel is not prepared to recommend recognising accountancy qualifications alone as sufficient to sell land and businesses.

However, the Review Panel considers that there is no reason, in principle, why accountants should not be permitted to sell land and businesses if they can demonstrate adequate competency to do so. As noted, the Review Panel was not satisfied that accountants possess

sufficient competency in dealings with land. Nonetheless, given their existing competency in commercial and contract law, it may be possible for accountants to develop competency in the land related aspects of a transaction without having to undertake significant further study.

The Review Panel therefore recommends that a further review of this issue be conducted by the Office of Consumer and Business Affairs in association with bodies representing the interests of accountants, with a view to permitting appropriately qualified accountants to be registered as land agents and/or developing appropriate "top-up" qualifications for accountants to enable them to gain registration.

Conclusion

Some accountants are sufficiently competent in the business related aspects of the sale of a business to conduct such transactions without risk to consumers. However, most business sales are inextricably connected to land, whether in the form of a lease, freehold title or other interest. Accountants generally do not possess competence in the land related aspects of the transaction.

It may be possible for accountants to develop competency in the land related aspects of a transaction without having to undertake significant study.

Recommendation

The Review Panel recommends that the Office of Consumer and Business Affairs conducts a further review of the competencies required for registration as a land agent. In the course of such a review, the Office of Consumer and Business Affairs should liaise with bodies representing the interests of accountants with a view to exploring the potential for either recognition of accountants qualifications as sufficient for registration as a land agent or the development of a "top up" qualification to provide accountants with sufficient competency.

Sales Representatives

The Act defines a sales representative as :-

a person who, for or on behalf of an agent, induces or attempts to induce, or negotiates with a view to inducing, a person-

- (a) to acquire or dispose of land or a business; or
- (b) to make an offer to acquire or dispose of land or a business; or
- (c) to accept an offer to acquire or dispose of land or a business; or
- (d) to enter into a contract for the acquisition or disposal of land or a business,

whether or not the agent is the owner of the land or business, but does not include a person who so acts only in relation to a lease of land that is not to be used for the purposes of a business

There are two competition issues which flow from this definition. The first is that the definition restricts this type of work to sales representatives. If there are other people who could carry out this work without risk to consumers then the definition may be too broad. However, the Review Panel considers that sales representative is closely defined and limited to the work which is specifically related to a transaction involving the creation or transfer of interests in land or businesses.

The second restriction is that although this definition is reasonably broad, section 11 of the Act refers specifically to the 'employment' of sales representatives. The Act appears to presuppose that the only way in which sales representatives will be engaged is through "employment". If this is the case, then the Act is placing a limitation on the way in which a sales representative can work. It would appear that a person who is not "employed" by an agent but performs the work of a sales representative (ie a contractor) would be required to be registered as an agent under the Act (and therefore fulfil all of the requirements for registration).

3.1.5 What are the benefits of the restriction?

Most submissions were opposed to the idea of allowing sales representatives to operate on a contractor rather than an employee basis.

One of the risks in allowing sales representatives to operate as contractors rather than as employees is that the agent who uses the contractor may be able to avoid vicarious liability for the acts and omissions of the contractor, which could reduce the level of consumer protection. Indeed, it has been suggested that a further benefit of the current regime is that agents are liable for the torts of their employees, and that this would not apply to independent contractors used by the agent. However, the Review Panel does not consider that this is a correct view of the law as it currently stands. Section 58 of the Act provides that a registered agent is liable for the acts or defaults of its employees, officers or agents, "agent" here appearing to be used in its everyday sense rather than specifically referring to a registered land agent. While this was clearly intended to cover the situation where a land agent engages another registered agent to act on behalf of the agent, there is no reason why it could not apply to independent contractors.

The main benefit of the restriction is that it ensures that sales representatives are under the ongoing control and supervision of registered land agents who are their employers. This enables the qualifications required of sales representatives to be lower, as the level of supervision provides additional consumer protection. Thus the lowest possible barrier to entry is created.

In this regard, the Law Society submitted that:-

"sales representatives should not be allowed to operate as contractors or in any other fashion other than as the employee of some suitably qualified and responsible person. Sales representatives, in large measure, lack the knowledge and experience necessary to conduct a business (including maintenance of a trust account) and to properly look after the interests of their client."

while REISA submitted that:-

“the implications of contracting a professional person are vastly more complex than contracting, say, a tradesperson... the risks to the consumer in permitting this approach are that the quality of service provided may be adversely affected... there is the important issue as to who controls the behaviour of and is liable for the actions of the contractor.”

Thus concerns relating to supervision appear to the Review Panel to be the major factor mitigating against the “introduction” of independent contractor sales representatives.

3.1.6 What are the costs of the restriction?

It should also be noted that, while there may be some reduction in flexibility flowing from the restriction, the effect of the restriction would be partly ameliorated if the later recommendation of the Review Panel, that the qualification required for registration as a land agent be reduced, were adopted. If a third party agency wants to be able to contract out staff, there appears to be no reason why they cannot use registered agents. If the barrier to entry for agents is reduced, then so too is the extent of this restriction.

3.1.7 What are the alternatives?

(1) the “Authorised Sales Representative” model

This model would involve requiring an agent to issue an authorisation, in writing, to any person engaged by the agent to act as a sales representative, whether as employee or contractor. It could be made an offence to act as a sales representative or to hold oneself out as a sales representative without holding this authorisation. The agent could be made strictly liable for the acts and omissions of any person holding such an authorisation from the agent, where those acts or omissions arose in the course of the engagement. There would be an onus on the agent to cancel the authorisation upon a person ceasing to be an authorised sales representative. This is modelled on the Corporations Law provisions relating to the representatives of dealers and investment advisers.

This option was suggested in the Issues Paper. In response, however, REISA submitted that:-

“the only beneficiaries from such a proposal are staff management companies and employer land agents who may be trying to avoid tax, compliance with relevant industrial awards, compliance with superannuation requirements and compliance with payroll tax legislation.”

On the other hand, CASA submitted that:-

“as long as the same regulation and liabilities are imposed on contractors and consumers are availed the same level of protection by access to the fund, a system of authorisation for contractors would be just as effective as the current system and would increase competition for the industry.”

The Review Panel has given some consideration to this model. However, there are a number of problems with this model. Firstly, unless there was a limit imposed on how

many proper authorities a person could hold, it may become difficult to trace who the sales representative was acting for at a particular time (in the absence of any contract of employment which stipulated the times at which the employee was in the employ of the agent).

Secondly, some record would need to be kept of who had been issued with proper authorities, including details such as the date on which the proper authority was given, the agent by whom the authority was given, and the name and address of the person to whom the authority was given. This would impose additional requirements on agents who currently employ sales representatives, thus imposing further costs. Effectively, it would result in an increase in regulation of the industry.

Further, it is considered doubtful whether a move to this system would increase flexibility in the industry.

Recommending any changes to the current Act which result in a net increase in the level of restriction is outside the terms of reference for this review. It is therefore the conclusion of the Review Panel that this is not a viable alternative.

The Real Estate Employers Federation agreed with this finding. It noted that *"the structure that is in place has worked successfully for many years"*, and that:-

"to lessen the restrictions could lead to a lowering of the standards and perhaps permit undesirable and possibly dishonest persons to enter the industry".

The Review Panel found these submissions persuasive, and noted in particular the opposition of the REISA and the Real Estate Employers' Federation of South Australia to any change.

(2) The contractor model

Under this model, sales representatives could operate like normal contractors and contract out their labour to land agents.

There are two problems with this model. The first is that sales representatives who were operating as contractors would be considered to be "carrying on business" and therefore fall within the scope of the definition of agent. If this model were to be adopted, the definition of agent would need to be changed.

A more serious problem with this model is the lack of control in the relationship. Unlike an employer/employee relationship, the contractor/subcontractor relationship limits the extent to which the person engaging the contractor can control or be responsible for the contractor's conduct. The lines of responsibility become blurred. While ultimately, the agent should be responsible for the acts and omissions of that agent's staff, such responsibility may be harder to demonstrate in the contractor relationship.

The reason sales representatives are allowed to operate with lower qualifications is because of the level of supervision that they are required to be under. The ultimate responsibility lies with the agent, not with the sales representative. This enables a lower level of training, and thus a lower barrier to entry, while still affording consumers a reasonable level of protection. It is difficult to see how the same level of supervision could be provided in a

contractor relationship, where the services may be being provided sporadically, or perhaps to a number of different agents.

The Review Panel has considered a number of variations on this less restrictive model which may allow sales representatives to operate as contractors rather than employees. However, none of these models adequately addresses the question of supervision. Additionally, the Review Panel considered models which may address this issue in ways which are not necessarily less restrictive. However, the Review Panel found that those models which may address this question only do so by imposing further restrictions in other areas, and in no case could the imposition of these further restrictions in one area be justified by the increased flexibility in another.

The Review Panel also noted that no submissions put forward an alternative model to the existing arrangements.

It should also be noted that the effect of this restriction would be less significant if the gap between the qualifications required for sales representatives and land agents was reduced.

The conclusion of the Review Panel is therefore that there is no viable alternative to the current requirements.

Conclusion

The benefits of the restrictions on the ways in which sales representatives can be engaged outweigh the costs.

There are no viable alternatives to requiring sales representatives to be employed.

3.2 Qualifications

3.2.1 Land Agents

Land agents are required to hold prescribed qualifications before they can obtain registration. This is, prima facie, a barrier to entry.

There are two competition issues which arise from this barrier:-

- (a) whether any requirement to hold qualifications is justified; and
- (b) whether the current requirements are set at an appropriate level (ie the level at which consumers derive the most benefit at the least relative cost - the community standard)

3.2.2 What are the benefits of requiring land agents to hold prescribed qualifications?

The Law Society submitted that there should be a qualification requirement for both an agent and a sales representative as:-

“both will be in the position of preparing a contract for the sale of a property which is a legal contract binding on both parties. There must therefore be a minimum level of competency and understanding of the legal requirements for a contract and the importance of special condition clauses which are usually drafted by agents and sales representatives. There should be exemptions, however, for persons who are (or have been) legal practitioners, given that they will have already satisfied this minimum educational requirement.”

It was further submitted that:-

“the risk to consumers of financial loss (as a result of having to take court proceedings due to the poor/ambiguous wording used) is far greater if no such educational requirement was put in place.”

REISA submitted that the justification for this requirement was:-

“reasonable assurance of consumer protection. By holding prescribed qualifications the consumer can be reasonably assured that the land agent has substantial knowledge and experience...The consumer can also be reasonably assured that appropriate guidance and support is given to the agent's subordinates, there is a reasonable level of financial management and that trust accounts are operated properly.”

3.2.3 What are the benefits of this restriction?

3.2.3.1 Locating a service provider

The Act assists consumers in locating an appropriate service provider by requiring all land agents to be registered. This gives consumers the assurance that the service provider with which they are dealing possesses appropriate qualifications and is less likely to default on the transaction. In the absence of registration requirements, consumers would have to undertake other searches to identify whether the land agent was an appropriate service provider. The consumer may incur significant expense and waste considerable time in attempting to locate an appropriate service provider.

3.2.3.2 Reduction of information asymmetry

Information asymmetry occurs when there is a disparity of information between the service provider and the consumer. While consumers have a natural incentive to buy services with a price/quality combination that they desire, it is particularly difficult for them to do so where the supplier has much more knowledge about the likely quality of the service that is being rendered. In the provision of many services, the quality of the service can only be assessed once the service has been received. Therefore it is only after the transaction that the consumer can assess whether the price/quality combination was as they desired.

The Act assists the consumer in assessing this by providing an assurance that the agent has at least reached a certain base level of qualification.

3.2.3.3 Reduced likelihood of misrepresentation in the advertising stage

South Australia has extensive laws dealing with misrepresentations, including the *Misrepresentation Act 1972* and the *Fair Trading Act 1987*. When a land agent is advertising

property, it is important that these laws are obeyed. A land agent who was unaware of those laws or who deliberately disobeyed them may misrepresent a property to contain features which it did not contain or to have other desirable characteristics which do not exist.

From a purchaser's perspective, a misrepresentation may result in the consumer finding that the property they have purchased is not as valuable as they had assumed, based on the misrepresentation. While they may have a remedy, the expense of enforcing that remedy may be prohibitive.

From a vendor's perspective, the situation is even worse. A misrepresentation made by the agent in order to induce the purchaser to enter the contract may render that contract voidable. Under the *Misrepresentation Act 1972*, the fact that conveyances have already taken place does not affect the remedy available to the purchaser. This means that a vendor, believing him or herself to have sold the property, may suddenly discover that the contract is avoided. The vendor could suffer considerable loss as a result, especially if the vendor has purchased another property. The situation of a home buyer, for example, who has bought a new house, believing themselves to have sold their old house. If the contract is rescinded, the vendor could find themselves liable for two sets of mortgage payments, as well as a significant debt, while waiting for a new purchaser to buy the property. In some situations, it may be difficult for the vendor to find a purchaser on similar terms as the initial contract, or to find a purchaser within a reasonable period of time.

The Act is of benefit to the consumer in this situation because the Act prevents registration of people who do not possess appropriate qualifications. In the course of acquiring those qualifications, prospective agents will learn about the laws of misrepresentation. This prevents the unwitting misrepresentation by agents.

Education will not deter those who deliberately misrepresent property in the hope that they don't get caught, but there is little the law can do beyond prohibiting such conduct and ensuring that misrepresentations are appropriately punished.

3.2.3.4 *Reduced risk of contractual problems*

In South Australia, unlike many jurisdictions, Land Agents are permitted to draft contracts for the sale of land or businesses themselves. (In many other States, only legal practitioners may draft contracts). While this reduces the costs of these transactions, it also poses greater risk to the consumer if the contract is drafted by someone with inadequate knowledge of the applicable law. Problems may arise where the contract is either unenforceable because of the difficulties in interpreting some sections of the contract, or where the contract fails to reflect the bargain made between the parties - for example by failing to take into account all features of property which are to be included in the sale. Failure to understand the laws relating to fixtures may result in a contract which sells something which the vendor had no intention of selling.

The education of land agents involves learning principles of contract and property law, and any other laws relating to land and business. Ensuring that land agents have had this education ensures greater professional standards and greater knowledge of contract and property law.

In addition, agents who have been properly trained will appreciate the need to perform searches of the relevant title to ensure that there are no encumbrances on that title. Failure to do so could potentially cause significant financial hardship to a party who purchases a property which is subject to encumbrances (encumbrances which will be discovered when conveyancing takes place).

3.2.3.5 *Reduced risk of business failure*

REISA suggested that the Review Panel had not adequately considered the possibility of business failure in relation to land agents. It was suggested that the reduction of such business failure was a significant benefit of the requirement for agents to hold qualifications. The Review Panel has considered this issue. The Review Panel is not convinced that there is a significant risk of business failure in the real estate industry, nor does it consider that the risk to consumers in the event of business failure is of enough significance that this alone would warrant retention of the qualification requirement. Statistics received from Insolvency and Trustee Service Australia indicate that there are very few business related bankruptcies in the real estate industry. The statistics are as follows:-

Bankrupts and reduced debtors in occupational category "Insurance, Real Estate, Auctioneers and Valuers".

Period	Business-related	Non-business related	Total
1993/1994	3	14	17
1994/1995	8	5	13
1995/1996	6	11	17
1996/1997	8	9	17
1997/1998	3	5	8

The Review Panel therefore does not consider that there is a significant risk of business failure in relation to land agents. The potential for business failure is therefore not, in itself, a justification for the retention of qualification requirements.

3.2.4 What are the costs of this restriction?

Competition policy predicts that where there is a barrier to entry resulting in less competition within an industry, that industry is less likely to be innovative, efficient or cost-effective. These factors produce costs for the community as a whole. These costs were discussed in more detail in the earlier discussion of the costs and benefits of regulation of the industry.

3.2.5 A cost/benefit analysis

The conclusion of the Review Panel is that the benefits of requiring land agents to hold prescribed qualifications outweigh the costs. The rights involved in such transactions are significant rights, and there is a substantial risk to consumers arising in many aspects of the transaction if the transaction is performed by someone who is incompetent.

Conclusion

The benefits of requiring land agents to hold prescribed qualifications outweigh the costs.

3.2.6 Is the current level appropriate?

The following qualifications are prescribed for land agents:-

- (a) Certificate in Real Estate Agency conferred by the Department for Employment, Training and Further Education;
- (b) degree of Bachelor of Business (Property) conferred by the University of South Australia, including satisfactory completion of (or status granted in) the following subjects:-
 - (i) Commercial Property Management; and
 - (ii) Real Estate Business and Marketing Management;
- (c) Graduate Diploma in Property, or Master of Business in Property, conferred by the University of South Australia including satisfactory completion of (or status granted in) the following subjects:-
 - (i) -
 - (A) Property Law 1G and 2G; or
 - (B) Property Law 2M; and
 - (ii) -
 - (A) Real Estate Valuation 1 and Property Case Studies; or
 - (B) Real Estate Valuation G; and
 - (iii) -
 - (A) Real Estate Business Management and Real Estate Case Studies; or
 - (B) Real Estate Business and Marketing Management G;
- (d) degree of Bachelor of Business in Property conferred by the University of South Australia, including satisfactory completion of (or status granted in) the following subjects:-

- (i) Property Management; and
 - (ii) Real Estate Field Work 1 and 2; and
 - (iii) Property Marketing;
- (e) degree of Bachelor of Business in Property conferred by the University of South Australia, together with satisfactory completion of (or status granted in) the following subjects offered by the Department for Employment, Training and Further Education as part of the course for the Certificate in Real Estate Agency:-
- (i) Practice II; and
 - (ii) Practice III.

However, it is understood that TAFE no longer offers the course "Certificate in Real Estate Agency". Instead, TAFE is offering a Diploma of Business (Real Estate Management). This course involves subjects well in excess of those required to cover the learning outcomes of the previous certificate course and is approximately double the length of the certificate course.

Attempts to increase the minimum level of qualification required for entry to an industry are of great concern in relation to their impact on competition. Any barrier to entry should be set at the minimum level necessary to achieve the intended benefit. This will not necessarily correspond with industry views of "best practice".

Although degree courses are recognised for the purposes of registration as an agent, this may reflect an acknowledgment that those who have completed a degree possess sufficient knowledge to enable them to work in the industry without being required to complete the TAFE course. It does not mean that the level of knowledge required to work in the industry is necessarily at degree level. Those qualifications may well be in excess of the minimum level required for occupational licensing purpose, but it would be unfair not to recognise them for the purposes of occupational licensing.

However, if a requirement to hold prescribed qualifications is to be retained, then some minimum acceptable level at which registration will be granted must be established - otherwise the barrier to entry will become inappropriately high. It may be necessary to designate individual subjects within the current courses offered, or alternatively within the proposed National Training Packages, completion of which will represent that minimum qualification for registration. If students wish to complete the entire course, that is entirely their choice, but entry to the occupation should not be limited by courses which represent inappropriately high barriers to entry.

In response to the Issues Paper, it was agreed that current requirements are excessive 'in certain areas', but at the same time, REISA felt that:-

"current requirements give consumers a reasonable assurance of competency but not experience or expertise."

REISA also raised the issue of on-going professional development. However, the imposition of such a requirement would be a further restriction of competition.

CASA submitted that:-

“consumers benefit by better educated and qualified persons representing them. If their choice is diminished by excessive training that deters prospective agents and sales representatives then the training requirements must be reviewed. The current requirements do not appear to be excessive or an inappropriate barrier to entry.”

Despite these submissions, the Review Panel considers that current qualification requirements are excessive. They go beyond the “community standard” and reflect more of a “best practice” approach to training.

It is therefore the conclusion of the Review Panel that current requirements should be reduced.

REISA and DETE disputed this conclusion. They submitted that current requirements are appropriate. DETE’s submission was that the requirements of the TAFE course had been set by industry in accordance with the standards which the industry believes are appropriate for the industry. However, the Review Panel considers that this statement reflects a fundamental misapprehension as to the purpose of setting qualifications for occupational licensing. Occupational licensing, including the registration of land agents and the negative licensing of sales representatives, is directed at ensuring the competence of industry participants, not at increasing the “professionalism” of the industry.

Any required competencies must be relevant to the objectives of the Act. In this sense, any competencies specified for registration (or negative licensing) should not reflect competencies sought by employers within the industry, except insofar as they are necessary to meet the objectives of the legislation.

The registration and negative licensing systems do not constitute a *defacto* selection tool for the benefit of employers. Employers must make their own assessment of the competence of any person engaged in their business. For this reason, it is necessary that the Office of Consumer and Business Affairs critically view and appraise the National Competency Standards, which reflect the competencies desired by the industry - not necessarily the competencies desired by the community or by licensing authorities. Nonetheless, the National Competency Standards should form the basis of competencies specified by licensing authorities, to enable recognition of learning or articulation to other training by a licence applicant.

The Review Panel affirms its preliminary recommendation that when National Competencies have been agreed, these competencies should be examined and only those competencies which are relevant and necessary to combat the consumer risk should be mandated for registration purposes.

Conclusion

**The current qualification requirements for land agents are excessive.
The current requirements should be reduced.**

Recommendation

The Review Panel recommends that when National Competencies have been agreed, these competencies should be examined and only those competencies which are relevant and necessary to combat the consumer risk should be mandated for registration purposes.

3.2.7 Sales Representatives

The requirement that sales representatives hold prescribed qualifications is, prima facie, a barrier to entry.

3.2.8 Implications of the requirement for competition

There are two competition issues which arise out of the requirement that sales representatives hold prescribed qualifications. The first is whether the requirement is justified at all. It may be argued that sales representatives should not be required to hold qualifications in real estate before entering the industry.

Sales representatives work under the supervision of a land agent. It may be argued that the onus for ensuring that the sales representative is appropriately trained should be on the agent rather than on the sales representative. Rather than legislation requiring qualifications at the point of entry, agents could be given greater responsibility for the training of their employees.

The current requirement that sales representatives hold prescribed qualifications may limit the flexibility of employers to employ people with diverse backgrounds, such as law or marketing, as sales representatives. Removing the requirement to hold qualifications would allow such people to enter the industry, and they could receive training in any areas specific to real estate on the job. If individual agents required their sales representatives to hold qualifications, there would be nothing to stop them from doing so.

However, sales representatives are often involved in some of the risk areas of transactions - ie in negotiations, marketing, appraisal and the "settlement" of contracts. If a sales representative has no training in relevant areas, then there may be a significant risk posed to a consumer. The risks outlined in relation to land agents are thus equally applicable to sales representatives, and the benefits flowing from the restriction are similar. Although the level of supervision of sales representatives may be thought to provide some protection for consumers, there are still risks where sales representatives are involved in aspects of the transaction where they are not closely supervised, if they have not been trained adequately.

While the requirement for sales representatives to hold prescribed qualifications may represent a restriction on competition, provided the course is set at an appropriate level, the Review Panel considers that the benefits of requiring sales representatives to hold prescribed qualifications outweigh the costs.

As CASA submitted:-

"the justification for sales representatives to hold qualifications before entering the industry reflects the significance of the deal they are authorised to broker. If the training of such persons is left to the land agent the quality of the training may not be readily gauged until a disaster occurs resulting in insufficient consumer protection."

And as REISA pointed out:-

"the consumer may not be able to distinguish between a trained and untrained salesperson until it is too late."

Conclusion

The benefits of requiring sales representatives to hold prescribed qualifications outweigh the costs.

3.2.9 Are current requirements justified?

Having concluded that requiring sales representative to hold prescribed qualifications is justified, then a second competition policy issue arises. This issue is whether the current training requirements are inappropriately high.

The qualifications required to be held by a sales representative are:-

- (a) satisfactory completion of the courses of instruction approved by the Industrial and Commercial Training Commission in relation to the declared vocation "Customer Servicing (Real Estate Operations-Sales)" under the *Industrial and Commercial Training Act 1981*; or
- (b) satisfactory completion of a course accredited under the *Tertiary Education Act 1986* in relation to the Certificate in Real Estate Operations (Sales Consulting) (or some other academic award certified by the Minister responsible for the administration of that Act to be an equivalent academic award); or
- (c) at least one of the following qualifications obtained after 31 May 1993:-
 - (i) Certificate in Real Estate Sales conferred by the Department for Employment, Training and Further Education;
 - (ii) satisfactory completion of (or status granted in) the following subjects offered by the University of South Australia as part of the course for the degree of Bachelor of Business (Property):-
 - (A) Introduction to Law; and
 - (B) Law of Property; and
 - (C) Real Estate Management and Agency Practice; and

- (D) Physical Aspects of Real Estate;
 - (iii) satisfactory completion of (or status granted in) the following subjects offered by the University of South Australia as part of the course for the degree of Bachelor of Business in Property:-
 - (A) Property Law 1, 2, 3 and 4; and
 - (B) Property Studies 2 and 3; and
 - (C) Property Fieldwork 1 and 2;
 - (iv) satisfactory completion of (or status granted in) the following subjects offered by the University of South Australia as part of the course for the Graduate Diploma in Property or the degree of Master of Business in Property:-
 - (A) -
 - × Property Law 1G and 2G; or
 - × Property Law 2M; and
 - (B) -
 - × Real Estate Marketing and Property Case Studies; or
 - × Real Estate Marketing and Agency Practice G; or
- (d) a qualification entitling the person to be registered as an agent.

The TAFE course has altered significantly over the years, and now represents a workload of 547 hours, compared to 162 hours when the certificate course was first developed. The subjects involved appear to exceed the requirements under the former certificate, and may represent an excessive barrier to entry.

Attempts to increase the minimum level of qualification required for entry to an industry are of great concern in relation to their impact on competition. Any barrier to entry should be set at the minimum level necessary to achieve the intended benefit. This will not necessarily correspond with industry views of "best practice".

REISA submitted that:-

"it may be that some aspects of the TAFE course do not represent essential qualifications"

but that:-

"qualifications in South Australia need to be higher, because the responsibilities of agents and salespersons in South Australia are much higher than in other states."

As with the prescribed qualifications for agents, the Review Panel has concerns that the level of training required for sales representatives undertaking the TAFE course may be inappropriately high. However, the Review Panel notes that there are other courses available for sales representatives which are not as detailed as the current TAFE course. Thus while some change may be warranted in relation to the recognition of that course, overall, the qualification requirements for sales representatives are considered by the Review Panel to represent an appropriate balance between the need to protect consumers and the need to allow competition in the market.

Notwithstanding this, the Review Panel considers that the current requirements should be reviewed once National Competency Standards have been agreed, and that only those competencies which are necessary for the protection of consumers should be mandated for sales representatives. Without wishing to be prescriptive, the Review Panel would indicate that the type of competencies that would be appropriate are a *basic* knowledge of contract, misrepresentation, general commercial law and real property law, together with *basic* training in skills such as property appraisal.

Conclusion

The current qualification requirements for sales representatives overall represent an appropriate balance between the need to protect consumers and the need to allow competition in the market. However, the requirements of the TAFE course are inappropriately high.

Recommendation

The Review Panel recommends that the current requirements should be reviewed once National Competency Standards have been agreed, and that only those competencies which are necessary for the protection of consumers should be mandated for sales representatives.

3.3 Reputation

3.3.1 General reputation

The Act imposes further restrictions by requiring a person to be of good general reputation. This is assessed at the point of entry into the industry by the requirement that a person must not:-

- a) have been convicted of an offence of dishonesty; or
- b) be suspended or disqualified from practising or carrying on an occupation, trade or business under a law of this State, the Commonwealth, another State or a Territory of the Commonwealth.

3.3.2 Financial reputation

The requirement that a person be of good financial reputation may pose a further barrier to entry. This is assessed at the point of entry into the industry by the requirement that a person must not:-

- a) be an undischarged bankrupt or subject to a composition or deed or scheme of arrangement with or for the benefit of creditors; or
- b) during the period of five years preceding the application for registration, have been a director of a body corporate wound up for the benefit of creditors-
 - i) when the body was being so wound up; or
 - ii) within the period of six months preceding the commencement of the winding up.

3.3.3 Implications of the requirement

Land Agents

These requirements are a barrier to entry and hence a restriction on competition.

The Law Society submitted that:-

"as agents... deal with often the most significant asset of consumers - their home/property - there should be a requirement for the person to be of good reputation. The risk to consumers is greater if this were not required and, although it is a barrier to entry, it prohibits only those people who are more likely to cause harm to consumers from entering the profession which is in the consumers' best interests in any event."

REISA submitted that reputation should be a criterion. While it was considered that the current requirements *"may in some circumstances act arbitrarily or unfairly"*, the current arrangements *"provide a reasonable degree of flexibility' and there is no alternative 'short of allowing review on a case by case basis"*.

The restriction was considered by REISA to *"keep dishonest individuals away from consumers' business interests"* and it was considered that keeping such people out of the industry results in *"less court action, less impact on the indemnity fund and consumer assurance"*.

The conclusion of the Review Panel is that while both of these requirements clearly restrict entry into the occupation, they clearly exist to protect consumers from risk of financial loss or criminal activity. Consumers are at significant risk when employing agents. Significant amounts of money are placed in the agent's trust account. Fraud or, in some circumstances, negligence may result in the loss of that money. Those who have a history of dishonesty or financial mismanagement are thought to pose a greater risk to the consumer. Therefore, the conclusion is that the benefits of the restriction outweigh the costs.

Sales representatives

Only the personal reputation of sales representatives is relevant for the purposes of the Act. Sales representatives are prohibited from working in the industry if they have either been convicted of an offence of dishonesty or have been suspended or disqualified from practising or carrying on an occupation, trade or business under a law of South Australia, the Commonwealth or another State or Territory of the Commonwealth.

This requirement represents a barrier to entry.

The Review Panel notes at the outset that while Sales representatives do not hold money on trust, they do enter people's homes and will often have access when an owner or occupier is absent. This is considered an area in which a person with a conviction for an offence of dishonesty poses a risk to consumers in terms of criminal activity.

The Law Society submitted that:-

"as sales representatives... deal with often the most significant asset of consumers - their home/property - there should be a requirement for the person to be of good reputation. The risk to consumers is greater if this were not required and, although it is a barrier to entry, it prohibits only those people who are more likely to cause harm to consumers from entering the profession which is in the consumers' best interests in any event."

REISA submitted that the same considerations apply in relation to sales representatives as to agents.

CASA submitted that:-

"the responsibilities of sales representatives do not appear to be such that a personal reputation should affect their employment. However, considering they are in a position to negotiate sales, a history of dishonesty offences may have taught inappropriate practices. This risk is not confined to those who have been convicted of dishonesty offences so perhaps the evaluation of this risk should be the responsibility of the employer."

The Review Panel has considered the possibility of leaving the decision as to whether to employ a person with a history of dishonesty to the employer. However, the Review Panel is concerned that such action may place consumers at risk, as employers who are not faced with a statutory requirement not to employ someone who has committed an offence of dishonesty, may not bother to check the sales representatives previous criminal history. Although sales representatives do not hold the same responsibilities as land agents, they are nonetheless placed in a position where they may be entrusted with a reasonable level of responsibility. A history of conviction for dishonesty would tend to indicate that a person should not have such trust reposed in them. Even though sales representatives do not control trust accounts, they may still be in a position where they may have access to clients' money and, as discussed above, they have access to their client's homes. Both of these factors potentially present considerable risk for the consumer.

At the same time it should also be noted that the costs of this restriction are insignificant. As the scope of the provision is so narrow, and aimed particularly at offences which may result in a risk being posed to the consumer, it is unlikely that many people are being kept out of the industry who should be permitted to be in it. Thus it is likely that it is not, in practice, having a significant impact on competition in the industry.

Thus, on balance, the Review Panel considers that the benefits of this restriction outweigh the costs. Although the decision as to whether or not to employ someone with a conviction for an offence of dishonesty could be left to the employing land agent, it would be difficult to force land agents to consider such offences without a requirement such as the current one. Although many if not most agents would require a statement of offender history before employing a sales representative, they may be tempted to still employ someone with a

conviction if they thought that that person would be a good sales representative or if the person was a friend or relative of the agent.

3.3.4 What are the alternatives?

The only alternative would be to narrow even further the range of offences which result in permanent disqualification from participation in the industry for both sales representatives and land agents. Currently, any person who has committed any offence of dishonesty is prevented from obtaining registration as an agent or being employed as a sales representative, no matter what offence of dishonesty was committed or how long ago it was committed. While there are some offences which are clearly of such a character that permanent disqualification from participation in the industry is warranted, there may be other offences where a first offence may be considered to warrant a shorter period of disqualification - for example, ten years.

The Review Panel considers that where a person has been convicted of a summary offence of dishonesty, or an offence of dishonesty for which the maximum penalty is no more than 2 years imprisonment, that conviction should not disqualify the person from obtaining a licence after a certain period of time has elapsed. The Review Panel considers that ten years would be an appropriate time period. To give some idea of the scope of offences which would be affected by this, the following list details summary offences under the Criminal Law Consolidation Act. It should be noted that these offences will only be summary offences if they involve less than \$2000.

Section of Criminal Law Consolidation Act 1934	Description
131	Simple larceny
132	Larceny by bailee
136	Stealing cattle
137	Killing animals with intent to steal the carcass
138	Stealing deer llama or alpaca in enclosed land
144	Stealing or fraudulently destroying cancelling or obliterating valuable security
145	Stealing or fraudulently destroying cancelling obliterating or concealing title to land or a will
146	Stealing or fraudulently taking or unlawfully and maliciously cancelling obliterating injuring or destroying a court record
147	Stealing or attempting to steal fixtures or parts of a building
148	Stealing or attempting to steal vegetation in any pleasure ground garden or other enclosed land
152A	Stealing or attempting to steal precious stones
153	Fraudulently removing or concealing precious stones or ore from mine
154	Stealing electricity
173	Larceny in dwelling houses
174	Stealing goods in process of manufacture
175	Stealing from ships or docks
183	Larceny by tenants and lodgers
184	Fraudulent misappropriation
189	Fraudulent appropriation of company property

192	Director public officer or manager publishing fraudulent statements
195	False pretences
196	Receiving
197A	Receiving goods stolen outside the State
202	Corruptly taking reward for recovery of stolen property
204	Impersonation in order to obtain property
205	Impersonating the owner of stock
214 except an offence against paragraph (a)(i) (ii) or (iii)	Forgery of deeds wills bills of exchange etc.
215	Forgery in relation to transfer of stock
216	Forgery of power of attorney in relation to transfer of stock
234	Demanding property under forged instruments
235	Forgery of other instrument or matter

It is proposed that after ten years, a conviction for any of these summary offences, or any other summary offences of dishonesty, for example under Commonwealth tax and social security laws or other South Australian law, will not be taken into consideration for registration purposes.

The Review Panel acknowledges that there may be some concerns where a person has been convicted of many offences of dishonesty but has not offended in that way for ten years. The Review Panel considered two options for addressing this issue.

The first option considered was to provide that only a *first* conviction for a summary offence of dishonesty would be disregarded for registration purposes. Any subsequent conviction would permanently disqualify a person from participation in the industry. However, the Review Panel considered that this may be draconian and, in terms of the intended effect of the new provision, may be ineffective. If, for example, a person at the age of 18 committed a number of "shoplifting" offences, but then reformed and applied for registration at the age of 35, then the Act would be keeping such a person out of the industry unduly. Therefore, the Review Panel rejected this option.

The other option was to reintroduce a fitness and propriety requirement. This would give the Commissioner for Consumer Affairs a discretion not to register someone where they had a history of offending which indicated that such registration would be inappropriate.

The difficulty presented by this option however, is the potential arbitrariness of the fitness and propriety requirement. Assessments of this nature involve an exercise of administrative discretion and are necessarily subjective to a degree. Subjectivity in an assessment process reduces certainty for applicants and has the potential both to distort competition at the point of entry and to act as a barrier to entry. Without clear definition of entitlement criteria, it may be the case that those who would otherwise seek to enter the industry are discouraged at the prospect of their application being rejected on this indeterminate ground. It is not possible for an applicant to ascertain prior to embarking on the assessment process whether or not they will be adjudged a fit and proper person.

Further, as identified above, an exercise of administrative discretion is required in a fitness and propriety test. This of itself brings costs to the government and the wider community as

a whole. In the first instance, a more detailed assessment process is required by the government upon receipt of an application for registration. Unlike an assessment against fixed criteria, such as whether or not an applicant has certain qualifications, or has been convicted of certain offences, which are simply matters of objective fact, a discretion must be exercised when making an assessment of fitness and propriety. This necessitates more time and resources being expended by government, which are costs ultimately borne by the wider community.

There is also the risk that the discretion may be incorrectly exercised resulting in a reduction of competition at the point of entry, with concomitant costs being imposed in the community. Further, it must be appreciated that a decision not to grant registration on fitness and propriety ground may be subject of an appeal to the District Court. Of course, the Review Panel acknowledges that any decision to refuse a registration is potentially reviewable. However, where all that is involved is a review of an administrative assessment of objective criteria, there will be much less scope for the Court reviewing the decision to overturn it. On the other hand, in the case of a rejection on fitness and propriety grounds, based on the exercise of an administrative discretion, there is more likely to be extensive argument before a Court. Administrative law principles such as the proper exercise of the discretion may be raised and disputed. It is also considered that there would be more appeals to the Court from rejections on fitness and propriety grounds as a person seeking legal advice is more likely to be advised that they have some prospect of success. Any such appeals will be lengthy and involve more complicated legal issues, which will in turn be a source of costs being imposed on the wider community.

The Review Panel therefore considers that the costs involved in the introduction of a fitness and propriety test would be significant.

When weighing these costs against the benefits which would accrue from the imposition of the test, it must be borne in mind that the ten year disqualification period refers to **summary** offences of dishonesty and not the more serious categories of **indictable** offences, which will still permanently exclude a person. By definition, summary offences of dishonesty will be at the low end of the scale in terms of seriousness of offending. As pointed out in the example offences detailed in the table above, the amounts involved must be \$2,000 or less to be a summary offence.

The Review Panel has recommended a person be disqualified for the relatively long period of ten years following a conviction for a summary offence. This position recognises that any offence of dishonesty is serious, summary or otherwise, but does take into consideration rehabilitation principles bearing in mind that summary offences are of less gravity than indictable offences.

Further, the risk against which regulation seeks to protect in terms of personal reputation is the risk of fiduciary default, or criminal or fraudulent behaviour in relation to trust money. To this end it is noted that the Act provisions regulating the operation of trust accounts, including an ongoing audit requirement, as another means by which these risks may be addressed.

As a final point, the Review Panel considers that in an industry as mature as this, the imposition of a fit and proper person test would be an inappropriate step towards a licensing rather than a registration scheme. In addition, a licensing scheme may be viewed

as a more "heavy handed" regulatory system than registration, and to that extent beyond the scope of this Review.

Given that any convictions for anything other than a summary offence of dishonesty will permanently exclude a person from being registered as a land agent or employed as a sales representative, the risk protection mechanisms in the Act, and the recommendation that those convicted of summary offences be excluded from the industry for ten years, the Review Panel concludes that the costs of a fit and proper person test outweigh the benefits.

On the basis of the foregoing, the Review Panel considers that the ten year exclusion period in relation to summary offences, be it a first or subsequent offence, is sufficient, in conjunction with other protection mechanisms in the Act, to provide consumer protection in relation to the personal reputation of a land agent or sales representative.

Conclusion

The benefits of the restriction relating to reputation outweigh the costs.

Recommendation

The Review Panel recommends that the restriction be retained, but that it be modified so that a conviction for a summary offence of dishonesty will only disqualify a person from registration as an agent or being employed as a sales representative for ten years.

4. RESTRICTIONS ON COMPETITION - CONDUCT RESTRICTIONS

4.1 Compliance with trust account provisions

Agents are subject to comprehensive trust accounting requirements. These requirements are set out in Divisions 1 and 2 of Part 4 of the Act (sections 14-30).

As in most industries where money is held on trust, the trust accounts of agents are heavily regulated. The objective of trust accounting provisions is generally to ensure that there is a clear audit trail and to reduce the possibility of misappropriation of funds.

The trust accounting provisions are fairly standard. Agents are required to deposit all trust money¹⁸ in an approved account¹⁹ as soon as practicable after receiving the money. No other money is to go into the account, and the money may not be withdrawn except in certain circumstances, which are outlined in section 16 and include, *inter alia*, payment to the

¹⁸ Defined as money received by the agent when acting as an agent to which the agent is not wholly entitled in law and in equity. It does not include money received by a agent in the course of mortgage financing.

¹⁹ Accounts are approved by the Commissioner for Consumer Affairs, and may be at a bank, building society or credit union.

person entitled to the money or payment of fees and disbursements. The interest on trust accounts is paid to the Commissioner.

The Act gives the Commissioner power to appoint an administrator or a temporary manager in certain circumstances.

The records to be kept by the agent are detailed in section 23 and the regulations.

4.2 Implications of the trust accounting requirements for competition

There are a number of competition issues which arise from the trust accounting requirements.

4.2.1 Additional costs from record keeping

The first is the additional costs imposed on business by the extensive trust accounting requirements. Complying with the record keeping requirements may increase the administrative burden and hence the costs of the agent. The difficulty in determining whether money is trust money or not may also increase the costs of doing business.

These may represent a moderate restriction on competition. Many of the requirements may be practices which a prudent business person would adopt in any case. Even if they represented a more serious restriction on competition, it is considered that they are easily justified by the protection they offer to consumers. Agents often hold large amounts of money on trust and there would be the potential for significant consumer detriment if such conditions were not imposed.

Conclusion

The benefits of trust accounting requirements outweigh the costs.

4.2.2 Restrictions on the use of electronic commerce

Some of the record-keeping requirements restrict the availability of electronic commerce to agents.

These may be able to be modified without reducing the level of protection for consumers. The Government as a whole is currently reviewing electronic commerce. The Review Panel therefore considers that it is more appropriate for changes to be made to these restrictions once a uniform approach has been established. However, the Review Panel considers that it would be preferable for the current trust accounting provisions to be altered to reflect the development of electronic commerce, but in such a way as to ensure consumers are still protected. The exact means for doing so should be determined through the electronic commerce project as a whole.

Conclusion

Any alteration of the restrictions on the use of electronic commerce should wait until a whole of Government approach to this issue has been established.

4.2.3 Requirement to hold money in a prescribed financial institution

Another restriction is the requirement to deposit money in an approved account. In theory, this requirement may limit the choice available to agents and represents a restriction on their conduct. However, in practice, there is little difficulty for an institution in gaining approval to hold trust accounts. The Commissioner for Consumer Affairs has set three requirements for approving accounts for receiving trust monies:-

- the account must pay interest, calculated daily, at a rate of at least 65% of the most recent average monthly 90 day Bank Accepted Bill rate quoted in the previous month's Reserve Bank Bulletin in Table F1: Interest Rates and Yields - Money Market. For example, interest calculations in respect of April 1999 Trust Account balances would use the February average rate quoted in March's Bulletin.
- the account must not be debited any account keeping fees or Government charges. Any such imposts must be charged to the Agent's working account.
- the account must be known by the relevant financial institution to be Year 2000 compliant, or, the relevant financial institution must be currently taking appropriate action to ensure that the account is Year 2000 compliant.

Provided an account complies with these criteria, it is an approved account for the purposes of section 15 of the Act. The choice of financial institution is broad - it includes banks, building societies and credit unions.

It is therefore the conclusion of the Review Panel that the requirement to deposit money into an approved account is a trivial restriction on competition.

Conclusion

The requirement to deposit money into an approved account is a trivial restriction on competition.

4.2.4 Requirement to have accounts audited by a registered company auditor

This issue was raised by the National Institute of Accountants, which considers that the current requirement is too restrictive. It suggests that a more appropriate approach would be to require a person acting as an auditor under the Act to either be a registered company auditor OR have completed an appropriate course of study and training conducted over a period of not less than three years and have had practical experience in auditing under the direction of a registered company auditor.

The requirement to use a registered company auditor may be considered to be a more serious restriction on competition. The National Institute of Accountants (hereafter 'NIA') submitted that:-

"the requirement under the Act for a registered company auditor to undertake the audits of Agents' trust accounts is very restrictive and uncompetitive...[S]uch audits, which are known

as compliance audits, are not as complex as company audits and do not require the services of a registered company auditor."

Raoul P Dunk also submitted that the current provisions are too restrictive. He argued that members of the Institute of Chartered Accountants or the Australian Society of Certified Practising Accountants should be able to audit trust accounts.

The Review Panel has considered the situation in other States. In most States, audits of agents' trust accounts are only permitted to be conducted by registered company auditors or those granted special permission, whether by exemption from the requirement or otherwise²⁰. In Queensland, the only exception to this, trust accounts must be audited by members of either the Institute of Chartered Accountants in Australia or the Australian Society of Certified Practising Accountants²¹. Thus it is clear that in all States, significant restrictions are imposed on who may audit trust accounts.

There are significant benefits in only permitting registered company auditors to audit agents' trust accounts. It is in the course of audits that problems in the treatment of trust monies first come to light. It is necessary that those auditing practitioners trust accounts are sufficiently skilled in doing so in order to ensure that such problems are identified.

In addition, there is an advantage in having an objective standard set by another regulator, such that when trust accounts are audited, the auditors are accountable to another body as well as the Commissioner for Consumer Affairs. This helps to ensure that appropriate standards are maintained.

When the Land Agents Act was introduced, the requirement that a Registered Company Auditor audit trust accounts was deliberately inserted, because it was desired to ensure that sufficient rigour was exercised by auditors. There had been a number of problems with trust accounts which had not been realised because of a lack of rigorous auditing. Registered Company Auditors have a lot to lose if they are not sufficiently diligent in their work. This provides an incentive for the necessary high standards to be maintained. The Office of Consumer and Business Affairs has noticed that these auditors are extremely rigorous in the way in which they conduct audits. The Review Panel considers that any lowering of the standards required of auditors would place consumers money at risk.

If members of the National Institute of Accountants wish to audit trust accounts, then they should apply under the *Corporations Law*. It is really the standard set by that law which raises a competition issue, not the application of that law by the Office of Consumer and Business Affairs.

Conclusion

The benefits of requiring registered company auditors to audit agents trust accounts outweigh the costs.

²⁰ *Property, Stock and Business Agents Act 1941 (NSW) s38E, Estate Agents Act 1980 (Vic) s4 & 66, Real Estate and Business Agents Act 1978 (WA) s72, Auctioneers and Real Estate Agents Act 1991 (Tas) s4, Agents Licensing Act (NT) s60.*

²¹ *Auctioneers and Agents Act 1971 (Qld) s108.*

4.2.5 Restrictions on the investment of trust money

A more significant restriction on competition is the restrictions on the investment of trust money. Depending on the interpretation of the trust account provisions, the Act may prevent agents from withdrawing money from their trust accounts for investment.

There are two possible interpretations of section 16(a), the provision which deals with the payment of money from the trust account:-

- it may mean that the agent may withdraw money from the trust account for payment to the person(s) entitled to it only for the purposes of settlement or other termination of the contract or to satisfy some other debt which it is proper to pay in accordance with the directions of the person(s) entitled to the trust money.
- it may mean that the agent may withdraw the money either for payment to the person entitled or for payment at any time in accordance with the directions of that person, including for purposes such as investment.

The Act does not make clear which interpretation is the correct one. If the former interpretation is correct, then the Act places a restriction on competition. In the absence of the trust account requirements, agents would be able to offer investment as part of their services (to the extent that they did not breach the Corporations Law in doing so). This appears to be an intermediate restriction on agents' conduct. Currently, few transactions involve significant amounts of money being held for a substantial period of time.

4.2.5.1 What are the benefits of restricting the investment of trust money outside trust accounts?

Reduced risk of fiduciary default

Where investment outside an agents or conveyancers authorised trust account is permitted, there is a much greater risk of fiduciary default. This greater risk arises because such investments are not subject to the same auditing and record keeping requirements as trust accounts, nor are the financial institutions required to report any problems associated with such investments, unlike trust accounts. This makes it easier for fiduciary default to occur. This is obvious when one considers the objectives of trust account requirements in the first place. If the consumer was not at greater risk where trust monies are being held, then there would be no need for restrictions on trust accounts. However, it is widely acknowledged, throughout Australia and internationally, that consumers are at a special risk in occupations where money is held on trust, and that trust accounting requirements offer a greater protection to consumers than regular accounts do. Investment outside of the trust account takes the money outside this regime and thus exposes it to greater risk.

Protection of the Indemnity Fund

Where agents invest trust money in an account other than the approved trust account, the indemnity fund is deprived of the interest that would otherwise accrue on the money held in the agent's approved trust account. Concurrently, the risk to the persons entitled to the money of loss of that money is increased, as it will no longer be in a readily traceable and approved trust account. Thus the indemnity fund is exposed on two fronts:-

- (1) loss of income through reduced interest payments; and
- (2) increased risk of default, since the money is no longer in a readily traceable and approved trust account.

If such transactions were to occur on a frequent basis, the viability of the fund may be threatened. This would ultimately result in a reduction of consumer protection.

4.2.5.2 What are the costs of restricting investment outside the approved trust accounts?

Purchasers are deprived of the benefit of interest

The main cost of this restriction is that purchasers who have paid deposits are deprived of any interest on their money while that money is held on trust. In smaller transactions, this will not be a significant cost, as both the money invested and the time for which it is held will be relatively small. However, where large deposits are held, and particularly where those deposits are to be held for a long period of time, purchasers may lose significant amounts of money which they would otherwise have earned by way of interest.

Potential for negative impact on development

From the former cost, it follows that there is a potential for a negative impact on development as a result of this restriction. This impact may arise because the types of transactions which will involve large deposits being held for long periods of time will generally be large developments, and potential purchasers may be reluctant to invest in properties where they have to pay large deposits and will earn no benefit on that money for months or even, in some cases, years. However, no evidence has been presented to the Review Panel of purchasers' reluctance to invest in developments as a result of this requirement.

4.2.5.3 Cost/benefit analysis

Weighing these factors in the balance, the Review Panel considers that the benefits of the restriction outweigh the costs. Trust money is at such a risk that stringent requirements for its investment are justified.

4.2.5.4 What are the alternatives?

The Review Panel considered a number of alternatives to the current restriction.

(a) Allowing investment outside the trust account in limited circumstances

One option for dealing with this issue which the Review Panel considered was to amend the Act to make it expressly clear that such behaviour was permissible.

Were this option to be followed, there would be a number of issues which would arise in relation to the continued protection of consumers and the ongoing viability of the indemnity fund.

Where agents invest trust money in an account other than the approved trust account, the indemnity fund is deprived of the interest that would otherwise accrue on the money held

in the agent's approved trust account. Concurrently, the risk to the persons entitled to the money of loss of that money is increased, as it will no longer be in a readily traceable and approved trust account. Thus the indemnity fund would be exposed on two fronts:-

- (1) loss of income through reduced interest payments; and
- (2) increased risk of default, since the money is no longer in a readily traceable and approved trust account.

If this option were pursued, it would be necessary to amend the legislation to create specific requirements for such investments. There are a number of ways in which this could be done.

- The policy of Western Australia and Victoria could be adopted. In these States, large deposits (over \$20,000) must be held in the agent's trust account for a minimum of 60 days, before they can be moved to other investments. This ensures that the fund receives at least some interest on such monies.
- A provision could be enacted to the effect that the indemnity fund will no longer be liable where the purchaser opts to have the funds moved to another account. This is the current situation in Queensland. It would protect the fund from all liability in such instances.

If either of these options were pursued, it would also be necessary to develop some means to protect purchasers who believe, wrongly, that they are protected by the Act. Purchasers could be protected to some degree by a requirement that all agents disclose, prior to entering into transactions involving the investment of trust monies outside of the approved trust account, that entering into such an arrangement excludes the operation of the Indemnity Fund. Failure to disclose could be made an offence under the Act.

This raises the issue of the liability of the fund should the agent fail to disclose. The two options are:-

- the fund remains liable; or
- the fund will not be liable.

The advantage of the fund remaining liable would be that it prevents a situation where an unwitting purchaser, believing themselves to be protected by the fund, finds themselves with no form of recourse on default by the agent. The advantage of the fund not being liable is the same as that of limiting the liability of the fund in the first place, namely that the fund is protected from:-

- a) loss of income through reduced interest payments; and
- b) increased risk of default, since the money is no longer in a readily traceable and approved trust account.

Given that the fund exists for the protection of consumers, any unnecessary reduction in the fund should be avoided.

The use of such a system is not without precedent. Currently under the rules of the Stock Exchange, where certain transactions are entered into the protection of the indemnity fund is

lost. Where this occurs, the broker involved is required to disclose the loss of protection to the purchaser. Non-disclosure, however, will not affect the fund's liability (ie if the agent fails to disclose, the fund will still not be liable).

However, in considering this option, it is necessary to consider how this relates to the public policy objectives of the Act.

The clear objective of the Act is to protect persons who deal with agents from the risk of fiduciary default. Excluding the operation of the indemnity fund where the money was invested other than in the approved trust account would seem contrary to this objective. It is arguable, however, that in a commercial world purchasers should be able to make a commercial decision to either:-

1. receive the benefit of interest and bear the risk of fiduciary default; or
2. not receive the benefit of interest but have the assurance of protection in case of fiduciary default.

The advantage of such a system is that it enables these transactions to continue, which encourages development, while concurrently protecting the indemnity fund from liability in situations where it has not received the benefit of interest. Essentially, this option enables the purchaser either to have the money invested and gain the benefit thereof, or to retain the protection of the indemnity fund.

On the other hand, it must be acknowledged that there are some valid objections that could be made to this course of action. The clear objective of the fund is to ensure protection of persons entitled to trust money. Prohibiting the investment of trust monies into other than approved trust accounts provides consumers with this protection.

Submissions were divided as to whether such investment should be permitted. The Institute and the Law Society were opposed to such investment being permitted in the case of conveyancers. It was submitted that a conveyancer 'would have money in the trust account for a very short time and the question as to the investment of money does not even arise' (Law Society). The Institute considered that:-

"A prohibition on conveyancers investing trust monies on behalf of clients would be preferable to a policy under which clients would decide whether to receive the benefit of interest and bear the risk of fiduciary default, or forgo the benefit of interest for the assurance of protection in case of fiduciary default. Investment of trust monies by conveyancers on behalf of clients is infrequent, and it would be better to prohibit these transactions rather than encourage them."

The Real Estate Institute of South Australia, on the other hand, considered that such investment should be permitted, under certain circumstances.

The Review Panel considers that a uniform approach should be adopted to the treatment of land agents and conveyancers trust monies. However, it does not feel that the approach outlined above adequately protects either consumers or the fund (which is there for the protection of consumers).

(b) Allow agents to negotiate a higher interest rate with the bank and purchasers receive the difference

A further alternative has been considered by the Review Panel which may better ensure the protection of consumers and the fund, but would still allow some flexibility in the use of trust money. The suggestion is to allow agents to negotiate a better rate of interest than the current minimum required by the Commissioner for Consumer Affairs. Where agents are able to do so, then the difference between the interest rate set by the Commissioner for Consumer Affairs and the negotiated rate would be passed on to the person on whose behalf the money was being held.

This system would have two advantages:-

(1) protection of the indemnity fund

The money would still be being held in a trust account and subject to the same auditing requirements as all trust accounts held by agents. Thus there would be considerably less risk to the fund than if any form of investment outside the trust account was permitted. Further, the fund would continue to receive the benefit of interest, so that its ongoing viability would be better assured.

(2) Those paying large deposits are not completely deprived of interest

The type of situation in which this level of flexibility would be most beneficial is where a purchaser has paid a large deposit to the vendor, and settlement will not take place for a significant period of time. In such a situation, preventing any form of investment of the money would result in the purchaser being deprived of any interest that could have been earned on that money for however long the period is until settlement. This could have a negative impact on investment in this State. However, where investors may receive at least some of the benefit of their money over the period in which it is held on trust, there may be more benefit for purchasers.

While the Review Panel seriously considered this option, it was pointed out that there would be significant administrative problems with it. There are already substantial difficulties in keeping financial institutions informed and educated on their responsibilities regarding the accurate calculation and forwarding of interest to the Commissioner for Consumer Affairs. Implementation of the recommendation would introduce an additional layer of complexity and potential source of confusion.

(c) Establishment of Trust Accounts maintained for the exclusive benefit of a particular client

The Review Panel has also considered the scheme in place under the *Legal Practitioners Act 1981*. Under that scheme a legal practitioner is required to place all trust money received into an interest bearing trust account. Interest paid on these monies is to be passed on to the Law Society and is ultimately applied to the funding of the Legal Practitioner's Guarantee Fund and the Legal Services Commission.

However the scheme differs from that under the *Land Agents Act 1994* to the extent that legal practitioners may establish a trust account for the exclusive benefit of a particular client²². Upon receipt of written direction from the person entitled to the money,²³ a legal practitioner may deposit trust money into that account rather than into their general trust

²² *Legal Practitioners Act 1981* section 57A

²³ *Legal Practitioners Act 1981* section 31(2)

account. In this event, the interest earned on the trust money is not required to be paid to the Law Society, rather the interest may be passed back to the person entitled to the money. Therefore the consumer does not lose the benefit of interest payments on large amounts held for a significant time.

The Review Panel understands that the scheme is most commonly used in instances such as the administration of an estate where the matter involves significant sums of money and is likely to take a long time to settle.

There are two important points to note about the scheme. Firstly, trust money dealt with in this way does not lose its nature, it remains trust money. Therefore, in the case that the legal practitioner commits fiduciary or professional default in relation to the money, the person entitled to the money may still be able to claim against the guarantee fund.²⁴

The second point to note is that the scheme imposes stringent reporting requirements on legal practitioners. If a legal practitioner receives a written direction from a client to place trust money into a trust account maintained for the exclusive benefit of the client, then they must retain that written direction as part of their records.²⁵ A practitioner must also keep a register of direct payments and any trust money not deposited in the practitioner's trust account is required to be noted in that register.²⁶ The details which are required to be kept in the register include the date of the receipt, the name of the person on whose behalf the money is received, the amount of the receipt and the reference number of any cheque. In this example the practitioner would need to make such an entry as a deposit into the account would be a direct payment. These requirements allow an audit trail to be established in the event that a dispute arises or a default occurs.

This system therefore has two advantages :

- (1) it overcomes the problem of consumers being deprived of interest on trust money where the amount is significant and held for a long time; and
- (2) it addresses problems of increased risk of default as identified in the other proposals by implementing a strict reporting regime.

The Review Panel accepts that the system does have a disadvantage in so far as the money retains its character as trust money and therefore in the event of fiduciary default the indemnity fund would be liable. This is problematic as the indemnity fund would not receive the benefit of interest on these accounts. Therefore, those consumers who place money into a land agent's ordinary trust account would be effectively subsidising those who chose to place their money into the exclusive personal trust account.

If such a scheme were to be adopted in relation to Land Agents, the Review Panel considers that this may be a less restrictive alternative to the current scheme. The Review Panel therefore recommends that the Commissioner for Consumer Affairs further investigate this proposal in consultation with industry, consumer and other interested parties.

Recommendation

²⁴ The Review Panel notes that a claimant will have to satisfy all the criteria for claiming against the Guarantee Fund as set out in Part 5 of the *Legal Practitioners Act 1981*.

²⁵ *Legal Practitioners Regulations* regulation 17

²⁶ *Legal Practitioners Regulations* regulation 18

That the Commissioner for Consumer Affairs investigate this issue further in consultation with industry, consumer and other interested parties.

4.3 Disciplinary Provisions

The Act prescribes certain situations in which disciplinary action can be taken. The objective of these provisions is to provide remedies over and above those which exist under other Acts and at common law. They provide a way of excluding persons from the industry who have demonstrated that they pose a risk to consumers.

Disciplinary action may be taken against a registered agent where the registration of the agent was improperly obtained, where the agent has acted contrary to an assurance accepted by the Commissioner under the *Fair Trading Act 1987*, contrary to other Acts governing the conduct of agents, has acted unlawfully, improperly or negligently, or has acted in such a way that the agent would not be able to obtain registration if they attempted to apply, or are otherwise no longer fit and proper. Disciplinary action may be taken against sales representatives if they have acted unlawfully, improperly, negligently or unfairly in the course of acting as a sales representative.

Action may be taken against each director of a body corporate where there is proper cause for disciplinary action against the body corporate. This includes a shadow director. This prevents people hiding behind the corporate veil in an attempt to evade the provisions of the Act.

There are a number of penalties available which range from a reprimand or a fine to suspension or expulsion from the industry. The grounds for disciplinary action are quite extensive, as are the types of disciplinary action which may be taken. This allows flexibility in the treatment of agents, and enable proportionality in the action taken against agents, while concurrently ensuring that consumers are properly protected.

4.3.1 Implications of the provisions

The disciplinary provisions may be seen as placing some restrictions on market conduct. The market conduct which is restricted by these provisions, however, is conduct which is wholly undesirable - negligence or deliberate wrongdoing. Restricting such conduct cannot be seen as truly restricting competition. Additionally, such conduct is penalised under the common law.

The Law Society submitted that the disciplinary provisions 'are a necessity and restricting wrongdoing cannot be seen as restricting competition'.

REISA submitted that it was "*not aware of disciplinary provisions affecting competition*".

The conclusion is that these provisions are a trivial restriction on competition.

Conclusion

The disciplinary provisions are a trivial restriction on competition.

Appendix 1 - Conclusions and Recommendations

Conclusion 1

The relevant market is the market for the provision of services other than conveyancing relating to the sale of land and businesses in South Australia.

Recommendation

The Review Panel finds that the benefits of regulation outweigh the costs and there are no viable alternatives to regulation.

The Review Panel therefore recommends that the *Land Agents Act* be retained.

Conclusion 2

The qualifications held by legal practitioners provide adequate protection for consumers in relation to the contractual and legal aspects of the transaction.

Recommendation

The best alternative is to prescribe the qualifications held by legal practitioners for the purposes of registration, subject to legal practitioners demonstrating competency in appraisal.

Conclusion 3

Some accountants are sufficiently competent in the business related aspects of the sale of a business to conduct such transactions without risk to consumers. However, most business sales are inextricably connected to land, whether in the form of a lease, freehold title or other interest. Accountants generally do not possess competence in the land related aspects of the transaction.

It may be possible for accountants to develop competency in the land related aspects of a transaction without having to undertake significant study.

Recommendation

The Review Panel recommends that the Office of Consumer and Business Affairs conducts a further review of the competencies required for registration as a land agent. In the course of such a review, the Office of Consumer and Business Affairs should liaise with bodies representing the interests of accountants with a view to exploring the potential for either recognition of accountants qualifications as sufficient for registration as a land agent or the development of a "top up" qualification to provide accountants with sufficient competency.

Conclusion 4

The benefits of the restrictions on the ways in which sales representatives can be engaged outweigh the costs.

There are no viable alternatives to requiring sales representatives to be employed.

Conclusion 5

The benefits of requiring land agents to hold prescribed qualifications outweigh the costs.

Conclusion 6

The current qualification requirements for land agents are excessive.
The current requirements should be reduced.

Recommendation

The Review Panel recommends that when National Competencies have been agreed, these competencies should be examined and only those competencies which are relevant and necessary to combat the consumer risk should be mandated for registration purposes.

Conclusion 7

The benefits of requiring sales representatives to hold prescribed qualifications outweigh the costs.

Conclusion 8

The current qualification requirements for sales representatives overall represent an appropriate balance between the need to protect consumers and the need to allow competition in the market. However, the requirements of the TAFE course are inappropriately high.

Recommendation

The Review Panel recommends that the current requirements should be reviewed once National Competency Standards have been agreed, and that only those competencies which are necessary for the protection of consumers should be mandated for sales representatives.

Conclusion 9

The benefits of the restriction relating to personal risks outweigh the costs.

Recommendation

The Review Panel recommends that a restriction be retained, but that it be modified so that a conviction for a summary offence of dishonesty will only disqualify a person from registration as an agent or being employed as a sales representative for ten years.

Conclusion 10

The benefits of trust accounting requirements outweigh the costs.

Conclusion 11

Any alteration of the restrictions on the use of electronic commerce should wait until a whole of Government approach to this issue has been established.

Conclusion 12

The requirement to deposit money into an approved account is a trivial restriction on competition.

Conclusion 13

The benefits of requiring registered company auditors to audit agents trust accounts outweigh the costs.

Conclusion 14

A scheme similar to that contained in the *Legal Practitioners Act 1981* allowing a land agent to establish a separate trust account for the exclusive benefit of a particular client may be appropriate to address the restriction on investment of trust money.

Recommendation

That the Commissioner for Consumer Affairs investigate this proposal further in consultation with industry, consumer and other interested parties.

Conclusion 15

The disciplinary provisions are a trivial restriction on competition.

Appendix 2 - Terms of Reference

The *Land Agents Act 1994* and associated regulations are referred by the Minister for Consumer Affairs to the Office of Consumer and Business Affairs for evaluation and report

by September 1999. The review is to focus on those parts of the legislation which restrict competition or which impose costs or confer benefits on business.

Consistent with the Competition Principles Agreement, the review should assess whether any restrictions on competitive conduct represented by the *Land Agents Act* are justified in the public interest by:-

- identifying the nature and magnitude of the social, economic or other problems that the Act seeks to address;
- identifying the objectives of the Act;
- identifying the extent to which the Act restricts competition;
- identifying relevant alternatives to the Act, including less intrusive forms of regulation or alternatives to regulation;
- identifying which groups benefit from the Act and which groups pay the direct and indirect costs which flow from its operation; and
- determining whether the benefits of the Act's operation outweigh the costs.

1. METHODOLOGY AND TIMETABLE FOR REVIEW

The review should adopt the following procedures **(in accordance with the indicated timetable):-**

- Appointment of Review Panel and finalisation of draft terms of reference **(by end of November 1998)**
- Initial research identifying relevant resources and materials, including materials on any interstate and overseas equivalents **(by mid-January 1999)**
- Preparation of an issues paper **(by mid-February 1999)**
- Release of issues paper for public and industry comment **(early March 1999)**
- Incorporation of comments into Draft Report **(by end of May 1999)**
- Preparation of Draft Report and release for public and industry comment **(early June 1999)**
- Preparation of Final Report to Minister for Cabinet **(by mid-August 1999)**
- Release of report **(by end of September 1999)**

2. CONSULTATION

The review will consult widely with industry and consumer representatives, educational institutions and relevant Government agencies.

3. THE REVIEW PANEL

The review will be conducted by a review panel consisting of the following persons:-

- Ms Margaret Cross, *Deputy Commissioner (Policy & Legal), Office of Consumer and Business Affairs;*
- Mr Alan Sharman, *Registrar-General, Land Services Group, Department for Administrative and Information Services;*
- Mr Matthew Bubb, *Senior Policy Officer (Competition Policy), Office of Consumer and Business Affairs (until 8 September 1999);*
- Mr Adam Wilson, *Senior Policy Officer (Competition Policy), Office of Consumer and Business Affairs (from 9 September 1999);*
- Ms Kate Tretheway, *Legal Officer, Policy & Legislation, Attorney-General's Department*

4. CONTACT OFFICER

The contact officer for the review is:-

Mr Adam Wilson
Senior Policy Officer (Competition Policy)
Office of Consumer and Business Affairs
GPO Box 1719
ADELAIDE SA 5001

Telephone: (08) 8204 9776
Facsimile: (08) 8204 1217
E-mail : Wilson.Adam@agd.sa.gov.au

Appendix 3 - Consultation List

- * Accreditation and Registration Council
- * ACT Consumer Affairs Bureau
- * Australian Competition and Consumer Commission
- * Australian Institute of Conveyancers (SA Division) Inc
- * Australian Property Institute (SA Division)
- * Australian Small Business Association
- * Australian Society of Certified Practising Accountants
- * Committee of Investigating Mortgagees
- * Consumer Affairs Division, Commonwealth Treasury
- * Consumers Association of South Australia
- * Delfin Property Group
- * Department of Education, Training and Employment (SA)
- * Department of Fair Trading (NSW)
- * Department of Human Services (SA)
- * Department of Justice (Tas)
- * Department of Justice (Vic)
- * Department of Transport, Urban Planning and the Arts (SA)
- * Institute of Chartered Accountants in Australia (SA Division)
- * Insurance Council of Australia
- * Knight Frank
- * Law Society of South Australia
- * Local Government Association
- * Ministry of Fair Trading (WA)
- * MMAL
- * Mr E.C. Dixon
- * Mr P. Wood
- * NSW Consumer Protection Agency
- * Office of Consumer Affairs (Qld)
- * Office of Consumer Affairs (Tas)
- * Office of Consumer Affairs and Fair Trading (NT)
- * Office of Fair Trading and Business Affairs (Vic)
- * Office of the Sheriff for South Australia
- * Office of the Small Business Advocate
- * Real Estate Employers Federation of South Australia
- * Real Estate Institute of South Australia
- * Retail Traders Association of South Australia
- * Society of Auctioneers and Appraisers (SA) Inc
- * South Australian Employers Chamber of Commerce and Industry

Appendix 4 - Submissions Received

Organisation	Issues Paper	Draft Report
* Consumers Association of SA	✓	X
* Department for Administrative and Information Services	X	✓
* Department of Education, Training and Employment	X	✓
* Department of Fair Trading (NSW)	✓	✓
* Insolvency Practitioners Association of Australia (SA & NT Division)	X	✓
* Joint Legislation Review Committee (Australian Society of Certified Practising Accountants; Institute of Chartered Accountants in Australia)	X	✓
* Leadenhall Australia Limited	✓	X
* National Institute of Accountants	✓	X
* Raoul P Dunk & Co	X	✓
* Real Estate Employers' Federation of South Australia	X	✓
* Real Estate Institute of SA	✓	✓
* South Australian Employers Chamber of Commerce and Industry	✓	X
* The Law Society of South Australia	✓	✓