



CENTRE FOR
INTERNATIONAL
ECONOMICS

ATTACHMENT A

*NCP review of the
Northern Territory
Agents Licensing
Act*

Prepared for

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*Centre for International Economics
Canberra & Sydney*

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Glossary

ALB	Agents Licensing Board
CPA	Competition Principles Agreement
LSNT	Law Society of the Northern Territory
NCC	National Competition Council
NCP	National Competition Policy
NTETA	Northern Territory Employment and Training Authority
NTU	Northern Territory University
PII	Professional Indemnity Insurance
REIA	Real Estate Institute of Australia
REINT	Real Estate Institute of Northern Territory
RTO	Registered Training Organisation
VET	Vocational Education and Training



Summary and recommendations

THE AGENTS LICENSING ACT 1979 regulates realty agents through occupational licensing. The often-stated objective of occupational licensing is to strengthen the position of the consumer in their dealings with service providers who are often in a stronger bargaining position, due to information imbalances. An information imbalance exists when one party to a transaction has more information than the other party, putting them in an advantageous position, enabling them to exploit the consumer for their own personal benefit.

Market realities

The infrequency with which (typical) consumers undertake real property transactions and the extent of monies involved means that consumers are placed at risk of significant financial loss and hardship if agents or their representatives are negligent, incompetent or dishonest. These 'market realities' simply serve to emphasise the size of risk against which individual consumers seek protection in property transactions.

Occupational licensing is about ensuring that service providers have a particular set of skills, which provide consumers with a certain standard of service, thereby minimising the risks associated with property transactions.

Objective of the legislation

The review team considers that the primary objective of the Act is to protect consumers of real estate, business and conveyancing services from agent misconduct or negligence. The Act seeks to achieve this through occupational licensing – legislating that agents be licensed, accountable, and meet certain standards of professional competence.

The *Agents Licensing Act 1979* and *Agents Licensing Regulations* contain comprehensive and prescriptive regulation of the activities of realty agents and their representatives. This is accomplished through occupational licensing. Specifically, the Act and its associated regulations:

Restrictions on competition

Competition in agent service provision is restricted in a variety of ways by the *Agents Licensing Act 1979*. Two broad categories of restriction have been identified – restrictions on entry to the agent service provider market (contestability) and restrictions on the mode of operation for agents and/or

their businesses. Restrictions on market entry are considered to be those restrictions that are 'one-off', while restrictions on the mode of business operations are 'on-going'.

Restrictions on market entry

Fit and proper person test The review team recommends that the fit and proper person test be retained, but amended so as to signal to potential licence applicants the criteria against which their fit and proper status will be assessed.

Educational requirements Prescribed educational qualifications should remain a condition of licensing. Educational requirements should be determined by the ALB in consultation with the industry. Educational requirements should be set at the minimum level necessary to deliver the intended benefits. The educational requirements of agents' representatives should be left to agents to decide.

Experience requirements The review team sees an arbitrary 'years of experience' requirement as unnecessarily inflexible. Capacity to carry on business as a licensed agent should have regard to the national competency-based approaches to training. The required years of relevant experience should therefore be reviewed in the light of this approach.

Substitutability between educational requirements and relevant workplace experience should be left to the ALB to determine.

Education supply The review team recommends the Act be amended to allow any Registered Training Organisation authorised by NTETA to receive funding from the Fidelity Fund for the purpose of providing realty education.

The review team suggests that the ALB and DIB investigate the possibility of tendering out sole rights to deliver realty education as a means of promoting competition between education providers.

Restrictions on business operations

Maintaining an office in the Northern Territory and licensing of branch managers The requirement that licensed agents are to maintain an office in the Northern Territory should be rescinded. The review team recommends that realty businesses should have a licensed agent in control of the overall business, but the requirement to have licensed agents as branch office managers be overturned where more than one office is maintained by that business in the same town or city. The need for managers to be licensed agents is a decision best left to the licensed agent in control of the business.

	<p>The review team considers that suitability to train and instruct trainees be dependent upon individuals having 'workplace training certification', to be awarded through a workplace competency assessment. The review team considers the ALB should further investigate this option.</p>
<p><i>Limiting the functions undertaken by conveyancing agents</i></p>	<p>The review team recommends that licensed conveyancing agents be allowed to provide mortgage lease and business sale contracts. However, this is to be contingent on conveyancing agents having the necessary qualifications to offer such services.</p> <p>The ALB and conveyancing sector should investigate a 'restricted' conveyancing licence to overcome problems associated with some agents choosing not to upgrade their skills.</p>
<p><i>Compulsory Professional Indemnity Insurance</i></p>	<p>The review team recommends that Professional Indemnity Insurance remain a requirement of an agent's licence. The ALB is best placed to set the (minimum) level of PII required by agents.</p> <p>The review team recommends that professional bodies and the Registrar should be allowed to arrange Professional Indemnity Insurance on behalf of agents, but agents should have the freedom to insure outside of the arranged scheme if they so choose.</p>
<p><i>Compulsory Fidelity Fund contributions</i></p>	<p>The review team recommends that the Fidelity Fund consumer protection arrangements remain in place. However, the actuarial soundness of the Fund should be reviewed along with the current cap on claims.</p>
<p><i>Legislated rules of conduct</i></p>	<p>The review team recommends that, if needed, the Rules of Conduct be amended so as to contain the minimum conduct standards required by agents to ensure an adequate level of consumer protection.</p> <p>The requirement for all real estate agents and all conveyancing agents to abide by REINT's and LSNT's conduct rules (respectively) should be removed from the Act.</p>
<p><i>Composition of Agents Licensing Board</i></p>	<p>The review team considers that the two real estate industry representatives on the Board should be drawn from the wider real estate industry and not restricted to those persons being REINT members.</p> <p>The Act should better recognise the separate needs of conveyancing agents when it is sitting on matters concerning them.</p> <p>The review team recommends that the Act be amended so that it requires the appointment by the Minister of two licensed real estate agents, who</p>

will sit on the Board when it is dealing with real estate agents' matters. Reference to membership of REINT should be removed.

Similarly, the review team recommends that the Act be amended so that the composition of the Board requires the appointment of two licensed conveyancing agents who will sit on the Board when conveyancing agents' interests are dealt with.

Alternative regulatory arrangements

Partial deregulation The review team considers that the existing regulatory regime – industry wide occupational licensing – delivers net benefits to the community. However, the regulation contains some unnecessary restriction on competition that act to reduce the benefits flowing to the community. By implementing the recommendations made in chapters 5 and 6, the review team believes that the objective of the legislation can be achieved in a less restrictive manner. This will deliver net benefits to the community.

The net benefits from the education standards and formal regulation imposed on real estate and business agents' representatives are not clear. Greater freedom and responsibility for agents in choosing their representatives would be beneficial. Partial deregulation with a simple register of representatives and a 'negative list' of those removed for breaches of the Act is recommended to replace current arrangements.

The review team believes that partial deregulation – where business principals need to hold a realty licence, but their employees are registered but not required to meet any *legislated* standards – to be able to deliver consumer protection at lower cost than the current occupational licensing regime. Legislated barriers to market entry for realty employees could be eliminated under the partial deregulation regime without sacrificing consumer protection. The less restrictive requirement on the qualification of branch managers could make a similar contribution.

The review team recommends that the partial deregulation scheme be implemented.

1

What is this review about?

THE CENTRE FOR INTERNATIONAL ECONOMICS (CIE), a private economic research consultancy, in conjunction with Desliens Business Consultants, has been commissioned by the Department of Industries and Business to undertake an independent review of the *Agents Licensing Act 1979*. This review is being conducted in accordance with the principles for legislation review set out in the Competition Principles Agreement (CPA) entered into by all members (Commonwealth, states and territories) of the Council of Australian Governments in 1995. The Terms of Reference for the review are set out in appendix A.

The review forms part of the Northern Territory government's obligation under the CPA to review and, where appropriate, reform all laws that restrict competition by the year 2000. Legislative reviews along National Competition Policy (NCP) lines are currently being undertaken of similar Acts in other states.

In undertaking this review we have consulted with stakeholders and asked for submissions from any interested parties. An issues paper, designed to facilitate consultations and the preparation of submissions, was distributed in June this year. The review was widely advertised in Northern Territory newspapers and also on the Department's website.

The review team held extensive discussions with stakeholders in both Darwin and Alice Springs, and every effort was made to encourage stakeholders to comment on topics raised in the issues paper. Stakeholders were given ample opportunity to participate in the review process.

Six written submissions were received. Details of submissions received can be found in appendix B. Some submissions drew attention to NCP reviews of legislation governing real estate (or land) agents in other jurisdictions. The review team considered the findings and recommendations made in these reviews.

In submissions made to the review, concerned stakeholders raised a broad range of issues. However, the review of the *Agents Licensing Act 1979* was

1 WHAT IS THIS REVIEW ABOUT?

restricted to competition policy issues only, and was not a general review of the legislation. As such, issues raised of a more general nature have not been considered in this review.

This report outlines the review team's findings and reflects discussions with DIB officers, views expressed by stakeholders in both interviews and in submissions, comments by members of an independent steering committee and the review team's own research.

2

What is National Competition Policy about

NATIONAL COMPETITION POLICY REPRESENTS a commitment by all Australian governments to a consistent national approach to improving the overall efficiency and competitiveness of the Australian economy. Reviews of potentially anticompetitive legislation are part of this approach. A key objective of National Competition Policy is to develop more open and integrated markets in all sectors of the economy. The idea is to promote competition where it will encourage more efficient use of resources, stimulate cost reductions and bring quality improvements.

National Competition Policy assumes that competition is generally desirable *unless* a legislated restriction can be shown, on a case-by-case basis, to deliver socially beneficial or desirable outcomes that are greater than those with no such restrictions in place. The specific test is contained in the Competition Principles Agreement is that legislation should not restrict competition unless it can be shown that:

- the benefits of the restriction to the community as a whole outweigh the costs (of the restriction); and
- the objectives of the legislation can only be achieved by restricting competition (Clause 5(1) of the Competition Principles Agreement).

It is significant to note that *both* of these criteria are required to be met if a restriction is to be retained. This means that even if a restriction passes a net public benefit test, it should not be retained if there are other less restrictive ways of achieving that outcome. Also, if a restriction is to be retained it is necessary to demonstrate that to keep it will result in a public net benefit. It is not sufficient to demonstrate that its removal would result in no or little net benefit.

The procedure for reviewing legislation is detailed in the Competition Principles Agreement. A review should:

- clarify the objectives of the legislation;
- identify the nature of restrictions on competition;

- analyse the likely effect of the restriction on competition and on the economy more generally;
- assess the balance of benefits and costs of the restriction; and
- consider alternative approaches for achieving the same result including non-legislative approaches.

This is procedure that has been adopted for the review of the *Agents Licensing Act 1979*. Chart 2.1 outlines the approach taken to NCP reviews.

It is important when assessing the benefits and costs of a restriction that distinctions are made between private benefits and costs, industry benefits and costs and community wide benefits and costs.

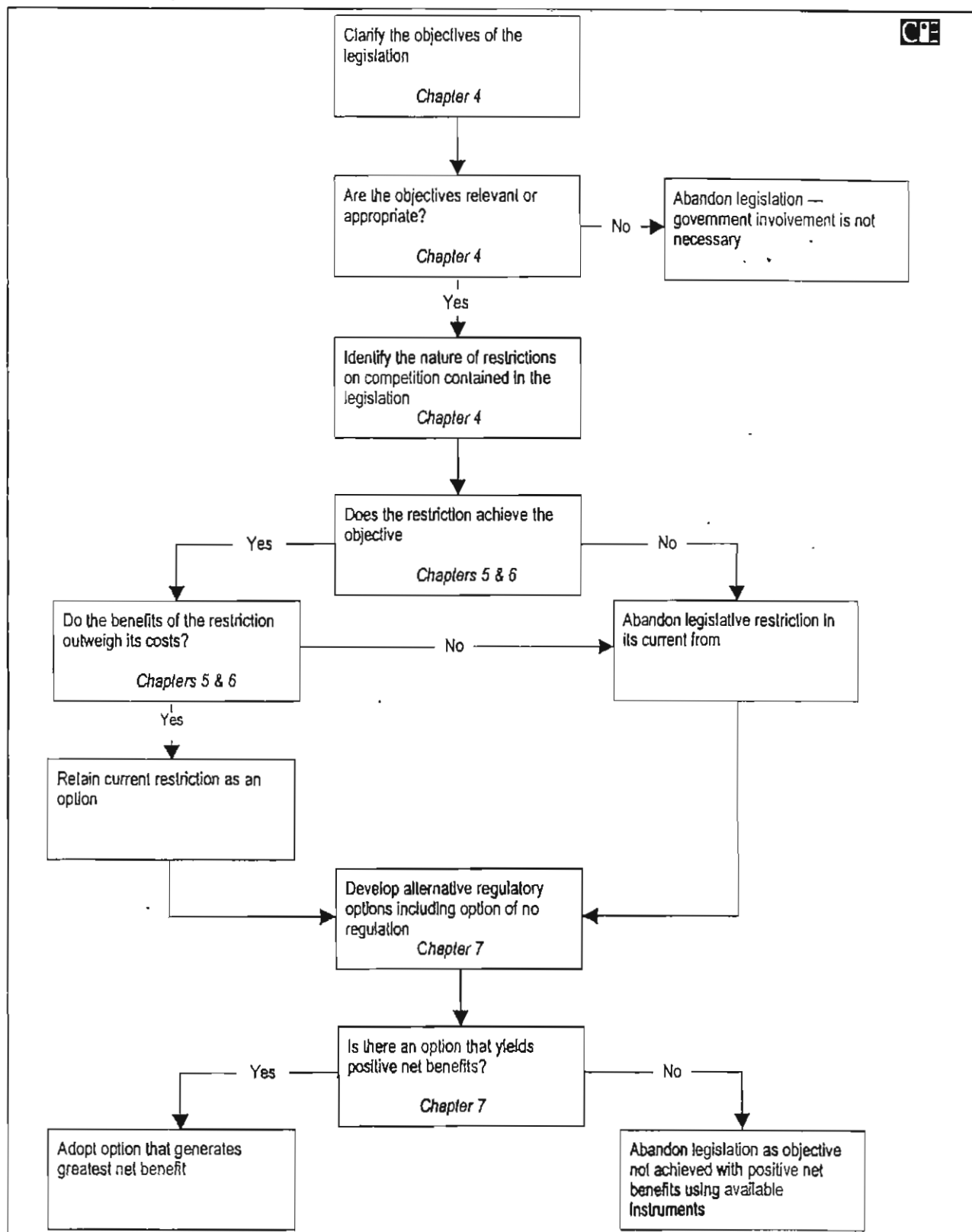
There are a range of public interest issues that are to be taken into account where relevant in assessing the benefits and costs of any restrictions. These include, but are not limited to:

- ecological sustainability;
- social welfare and equity;
- occupational health and safety;
- industrial relations and access and equity;
- economic and regional development including employment and investment growth;
- interests of consumers;
- competitiveness of Australian businesses; and
- efficient resource allocation.

Thus, NCP recognises that unrestricted competitive markets may not result in best community outcomes. However, the NCP and the legislative review process is underpinned by the view that free interactions between consumers and producers result in broadly based benefits throughout the community.

This does not mean that fewer rules and restrictions would necessarily be better. Competition itself cannot operate outside a framework of trust which is underpinned by general commercial, industrial, health and safety, and environmental laws.

2.1 NCP review process



3

The real estate market

IDENTIFYING THE RELEVANT market is an important step in a NCP review, and comprises defining the dimensions of the market(s) affected by the legislation under review. Market dimension, which can be established through defining industry participants and customers, allows identification of what groups are affected by the legislation, and which groups stand to be affected should the legislation be changed.

The *Agents Licensing Act* regulates most of the activities of natural persons and businesses associated with the sale and transfer of residential property and business interests (residential, commercial, and industrial property) for monetary reward. Given the prominence and depth of the property market, and the large number of parties involved in transactions, the *Agents Licensing Act 1979* has a large sphere of influence.

Real estate, business and conveyancing agents

Agents perform a range of services. A real estate or business agent is someone who, for reward, acts for a vendor in the sale, purchase, leasing or letting of real property or a business interest. This means that agents not only undertake and facilitate property (or business) sales and purchases, but also manage properties, arrange property rentals and carry out property appraisals. Conveyancing agents undertake, for reward, a range of services to facilitate the transaction of real property. Services include land title searches, preparation and execution of sale contracts, arrangement of settlement, document lodging and complete powers of attorney. The range of services offered by conveyancing agents does not however extend to preparation of leases or mortgages.

We note that the market for conveyancing services is served by both conveyancing agents and legal practitioners who are governed by legislation not under review here. Conveyancing agents do not compete with real estate agents.

In carrying out their services, real estate and business agents are assisted by agents' representatives. An agent's representative is a person who, in the service of and on behalf of, a licensed agent negotiates property transactions. The Act does not make provision for conveyancing agents' representatives.

Throughout this paper, and unless otherwise specified, 'agents' refers to real estate agents, business agents and conveyancing agents and, where appropriate, their representatives.

Table 3.1 shows the number of agents and agents' representatives active in the Northern Territory (NT). Care should be taken when interpreting the table. The categories 'Employed' and 'Unemployed' give the number of natural persons active in the industry, while categories 'Companies/firms' and 'Sole traders' give the number of licensed offices. For example, there are 53 licensed real estate offices in the NT, which employ 103 agents and 269 agents' representatives.

The *Mutual Recognition Act 1992* has, as a key principle, that the existence of a licence of equivalence in one jurisdiction is basis for a licence being issued elsewhere in Australia. This means that all licensed agents could, if certain operational requirements are met (see chapter 5), supply services to the Northern Territory realty market. It may therefore be appropriate to consider that the market for agent services extends beyond the boundaries of the NT. There are currently around 7500 licensed agency businesses Australia-wide.

Associated markets

Through regulating the activity of agents and their representatives, the Act also exerts influence, albeit indirectly, over those industries supplying the realty sector with production inputs. A prime example is education supply.

3.1 Agent licences in the Northern Territory^a

Licence type	Licensed offices		Natural persons		Total
	Companies/firms	Sole traders	Employed ^b	Unemployed ^c	
	No. licences	No. licences	No. licences	No. licences	
Real estate, business	45	8	103	7	163
Agent's representative	Na	Na	269	126	395
Conveyance	7	9	14	1	31
Total	52	17	384	134	589

^a Figures as at 31st July 2000. ^b Natural persons licensed or registered and employed by a (licensed) office, or by a solicitor in the case of conveyancers. ^c Natural persons licensed or registered but currently not active in the industry.

Source: Department of Industries and Business, personal communication and REINT submission.

By requiring agents and their representatives to have a particular level of education, the Act is also affecting providers of that education by ensuring that there is demand for realty education. Hence the relevant market includes not only agents and consumers of agent services, but also those supplying inputs to the realty sector.

Industry institutions

Agents Licensing Board

The Agents Licensing Board of the Northern Territory (ALB) is established under the Act. The ALB has responsibility for implementing the Act, which includes administering the licensing process, conducting inquiries into agents' behaviour, and bringing disciplinary action against agents found to have breached the Act. There are five members, appointed by the Minister:

- a public servant (usually from Department of Industries and Business);
- a legal practitioner (who is the Chairperson of the Board);
- two persons who are members of the Real Estate Institute of Northern Territory (REINT); and
- a consumer advocate.

For the purpose of considering issues relating to conveyancers, the ALB is to comprise the Registrar, a legal practitioner, a consumer advocate, and if the Minister *thinks appropriate*, two licensed conveyancing agents.

The ALB is serviced in discharging its responsibilities by the Department of Industries and Business.

Industry bodies

There are three industry bodies representing agents and their representatives in the NT:

- the Australian Institute of Conveyancers;
- the Real Estate Institute; and
- the Realtors Guild.

The Conveyancers Institute was established in 1993 and around 91 per cent of licensed conveyancing agents active in the industry are members.

The Real Estate Institute Northern Territory was established in 1974. Approximately 79 per cent of fully licensed real estate agents and agents'

representatives active in the industry are members of REINT. Around 66 per cent of licensed company real estate offices and sole traders are REINT members. However, in their submission to the review, REINT note that this figure is biased downwards by accountants, valuers, shopping centre managers and holiday apartments registered as company real estate offices (or sole traders) but not operating in day-to-day real estate. If account is taken of these, around 78 per cent of registered companies/firms and sole traders are REINT members.

The Realtors Guild Limited was registered in March 2000 and has around 11 per cent of the NT's (active) licensed agents and agents' representatives as members. However, the Guild is currently limiting its activities to the Darwin area, where around 40 per cent of agents and their representatives are members. The majority of Guild members are also members of REINT.

Financial cost of administering the current Act

The Fidelity Fund covers all of the costs associated with administration of the Act. The Fund is made up of monies from a range of sources, including:

- contributions and levies paid under the Act;
- licence and registration fees paid to the ALB;
- fines imposed on agents by the ALB;
- interest accruing from the investment of Fund monies; and
- interest accruing on (vendor) monies held by agents in trust accounts.

Licence and registration fees contribute around \$100 000 to the Fund. The majority of Fund monies come from the interest earned on invested Fund monies and agent trust accounts.

The total cost of administering the Act is in the order of \$330 000 to \$340 000 per annum. Around \$100 000 of this amount is paid for by the industry in the form of licence and registration fees. The remainder (around \$230 000) is covered by the other sources of Fidelity Fund monies. Administration of the Act includes expenditure associated with:

- the ALB and its (monitoring and enforcement) activities;
- the services of legal practitioners;
- office and administration costs; and
- Department of Industries and Business personnel responsible for implementation of the legislation.

4

The Act and its objectives

THE OBJECTIVES OF LEGISLATION play a central role in NCP reviews. Objectives of the *Agents Licensing Act 1979* need to be identified, and their relevance assessed, so as to:

- justify government intervention in the affected market(s); and
- assess the potential for alternative regulatory arrangements that might satisfy objectives in a less restrictive way.

Objectives of the Act

No clear statement of the overarching objectives of the *Agents Licensing Act 1979* can be found in the Act itself or in its regulations. However, implied objectives of the Act can be taken from the specific provisions of the Act and from parliamentary readings and debate surrounding the Act's introduction and its various amendments.

Submissions were mixed as to the objective of the Act. Some, for example REINT and the Institute of Conveyers, considered the objective to be consumer protection.

The objective of the *Agents Licensing Act* is to protect consumers of [services provided by] Real Estate, Business and Conveyancing Agents and should remain as such... (REINT submission, page 3)

The Realtors Guild, however, considered the objective of the Act to be to forge an exclusive arrangement between vendors and agents.

The effect of the Act is to establish an exclusive relationship between vendors or owners of Realty with an intermediary for the purpose of sale or management of the property. (Realtors Guild submission, page 7)

The review team considers that the primary objective of the Act is to protect consumers of real estate, business and conveyancing services from agent misconduct or negligence. The Act seeks to achieve this by legislating that agents be licensed, accountable, and meet certain standards of professional competence.

The Act requires and enforces occupational licensing – the stated purpose of the Act being to ‘...provide for the licensing of certain agents...’ The often-cited objective of occupational licensing is to strengthen the position of consumers in their dealings with service providers who are often in a stronger bargaining position, due to information imbalances. An information imbalance exists when one party to a transaction has more information than the other party, putting them in an advantageous position, enabling them to exploit the consumer for their own personal benefit.

If information imbalance and the risks of personal loss in dealings with agents are such as to undermine confidence and activity levels in a market, then market failure can occur.

The cost associated with poor decision making that might otherwise arise due to an information imbalance is magnified by the nature of the property market. Considerable sums of money are involved in property transactions, and may necessitate large borrowings and undertakings to repay loans over an extended period of time (25 years is not uncommon). For example, the median residential property sale in Darwin is valued at around \$197 000. Residential property will often be the consumer’s single largest purchase or investment, and the contracts drawn up by agents frequently represent one of the most important contracts a consumer will enter into. Making a decision based on limited or inaccurate information can expose consumers to significant and long-term financial hardship. Submissions to the review supported this notion.

Lack of relevant information or low awareness often results in poor decision making. Poor decisions in Realty transactions can be very costly. (Realtors Guild submission, page 8)

The Act further extends the notion of consumer protection by requiring agents to hold Professional Indemnity Insurance (PII) and to make contributions to a Fidelity Fund. Persons suffering monetary losses arising out of a defalcation of trust monies or misappropriation of property by licensed agents (or their representatives) can claim against the Fidelity Fund for compensation. PII provides an avenue for consumers adversely affected by agent negligence to seek recompense.

Are the objectives appropriate?

The review team considers that the *prima facie* objective of the Act – consumer protection – to be both relevant to and appropriate for today’s

realty market. Consumers of realty services may be exposed to three types of risk when undertaking property transactions:

- risk of professional incompetence;
- risk of business failure; and
- risk of criminal activity.

Several submissions to the review noted that consumers of agent services would be exposed to such risks and that the current legislation mitigates the risks faced by consumers.

Consumers of services offered by Conveyancing Agents may incur risks related to fraud (committed by the agent or their staff), or careless work practices. (Institute of Conveyancers submission, page 2)

The risks facing consumers [in absence of legislation] is that they might come into contact with an operator who has not been trained, who does not have the experience and who does not comply with the voluntary industry standards as set by members of that industry. (Denis Power submission, page 2)

The infrequency with which (typical) consumers undertake real property transactions and the extent of monies involved means that consumers are placed at risk of significant financial loss and hardship if agents or their representatives are negligent, incompetent or dishonest.

The Act seeks to reduce consumers' exposure to risk. If successful and cost effective, this would deliver community-wide benefits. This is especially so when we take into account that large sums of money are typically associated with real property transactions. The objective of the *Agents Licensing Act 1979* is therefore considered to be appropriate.

Is there overlapping legislation with the same objectives?

In relying on the *Agents Licensing Act 1979* to achieve the objective of consumer protection, it is presumed that other legislation such as the *Consumer Affairs and Fair Trading Act 1990* or *Trade Practices Act 1974* cannot sufficiently overcome any apparent market failure and ensure adequate consumer protection. The majority of submissions to the review considered that other legislation or criminal law proceedings do not offer consumers of realty services adequate protection. These matters are discussed further when alternatives to licensing are taken up in chapter 7.

It should be noted that conveyancing agents, competing as they do with legal practitioners rather than with other property agents, are affected by the legislation which governs their competitors. This includes the *Legal*

Practitioners Act and the *Real Property Act*. Conveyancing agents are, therefore, influenced by the objectives of this other regulatory framework as well as those of the *Agents Licensing Act*.

Is continued regulation of agents justified?

The need for prescriptive regulation to achieve the objective of 'consumer protection' is based on the presumption that market place disciplines resulting from competition between realty service providers and 'shopping around' by consumers cannot be relied upon to ensure the norms of fair dealing. In economists' terms, there is said to be market failure. Requiring agents, as a condition of their licence, to adhere to rules of conduct and to have minimum training and educational qualifications, provides a means by which consumers can be protected from monetary losses arising from unscrupulous or incompetent agents.

If market failure can be demonstrated — that is the property market, if left to itself, would not provide optimal economic or social outcomes — then a case for government intervention in the market *may* be made. However, regulation of agents will inevitably result in some costs.

Reduced competition

In discussions with stakeholders and in submissions made to the review, the review team was made aware that participants in the realty industry considered the industry to be competitive.

Agents compete one against the other within their industry in the normal course of business. ...as they all have to be subject to the same requirements there is no undue advantage to one or the other. Legislation has no bearing on competition between agents. (Denis Power submission, page 1)

However, a distinction needs to be drawn between competition amongst incumbent agents, and competition between incumbents and potential market entrants (market contestability). Several submissions to the review noted this distinction.

Competition is open and vigorous. [the legislation] Restricts only during the licensing process; once accredited there are no perceptible constrictions. (Realtors Guild submission, page 3)

The current Act reduces the level of competition by restricting the issue of licences to persons of acceptable standards... (Institute of Conveyancers submission, page 2)

The review team accepts that the market for realty service provision is relatively competitive, with licensed agents (and their representatives) competing intensely for clients. However, it is not a market that is fully contestable. Legislatively enforced barriers to entry prevent any person who does not satisfy a range of criteria from entering the realty market and competing for clients. Reduced competition (contestability) gives rise to numerous sources of cost – there is less incentive to innovate, increase efficiency, improve service and keep prices down.

Compliance costs

Complying with the requirements of the legislation may impose financial costs on agents and/or their businesses. The Act also requires that agents and their representatives abide by certain practices and standards. Compliance with such provisions will impose further costs.

In principle benefits of regulation

The review team considers that, in principle, some form of ongoing regulation of the market for agent services is warranted. The nature of the property market and the need for consumer protection provide a *prima facie* case for intervention in and regulation of realty service provision. However, government regulation of the realty industry will only be justified if it is efficient, effective and the benefits of regulation outweigh the associated costs – that is, regulation delivers *net benefits* to the wider community.

While individual restrictions on competition need to be assessed on a case-by-case basis, the review team believes that the community wide benefits arising through ensuring agents have minimum competencies and providing confidence to consumers in their dealings with agents are likely to exceed the costs of such regulation. Assessment of individual restrictions on competition is the subject of chapters 5 and 6.

A key task of NCP reviews is to assess whether alternative forms of regulation, including deregulation, could achieve the objectives of the Act at lower cost (or greater net benefit). While the review team considers that some form of ongoing regulation of realty service provision is in the wider community's interest, it does not necessarily follow that regulation should take the form of occupational licensing. In chapter 7 alternative forms of regulation are assessed.

Effect of the Act and its regulations

The *Agents Licensing Act 1979* and *Agents Licensing Regulations* contain comprehensive and prescriptive regulation of the activities of realty agents and their representatives. This is accomplished through occupational licensing. Specifically, the Act and its associated regulations:

- establish the Agents Licensing Board (ALB) to carry out the Act;
- prevent unlicensed persons from acting as real estate agents, business agents and conveyancing agents;
- restrict entry to the occupations of real estate agent, business agent, conveyancing agent and agents' representatives by stipulating license eligibility conditions and procedures, including:
 - minimum age requirements;
 - fit and proper character requirements;
 - prescribed educational qualifications and/or experience;
 - business location requirements;
- impose employment restrictions on agents' representatives, including:
 - agents' representatives to be registered;
 - licensed agents are not to employ unregistered representatives;
 - prohibition of employment by two or more agents;
- prescribe required business behaviour and practices such as:
 - trust monies, trust accounts and agents' accounting records;
 - audit and inspection of trust accounts;
- establish specific rules of conduct for licensed agents, encompassing:
 - due care, skill and diligence in carrying out duties;
 - prohibition on conveying information that is false, misleading or likely to deceive;
 - carrying out the lawful instructions of the principal;
- require agents to have due regard to and comply with rules of practice published or approved by the Real Estate Institute of the Northern Territory and the Law Society of the Northern Territory, and guidelines concerning fair trading practices issued by the Trade Practices Commission;
- require licensed agents to have professional indemnity insurance and to contribute to Fidelity Fund against which persons who suffer monetary losses can claim. Monies from Fund can be used for certain educational programs; and

- establish procedures for license application and renewal, the conduct of investigations and disciplinary measures, and set fees.

Restrictions on competition

All legislation regulates behaviour of market participants in some way, but not all regulation necessarily restricts competition. The National Competition Council (NCC) has identified seven ways in which legislation may restrict competition (NCC Legislation Review Compendium 1997). Legislation may restrict competition if it:

- governs the entry or exit of firms or individuals into or out of markets;
- controls prices or production levels;
- limits the quality or availability of goods and services;
- restricts advertising and promotional activities;
- restricts price or type of input used in the production process;
- is likely to confer significant costs on businesses; or
- provides advantages to some firms over others by, for example, shielding some activities from the pressures of competition.

Competition in agent service provision is restricted in a variety of ways by the *Agents Licensing Act 1979*. Two broad categories of restriction have been identified – restrictions on entry to the agent service provider market (contestability) and restrictions on the mode of operation for agents and/or their businesses. Restrictions on market entry are considered to be those restrictions that are ‘one-off’, while restrictions on the mode of business operations are ‘on-going’. The various restrictions are described and assessed in the following two chapters.

5

Restrictions on market entry

THE ACT ESTABLISHES that only persons, firms or companies licensed under the Act are allowed to carry on business as real estate, business or conveyancing agents. This restricts competition in the realty market as only licensed agents (and their representatives) are allowed to provide realty services. Furthermore, licensing requires that certain criteria are met before a licence is issued, meaning that the number of service providers and the ensuing level of competition are largely governed by stringency with which licence eligibility criteria are set. The licensing path for individuals is shown in chart 5.1 (the licensing path for companies and firms is similar).

To be eligible for an agent's licence, applicants must:

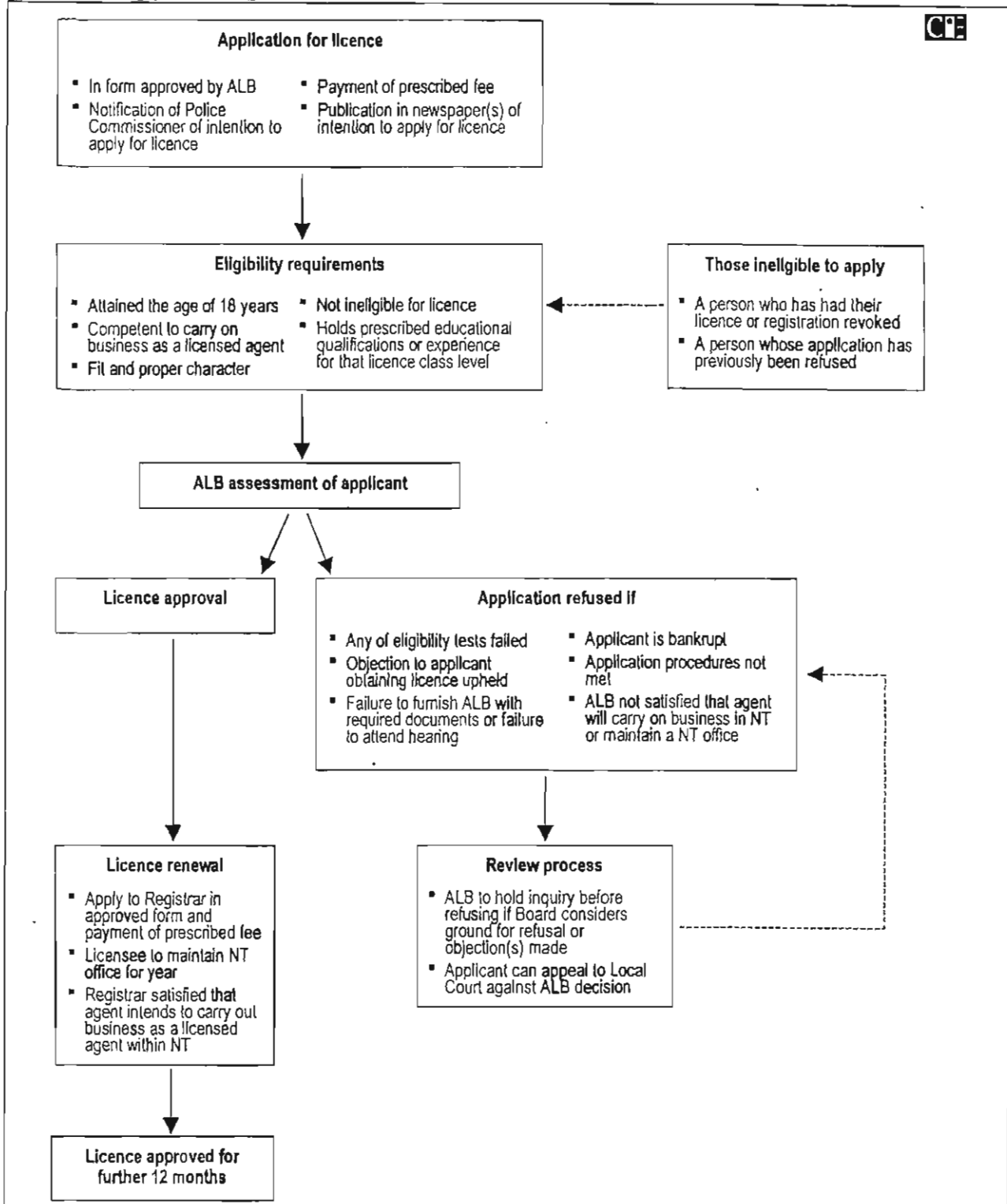
- have attained the age of 18 years;
- be a fit and proper person;
- hold the prescribed educational qualifications or experience for the class of licence;
- by reason of qualifications or experience, be competent to carry on business as a licensed agent; and
- if licensed, an applicant will carry on business as a licensed agent within the Northern Territory.

The *in principle* benefits of requiring realty agents to meet certain occupational requirements include:

- protecting consumers of realty services through ensuring that service providers are of good character and have (at least) minimum competencies; and
- providing confidence to consumers to deal with realty agents.

However, by restricting licences to only those applicants who satisfy the above criteria, the Act limits contestability in the agent service provision market. The question for this review is how large are these potential benefits and what costs do they impose on the wider community?

5.1 Licensing path for agents



Submissions to the review considered licensing criteria to be necessary to protecting consumers and the realty industry.

The Agents Licensing Act should remain in force as is...To protect the consumer and the Industry against any "Johnny come lately" who could destroy the Industry. (REINT submission, page 3)

...this is a function of Acts to limit participation in an industry to those competent enough to operate in the industry. Once again this is a fundamental of Consumer Protection. (Denis Power submission, page 3)

...the requirements for obtaining a licence. This is a positive restriction protecting consumers. (Institute of Conveyancers submission, page 6)

Fit and proper person test

The Act requires that licensees be of 'fit and proper' character. The assessment of an applicant's worthiness for a licence would be based on factors such as their character and general reputation, and their fitness and propriety. The Act gives no precise definition of a fit and proper person. The indications of good character are subjective and largely rely on character references, the applicant's own statements and the findings of any police checks. A criminal record, history of bankruptcy or licence revocation, or recommendation by the Commissioner of Police may be sufficient to exclude an applicant on the basis of being of unsuitable character.

The ability to exclude otherwise qualified applicants on the basis of character or past actions represents a barrier to entry.

Benefits of the fit and proper person test

Submissions to the review regarded the fit and proper person requirement as being a necessary step in identifying and excluding 'undesirable' people from the industry. The test is a proactive approach to ensuring agents are of suitable character and will build on the industry's reputation.

No submission supported limiting the fit and proper person test to a criminal history check. Rather, submissions favoured including in the test aspects such as bankruptcy and prior licence revocation checks, and consideration of work history.

Knowledge that a fit and proper test will be conducted has most likely discouraged some otherwise qualified individuals from applying for a licence. Furthermore, rejecting licence applicants on the basis that they are

not considered to be 'fit and proper' persons may go some way to ensuring appropriate agent standards and behaviour. However, the benefits of such a preventative approach to ensuring appropriate agent standards, and subsequent consumer protection, are difficult to quantify. For example, it is not possible to establish the success in terms of the extent to which people are discouraged from applying, or for that matter, the proportion of those so discouraged who would have turned out to be poor realty agents.

Costs of the fit and proper person test

The direct costs associated with screening individuals under the fit and proper person test are not very high. Applicants are required to undergo a police check, which comprises name verification (\$25), and if there is some doubt over the applicant's name, then fingerprinting is also required (\$60). Licence applicants are required to notify the public, via publication in a Saturday edition of a newspaper, of their intention to apply for a licence. The public notification requirement is to solicit views from the wider public on whether the applicant is of fit and proper character and competent to carry on business as a licensed agent. Advertisements typically cost around \$100. Direct costs are borne by applicants.

There are additional costs associated with the test in the sense that the ALB must assess each applicant's suitability, which takes time and resources. Furthermore, should an objection to the application be lodged with the Registrar, the ALB is to hold an inquiry before considering to grant or refuse the application. The Realtors Guild noted that the cost of such inquiries may be significant.

The costs of establishing statutory detail are not high in screening undesirable individuals. The cost of running inquiries from mainly industry related plaintiffs are extremely high where objections are not substantiated. (Realtors Guild submission, page 11)

The cost associated with such an inquiry is largely at the discretion of the licence applicant. If applicants opt for legal representation then the applicant may incur potentially significant costs. But legal representation is not compulsory, and the Department of Industries and Business have advised the review team that inquiries are structured so that applicants can represent themselves.

The costs of any such inquiries are borne by the realty industry as the ALB is funded via the Fidelity Fund, which is made up of licence and registration fees among other industry based contributions. The admin-

istrative costs of the fit and proper person test are borne largely by applicants and the industry.

A less tangible cost of the fit and proper person test arises as a result of the lack of clear definition of the criteria against which applicants are assessed. It may well be the case that persons who would otherwise seek to enter the industry are discouraged by the prospect of their application being rejected on the basis of failing indeterminate criteria.

Assessment of the fit and proper person test

The fit and proper person test is carried out to identify and exclude — on the basis of their character, reputation or past actions — certain individuals from the realty profession. Generally speaking, exclusion of such persons is likely to be in the consumer's interest, especially when the large sums of money involved in property transactions and agents access to people's homes is taken into account. However, it should also be noted that it is not possible to screen for criminal intent, and a criminal record does not guarantee that an individual will re-offend.

The review team considers that a proactive rather than reactive approach to ensuring that agents are of suitable character is preferable. Removing an individual's right to participate in the industry after an offence (as defined under the Act) has occurred is often too late for those affected. To this end, the fit and proper test should, in principle, be retained. The cost of the test is relatively low, and the benefits, while difficult to measure, are likely to be sufficient to deliver net benefits.

However, the review team has some concerns regarding the fit and proper person test in its current format. The difficulty presented by the test is the potential arbitrariness of the test requirements. Assessments are subjective and involve a degree of administrative discretion. This was recognised in submissions to the review.

Cost is minimal and benefits of the test are useful in determining applicants' eligibility although not conclusive. Problems could be created if applicants' minor misdemeanours are given too much importance assessing suitability of applicant. (Institute of Conveyancers submission, page 7)

Michael Bongiorno (L.J. Hooker) however suggested flexibility in applying the fit and proper person test is advantageous.

'The fit and proper person test is very broad and it's not clear what determines it. But that's important because the [Agents Licensing] Board needs to have

flexibility to act on information they receive about a particular person, beyond a criminal records check.' (Michael Bongiorno)

The review team agrees that discretion offers advantages by way of allowing each application to be assessed on its merits. However, the review team also notes that such discretion and arbitrariness may reduce contestability in the market place. It is currently not possible for applicants to ascertain prior to submitting their application whether or not they will be judged fit and proper. And as noted above, this uncertainty may see suitable and otherwise qualified persons not applying for a licence. This is not an ideal outcome.

To overcome the problem, the review team considers that the fit and proper person test be retained, but amended so as to signal to potential applicants the grounds on which their fit and proper status will be assessed. This would comprise, for example, specifying the types of criminal convictions that would see an applicant 'fail' the fit and proper test.

The fit and proper person test would not be operating effectively if, for example, someone with a conviction for a minor traffic infringement but otherwise qualified decided not to apply for a licence. If such a person did apply for a licence, the ALB would most likely waive the criminal conviction, as it is not relevant to the duties and responsibilities of realty agents. However, the applicant does not know this and may decide, as they have a criminal conviction, not to apply for a licence.

Specifying the assessment criteria would reduce the arbitrariness of the test and inform people of the eligibility requirements for fit and proper status. This would reduce the likelihood that suitable and otherwise qualified persons choose not to apply for a licence because they are misinformed or uncertain about the weighting given to, for example, criminal convictions in the fit and proper person test.

The advantages associated with the ALB's flexibility in its decision making process would not be compromised by this approach. Applicants could decide, even if they do not meet all of the specified fit and proper person criteria, to apply for a licence, knowing that it is a requirement of the Act that the ALB is to hold an inquiry into a person's application before refusing that application. During the inquiry process the applicant can put forward their case as to why they should be granted a licence and allow it to be judged on its merits.

Recommendation

The review team recommends that the fit and proper person test be retained, but amended so as to signal to potential licence applicants the criteria against which their fit and proper status will be assessed.

Educational requirements

The *Agents Licensing Act 1979* requires the various classes of licence holders and registered agents' representatives to have attained prescribed educational qualifications. Table 5.2 shows the required areas of study to be eligible for the various classes of real estate agent's licence. The education streams are not tailored to providing modules necessary for a business agent's licence. Rather, on completion of the unrestricted licence course, graduates have the educational qualifications necessary to work as either (or both) a real estate or business agent. The educational requirement for a licence to carry on business as a conveyancing agent is a Certificate in Conveyancing as accredited by the Northern Territory Employment and Training Authority (NTETA).

Requiring agents to hold prescribed educational qualifications represents a barrier to market entry.

Benefits of education requirements

It can be argued that certain educational qualifications are essential to ensuring a minimum level of agent competency. Such requirements therefore have a quality assurance dimension – licensees are sufficiently educated to be able to advise on and undertake property transactions, which are often complex and where poor decision making may expose consumers to significant financial ramifications. Consumers stand to benefit from the educational requirements through reduced risk of contractual problems, business failure and agent incompetence.

The benefits of educational requirements hinge on the extent to which:

- agent competency is achieved; and
- whether the skills that agents are competent in are relevant to the many responsibilities of licensed realty agents.

The majority of submissions to the review were of the opinion that the *current* suite of realty education modules do not equip students with all of

5 RESTRICTIONS ON MARKET ENTRY

5.2 Educational modules required for a licence^a

<i>Educational module</i>	<i>Unrestricted</i>	<i>Restricted (sales)</i>	<i>Restricted (property management)</i>
Real Estate Industry Overview			
Recognition of Commercial Building Styles and Faults			
Real Estate Consumer Protection			
Client Interaction			
Negotiation Skills			
Introduction to Sales			
Listings			
Property Appraisal			
Methods of Sale			
Introduction to Property Management			
Residential Tenancies			
Property Management Listings			
Renting Residential Properties			
Servicing Managed Properties			
Contract Law for Real Estate			
Property Law			
Contracts for the Sale of Land			
Real Estate Computing			
Real Estate Accounting			
Real Estate Computer Accounting			
Property Research and Analysis			
Property Advertising and Promotion			
Introduction to Specialised Property Management			
Body Corporate Legal Requirements			
Body Corporate Management			
Introduction to Specialised Body Corporate			
Property Selling			
Selling by Auction			
Introduction to Specialised Property Sales			
Selling Businesses			
Real Estate Office Operations			
Presenting Reports			
Computer Operations — Fundamentals			
Database Fundamentals			
Commercial Law Principles			
Total modules to be completed	17 and 18 = 35	13 and 12 = 25	13 and 15 = 28

^a represents module required for agent's representative licence, represents module required for full licence in addition to modules required for agent's representative.

Source: REINT.

the skills needed by agents. For example, REINT, which is the current course provider, noted

The existing training modules could be reviewed and updated, but with the new National Training Package soon to be endorsed and implemented the materials will more than adequately equip graduates with the skills needed by Agents. (REINT submission, page 6)

The Institute of Conveyancers noted that the Australian Institute of Conveyancers has approved a minimum standard education course for conveyancing throughout Australia and that this standard should be adopted in the Northern Territory.

Furthermore, the Realtors Guild questioned whether the current modules ensure agent competency.

The modules are largely KNOWLEDGE BASED and have no structure that requires evidence that the knowledge acquired has been transferred into workplace competency. (Realtors Guild submission, page 12)

Costs of education requirements

Course fees charged to students undertaking real estate courses are:

- \$1500 for the (unrestricted) Agent's Representative Certificate course; and
- \$2400 for the (unrestricted) Real Estate Agent Licence course.

Course fees for a (full) real estate agent's licence is therefore \$3900 – although this does not represent full cost recovery (see 'Education supply' below). As this is not an insignificant amount of money, the educational requirements and their associated course fees may represent an entry barrier to those people who have the intellectual capability to complete the course, but not the financial capability. To the cost of course fees should be added the cost of people's time spent studying.

There is currently no institution within the Northern Territory offering the education modules required for a Certificate in Conveyancing as accredited by NTETA.

In identifying the cost associated with obtaining educational requirements, only the *incremental* cost of those qualifications is relevant here. This means that if required qualifications would have been sought regardless of the legislation, then the incremental cost of the legislation would be low as agents will have undertaken appropriate education of their own accord.

Submissions to the review suggested that it was very unlikely that agents would voluntarily seek to educate themselves in the absence of the legislation, meaning that the cost of the various realty courses is a real cost imposed on new entrants to the industry. However, the review team questions the basis for this belief. If employers choose to only employ those persons with formal realty education, then potential entrants to the industry will realise the necessity and value of formal education – it will convey a competitive advantage to them in the labour market. There are numerous other professions in which participants are formally trained or educated yet not required by legislation to be so.

Assessment of the education requirement

The objective of the educational requirement is to ensure that consumers are dealing with competent agents. Given the complexity of property transactions, the review team considers that consumers would be placed at significant risk if property transactions were performed by agents without formal realty training. To this end, the review team considers that the benefits of requiring agents to hold prescribed qualifications outweigh the costs.

However, in arriving at this conclusion, the review team has assumed that education qualifications translates into competence, and that required educational standards are relevant to the industry's needs. This may not always be the case. With respect to the first issue, the review team considers that the move to a new training package in 2001, based on a combination of off the job and on the job training and structured so as to facilitate workplace competency assessment, will go some way to ensuring that qualifications translate into workplace competency. The review team considers the ALB in conjunction with the realty industry to be best placed to prescribe required educational qualifications. Workplace competency assessments will provide valuable input into determination of the level of education required for agents to be able to provide an adequate level of service.

The review team thinks it important to note that educational requirements should be set at the *minimum* level necessary to achieve the intended benefit. Requiring excessively stringent educational requirements so as to achieve industry best practice is not warranted and may impose inappropriately high barriers to entry, unduly restricting competition.

As argued in chapter 7 below, however, the educational attainments of agents' representatives, as distinct from licensed agents themselves, should be a discretionary matter for agents and their employees.

Recommendation

Prescribed educational qualifications should remain a condition of licensing. Educational requirements should be determined by the ALB in consultation with the industry. Educational requirements should be set at the minimum level necessary to deliver the intended benefits.

Education supply

Until 1996, the Northern Territory University (NTU) was the only education provider offering the modules necessary to obtain a real estate or business agent's licence. Declining enrolment and a required change to the curriculum saw the University withdrawing its agent's courses in 1996. REINT has always had some involvement in agents' education, initially offering the education modules necessary to obtaining registration as an agent's representative. Following the University's withdrawal, REINT purchased and then offered the modules necessary to obtaining full licences, thereby overcoming the education vacuum left by the University. Since 1996 REINT has been the sole provider of the educational modules necessary to obtain a licence.

REINT estimates that the per student running cost of a full (or unrestricted) agents licence is in the vicinity of \$5250. As noted above, the charge levied on the student is \$3900. The balance of course costs is met through contributions from the Fidelity Fund, made possible under Section 92 of the Act. REINT receives \$40 000 per annum from the Fidelity Fund to offer real estate education modules.

Other education providers are not prohibited under the Act from offering realty education modules. However, if education providers are to issue nationally recognised Vocational Education and Training (VET) qualifications, then the provider must be a Registered Training Organisation (RTO) authorised by NTETA.

While other education providers can offer realty courses, the Act stipulates that only REINT is able to receive contributions from the Fidelity Fund for educational purposes. This may place alternative education suppliers at a competitive disadvantage, as they are not able to offer courses at competitive rates on account of not being subsidised by contributions from the Fidelity Fund.

There is currently no institution within the Northern Territory offering the education modules required for a Certificate in Conveyancing as accredited by NTETA. NTU provided the course until (end) 1998. The Institute of Conveyancers is currently in negotiations with the Douglas Mawson Institute of Adelaide to provide the educational modules required for the Certificate in Conveyancing.

REINT has advised the review team that when submitting the 1999-2000 funding request to the ALB, an offer was made to conduct the education modules required for a Certificate in Conveyancing. A response to the offer was not received.

Benefits of restricting funding to REINT

On the broader issue of whether the Fidelity Fund should be used for educational purposes, the majority of submissions to the review thought it to be an appropriate use of Fund monies. For example

The Fidelity Fund is now at a stage where it would not be exterminated by a mass default of Agents. I am lead to believe that it is growing at a rate of \$500,000 per annum. Some part of this growth should be reapplied to the industry to its betterment. (Denis Power submission, page 4)

Only the Realtors Guild suggested that the Fidelity Fund should not be used for educational purposes.

Through subsidising the cost of education delivery, the cost to students of obtaining required educational qualifications is reduced. This has two consequences. Firstly, it lowers entry barriers, which acts to improve contestability in the marketplace.

Secondly, it may increase demand for realty education as the cost to students of such education is reduced. Hence the subsidy may distort resource allocation — too many resources are going into realty education supply. From an economic efficiency point of view, subsidies are usually only justifiable when there is some form of market failure, typically an externality. An externality arises when an activity leads to benefits (or costs) being generated but not captured (or incurred) by the person undertaking the activity, leading to under provision (or over provision) of the good. The review team is not entirely sure of the existence of an externality justifying the education subsidy. One possible source is that society benefits from better educated persons in general. When there are such external benefits, the market sees too few resources being allocated to production of that good (education) and less of it is produced than is optimal from society's viewpoint. By subsidising education, thereby increasing the number of better educated persons, this problem can be corrected. But this argument is better suited to justification of funding from *government* as opposed to *industry* subsidising the cost of education for potential industry participants.

REINT inferred that the funding arrangement improved the quality of agents, noting

With reference to the Fidelity Fund and its legitimate purpose, effective and nationally recognised training to high standards provided to Real Estate Operatives in the Northern Territory ensures reduced erosion of Fidelity Fund assets as a result of reduced claims on the Fund. (REINT submission, page 7)

In this sense, the transfer of Fidelity Fund monies to education subsidisation could be seen as a form of 'insurance purchase' by existing practitioners against the prospect of future claims generated through incompetence which in turn leads to malpractice when businesses are failing.

On the issue of limiting funding for education purposes to REINT alone, the review team cannot identify any immediate benefits. The current arrangement sees funding (for educational purposes) being limited to REINT, rather than say being available to all RTOs. In this sense the Act has a distributional impact, limiting education funding to one service provider.

Costs of restricting funding to REINT

The direct cost of the restriction is that alternative education providers are excluded from receiving funding for the purpose of realty education. This may mean that alternative suppliers are not given equal opportunity to compete in the provision of realty education.

In its submission to the review, REINT noted that current (realty) student numbers are not enough to have different education providers offering the same courses. The review team agrees that this is probably the case and is likely to persist for some time. However, this 'market reality' does not mean that only REINT should receive funding from the Fidelity Fund for education purposes. The current arrangement sees REINT having a distinct competitive advantage, on account of receiving an education subsidy from the Fidelity Fund, over other potential education suppliers. This may result in alternative education providers opting not to participate in the education provision market. If all education providers were able to receive funding then it may be the case that other providers could offer realty education courses to students at lower cost than present.

Assessment

The review team considers that the use of Fidelity Fund monies for educational purposes delivers benefits in terms of lowering the cost of realty education, thereby facilitating market entry.

Limiting funding for education purposes to REINT does not yield any benefits, yet may adversely impact upon alternative realty education providers. The review team considers that all appropriately qualified education providers should be eligible to receive funding for the purpose

of supplying realty education. Both the Institute of Conveyancers and REINT supported this.

The Fidelity Fund should be used for educational purposes and should be available for use by the Real Estate Institute of NT, Australian Institute of Conveyancing and any other education provider. (Institute of Conveyancers submission, page 9)

If there has to be reference in the Act to the recipient of funding for training purposes, perhaps the reference should be to "the Registered Training Organisation authorised/approved by NTETA" rather than to "the REINT". (REINT submission, page 7)

The review team agrees with REINT's suggested amendment to the Act.

One option for increasing the scope for competition in the delivery of realty educational is to tender out sole rights to education delivery. That way the tender process can be contestable with the successful tender being the only provider of realty education services, thereby going some way to ensuring adequate student numbers. The winning tender, so long as it was an appropriately qualified education provider, should be eligible to receive funding from the Fidelity Fund. The review team suggests that the ALB and DIB further investigate this option.

Recommendation

The review team recommends the Act be amended to allow any Registered Training Organisation authorised by NTETA to receive funding from the Fidelity Fund for the purpose of providing realty education.

The review team suggests that the ALB and DIB investigate the possibility of tendering out sole rights to deliver realty education.

Experience requirements

To be eligible for a licence, applicants need to have both the educational qualifications *and* experience to carry on business as a licensed agent on their own. Licence applicants need to demonstrate to the ALB that they have the experience and capacity to carry on business as a licensed agent. While each case is assessed on its merits, the ALB uses as a 'guideline' a requirement of four years relevant experience before an applicant is deemed to have the necessary experience to carry on business as a licensed real estate or business agent. Conveyancing agents are required to have three years experience gained while in the employment of either a legal

practitioner engaged in the sale and transfer of real property, a licensed conveyancing agent, or other appropriately qualified persons.

The four-year guideline is a carry over from the days when NTU was the supplier of agents education, and it took approximately four years (part time) for agent's representatives to complete the education modules necessary for a real estate agents licence. As the vast majority of agent's representatives worked in the realty industry whilst completing their studies, it has been argued that the four years experience guideline effectively imposed no restriction.

However, with REINT offering realty education modules, agents' representatives are able to complete the educational modules required for a full licence within 12 months. This opens the possibility that on completion of their studies, applicants have the educational qualifications for a full agent's licence but only one year's experience and not the four as required by the ALB. If the ALB steadfastly enforces its four years experience guideline, otherwise suitable applicants could be refused an agent's licence. This would have the effect of restricting entry to the realty service provision market.

The ALB is able to waive the prescribed educational qualifications if it is satisfied that the applicant holds equivalent educational qualifications or where, *by reason of experience*, the Board considers that the applicant should be exempted (totally or in part) from the educational requirements. There is currently no workplace assessment of applicants to assist in the Board's decision on the degree of substitutability between experience and prescribed educational qualifications. The decision to waive educational requirements in favour of workplace experience is therefore subjective and open to the Board's discretion.

Benefits of the experience requirement

Requiring a certain number of years' workplace experience before qualifying for an agent's licence is argued to ensure that agents are competent to carry on business as a realty agent. This would culminate in a reduction in the risks faced by consumers of agent services and increased consumer protection. In his submission, Denis Power noted that

[Four years experience] was a convenient time frame to adopt as it fairly equates with thinking in the industry that experience is competence and would take about this time for a person to become fully competent. (Denis Power submission, page 4)

The REINT suggested a further benefit of the experience requirement, namely to exclude people under the age of 22 from opening an agency.

If changed, the situation could arise where an 18 year old Agents Representative could complete the Full Licence Course and could open his/her own Agency at the age of 19. (REINT submission, page 8)

There is no a priori reason why excluding young people from opening an agency is of benefit. If that person is competent, it might *constitute* a cost by way of reduced consumer choice and less access to agency services. In order to meet the objectives of the legislation, suitability to open an agency would depend on competency, not on the age of the principal. If a 19-year-old person has demonstrated that he or she is competent to carry on business as a licensed agent, and they satisfy all other licensing criteria, then the review team considers that such a person should be granted a licence. In practice, this may be unlikely to occur. But in principle, licensing should not be refused on the basis of age under current arrangements, an agent's representative, who is perfectly competent and qualified to work as an agent, may be prevented from doing so for a number of years.

The issue for regulation is how best to determine competency. This is discussed later.

Costs of the experience requirement

As noted above, prescribing the number of years of workplace experience required for an agents licence may prevent some suitable and qualified persons from entering the agent market for a number of years. Bob Johnston in his submission to the review noted this.

It seems to be extremely restrictive to have to work for three years in a conveyancing office to then practice. This appears to be a belated apprenticeship designed to protect those already in the Industry from competitive market forces. (Bob Johnston submission, page 2)

The review team notes, however, that this experience requirement needs to be interpreted with care. Three years' experience with a solicitor or conveyancer is an *alternative* to the education requirement, not an additional requirement.

Assessment of the experience requirement

The review team considers that relevant experience is an important factor in reducing the risks faced by consumers of realty services. However, the review team believes that competency to carry on business as a licensed

agent is the meaningful criterion that should apply and this is not necessarily only achievable through 'a minimum number of years on the job' requirement.

The move to the National Training Package (and competency based training) in 2001 should facilitate such competency assessments, as was noted by Denis Power.

With the introduction of Competency Based Training a new entrant into the industry will be able to ask (and pay) for a pre-assessment before a Tribunal to assess whether that person's experience is relevant and if not to ascertain what further training the person should undergo to gain the competencies required. (Denis Power submission, page 4)

The Realtors Guild has suggested that workplace competency assessment will make the prescribed experience requirements obsolete.

Under workplace competency assessment the 'four year' requirements are irrelevant and unnecessary. They were applied in the absence of any reliable assessment process and at best were a faulty subjective and most restrictive approach. (Realtors Guild submission, page 14)

The review team agrees with these comments. Competency is about an appropriate mix of training and *relevant* experience. Under a competency based approach, a person is assessed as either ready to perform the tasks of an agent or they are not. Experience in a realty business is relevant only to the extent that, along with training and knowledge, it contributes to that assessment. To the extent that restrictions on market entry exist through experience arbitrary requirements, they can be removed through moving to a competency-based assessment of an individual's capability to carry on business as a licensed agent. Competency based assessment should provide a more accurate and comprehensive evaluation of whether an individual is capable of carrying on business as a licensed agent than under the current arrangement.

The issues paper asked for parties to comment on whether education and experience should be substitutable for one another. Submissions to the review were divided on the issue. Both the Institute of Conveyancers and REINT suggested that they should not be substitutes for one another, while the Realtors Guild thought they should be. In the team's view, this reflects divergent understanding of what is needed for 'competency' for licensing purposes.

Recommendations

The review team recommends arbitrary minimum years' experience requirements for reality agents' licences be reviewed in the light of the competencies-based approach which provides a flexible route to licensing.

6

Operational restrictions on realty service provision

THE ACT AFFECTS THE WAY agents carry out and operate their businesses. Such operational restrictions limit the flexibility of business decisions and may impose significant financial and compliance costs on businesses, thereby restricting competition.

Maintaining an office in the Northern Territory

It is a condition of a licence that the licensee maintains an office within the Northern Territory, including those whose principal place of residence is outside of the Territory. Furthermore, the licensee needs to register that office with the Registrar and have at all times, as manager of that office, a branch manager who is a licensed agent.

Benefits of requiring an office in the Northern Territory

The physical presence of a realty office may give consumers peace-of-mind when dealing with an agent, knowing that the agent is available for face-to-face meetings, is (relatively) familiar with the local realty market and has made a commitment to the local market. Consumers may also be reassured knowing that a licensed agent is managing the office, although such a benefit is partly dependent upon consumers of realty services knowing what is required for an agent needs to be licensed. Having a licensed agent as office manager will also ensure that there is an experienced and fully qualified person available to assist and teach the less experienced staff.

Only REINT considered the office requirement to offer consumer protection, by 'having someone in control'. The Realtors Guild did not consider the requirement to offer consumers any additional protection, nor did the Institute of Conveyancers, who noted

In today's business environment with a range of electronic devices on offer in the NT [the office requirement] does not offer the consumer any additional protection. (Institute of Conveyancers submission, page 12)

If the office requirement does not offer additional consumer protection then the requirement imposes unnecessary regulation over realty business operations.

Denis Power however suggested that the requirement might instead benefit some realty operators, noting

It would be more a matter of an outside operator being able to compete on the open market with Territory firms if he did not have a formal representation in the NT. I suggest the legislation protects some operators against themselves. (Denis Power submission, page 4)

If, as has been suggested, a benefit of the requirement is that it prevents agents from making poor business decisions (not to have an office in the Northern Territory), then the review team questions whether legislation is better placed to guide an agent's business decisions than marketplace forces. The review team considers that agents, in conjunction with market forces, to be best placed as to judge whether they need a physical presence (an office) in order to attract clients and conduct realty business. If consumers prefer for reasons of confidence and convenience to conduct business with agents who have an office, then those agents would prosper relative to those agents without an office.

A useful analogy lies in 'essential' office equipment. For example, a telephone would be essential to conducting business as a realty agent. However, it is not legislated that agents are required to have telephones or other such communications equipment. Agents are free to decide whether or not they have a telephone, knowing full well that if they cannot be contacted they will most likely go out of business. Hence market forces dictate that agents have telephones – legislation is not required to prevent agents from making a 'poor business decision' and not being contactable.

Costs of requiring an office in the Northern Territory

If agents were to maintain an office in the Northern Territory irrespective of the legislated requirement to do so, then the *incremental* cost of the office requirement would be minimal. However, for those realty agents whose principal place of business (and residence) is interstate and who would seek to conduct business only sparingly in the Northern Territory, then the office requirement would impose a significant cost. REINT however does

not believe that office requirements deter agents from other jurisdictions from conducting business in the Northern Territory.

With technological advancements such as the advent of ecommerce and the Internet, it may not always be the case that a formal office is advantageous to conducting realty business. Hence requiring agents to maintain such an office may impose unnecessary and potentially significant costs on licensed agents.

Assessment of requiring an office in the Northern Territory

The review team considers that marketplace forces are sufficiently powerful and persuasive to ensure that if realty agents do make 'poor' business decisions, they quickly correct them. The review team believes that agents are best placed to know whether or not they require a formal office in order to successfully operate a realty business. Furthermore, the review team is not convinced that the office requirement contributes further to achieving the objective of consumer protection. Benefits from the requirement are therefore thought to be minimal.

Costs of the requirement depend on the counterfactual – what would happen if there was no such requirement? If agents would maintain formal offices regardless then the requirement can be said to impose no additional cost on agents. However, if some agents would opt not to have a formal office then the requirement would impose a significant cost and operational restriction on those agents. Costs may grow over time as technology and consumer's reliance on and use of those technology advances, potentially making the formal office unnecessary. The review team considers that requiring agents to maintain an office may impose potentially significant costs on agents and place unnecessary restrictions on the manner in which agents conduct their business. The review team therefore recommends that the requirement that licensed agents are to maintain an office in the Northern Territory be rescinded.

Assessment of the requirement to have a licensed agent as branch manager

The Realtors Guild considered the requirement of office managers to be licensed agents as being costly, noting

Very restrictive. Very costly. It is not necessary to set up a full office and to equip and staff same if that office is only a sales or service call supported from a central office. In our modern environment, satellite kiosks or sales cells are demographically important but generally do not exist because of licensing requirements. (Realtors Guild submission, page 15)

The Institute of Conveyancers also considered the requirement to be costly, but for a different reason.

In the small conveyancing community which exist in the NT this requirement often prevents sole traders from taking reasonable holiday leave [as there is not the availability of licensed conveyancing agents to act as 'locum']

The Institute of Conveyancers concern is considered further below.

If agents are not required, as a condition of their licence, to maintain an office in the Northern Territory then there may be an inconsistency with the requirement that agents are to have at all times, as manager of their office, a branch manager who is a licensed agent.

However, the review team believes that the distinction between realty business, and realty office, needs to be made. The review team considers that ideally the owner of a realty business is best placed to decide whether the branch offices, assuming there are some, need a licensed agent as manager. At the end of the day a licensed agent, as owner of the business, is ultimately responsible for the decisions and actions made by staff and the success of the business. To this end the review team recommends that realty businesses should have a licensed agent in control of the overall business, but the requirement to have licensed agents as branch office managers be left to the decision of the licensed agent in control of the business when there is more than one office in the town or city.

There are legitimate concerns that a branch office many hundreds of kilometres from a business head office which does not have a licensed agent, or an experienced person as manager, may not be effectively controlled. Increased risks to consumers may result and the costs of covering these risks are spread to other agents to some extent.

Because of this, it may be appropriate to dispense with the licensed branch manager requirement where the branch is co-located in the same town or city as the head office but retain the provision for branches located elsewhere.

If an office is not required to have a licensed agent as manager, concerns might be raised over who will be responsible for teaching and instructing the less experienced staff. Given the emphasis of new training packages on combinations of formal education and on-the-job training, the review team believes this to be a valid concern. Currently, NTETA allows an office to have one trainee staff member per professional employee (not of trainee status). Believing this arrangement raises the prospect of relatively

inexperienced staff training trainees, the ALB passed a ruling whereby for every two trainee staff members there needed to be a licensed agent.

The review team considers it important that trainees are instructed by appropriately qualified and experienced people. Whether only licensed agents are suitable to train and instruct trainees is questionable – there may well be agent's representatives with a wealth of experience that are capable of teaching and instructing trainees on the practical aspects of the profession. The review team considers that suitability to train be dependent upon individuals having 'workplace training certification', to be awarded through a workplace competency assessment. The review team considers that the ALB should further investigate this option. The review team also believes the ALB to be best placed as to determine the appropriate minimum ratio of experienced staff to trainees.

It should also be remembered that if trainees are not getting appropriate on-the-job training thereby putting their workplace competency assessment in jeopardy, then they are free to seek out alternative employment that can satisfy their needs.

If, as a result of not requiring office managers to be licensed agents, there is a decline in the number of licensed agents, then we could expect licence fees paid to the Agents Licensing Board to decline. This may put pressure on available resources. Consequently, to ensure adequate operating resources, it may be necessary for the Agents Licensing Board to re-examine licence charges.

Recommendations

The requirement that licensed agents are to maintain an office in the Northern Territory should be rescinded.

The review team recommends that realty businesses should have a licensed agent in control of the overall business, but the requirement to have licensed agents as branch office managers be removed for branches in a town where there is at least one office managed by a licensed agent. The need for managers to be licensed agents in these situations is a decision best left to the licensed agent in control of the business.

The review team considers that suitability to train and instruct trainees be dependent upon individuals having 'workplace training certification', to be awarded through a workplace competency assessment. The review team considers the ALB should further investigate this option.

Limiting the functions undertaken by conveyancing agents

The Act details the functions that licensed conveyancing agents may perform. Functions permitted to be undertaken include:

- searching of land titles, searching and inquiring at government offices with respect to records, plans, policies, rates and taxes;
- arranging for the preparation and execution of contracts of sale, but only where the contract is in a form approved by the Registrar or Law Society;
- arranging and attend settlement;
- completing powers of attorney; and
- lodging documents at the Registry Office or other government office.

Conveyancing agents are, however, not permitted to undertake/prepare mortgage leases or business sales. This is not the situation in some other Australian jurisdictions. For example, in New South Wales and South Australia, licensed conveyancing agents are able to undertake/prepare mortgage leases and business sales, while in Western Australia conveyancing agents can convey business sales but not prepare mortgage leases.

Benefits of restricting services offered by conveyancing agents

Submissions to the review did not identify any benefits associated with preventing conveyancing agents from restricting the range of (conveyancing type) services able to be offered by conveyancing agents. Indeed, REINT submitted that conveyancing agents should be allowed to offer a greater range of services.

Extend the Act to allow Conveyancing Agents to prepare all Real Property Act documents [thereby] offering full service to clients. (REINT submission, page 9)

Not surprisingly, the Institute of Conveyancers also thought that the Act should be amended to allow a greater range of services to be offered, but noted that this was dependent on agents having the necessary knowledge to offer additional services.

We believe it is unreasonable of the Act to exclude licensed conveyancing agents from such work provided that the agents are trained and have the necessary knowledge to perform the work in a satisfactory manner thereby ensuring that the consumer is not at risk. (Institute of Conveyancers submission, page 13)

The Institute of Conveyancers also noted that the potential problem of 'lacking' educational qualifications was being addressed.

...the Australian Institute of Conveyancers - NT Division is seeking to have an Advanced Diploma course presented in Darwin to provide the opportunity for current licensees to upgrade their qualifications and to provide potential new licensees with the necessary qualifications to prepare these [mortgage lease and/or business sale] documents. (Institute of Conveyancers submission, page 13)

The Institute of Conveyancers noted in their submission an opinion of a Queens Council who stated that the profession of conveyancing in the Northern Territory is not same profession as that of a conveyancer in New South Wales, on account of restrictions imposed on the scope of work (Institute of Conveyancers submission, page 12). Given the potential shortfall in education, a potential benefit of the restriction is that it prohibits conveyancing agents from undertaking tasks for which they do not have the expertise.

Costs of restricting services offered by conveyancing agents

However, the above 'benefit' assumes that conveyancing agents in the Northern Territory were trained in the Territory, and educational requirements have always been at the same level. Furthermore, it also assumes that agents have not pursued further qualifications elsewhere. For example, it was noted in a submission that

In the Northern Territory there are three licensed conveyancers who also hold licences to operate in SA. These conveyancers have been trained and are experienced in handling these [mortgage lease and/or business sale] documents and would be able to provide an acceptable level of service to consumers in the NT if the Act did not specifically prevent them from doing

so. The Act is therefore restricting the range of services available to consumers.
(Institute of Conveyancers submission, page 13)

Limiting who can undertake and prepare certain contracts reduces competition in the provision of those services. As competition is a key driver of efficiency, cost reductions and quality improvements, these areas can be expected to have suffered as a result of the restriction. Indeed, the Institute of Conveyancers submitted that the cost of these services has remained higher relative to the cost of other services offered by conveyancers.

Assessment of restricting services offered by conveyancing agents

The review team is aware that increasing the qualifications required by conveyancing agents raises already existing barriers to market entry. However, the review team considers the benefits from increasing competition in conveyancing service provision and the ensuing community wide benefits to be sufficient to outweigh the incremental cost associated with heightening already existing barriers to entry.

To this end, the review team recommends that properly qualified licensed conveyancing agents be allowed to provide mortgage lease and business sale contracts. However, this is to be contingent on conveyancing agents having the necessary qualifications to offer such services. Workplace competency assessments may provide the best means by which an agent's capability to provide additional conveyancing services can be judged.

An important trade off arises in moving to 'full service' conveyancing accompanied by increased educational requirements for new agents and equivalent demonstrated competencies by existing agents.

To ensure the continued provision of these basic services at prices that reflect the cost of the service, the ALB and conveyancing sector may need to investigate a 'restricted' conveyancing licence. Those agents deciding not to update their qualifications or not able to demonstrate capability to prepare such documents may need to be issued with a restricted licence and precluded from preparing the more advanced and challenging documents.

Recommendations

The review team recommends that licensed conveyancing agents be allowed to provide mortgage lease and business sale contracts. However, this is to be contingent on conveyancing agents having the necessary qualifications to offer such services.

The ALB and conveyancing sector should investigate a 'restricted' conveyancing licence to overcome problems associated with some agents choosing not to upgrade their skills or new entrants wishing to offer basic services that do not involve these additional activities.

Compulsory Professional Indemnity Insurance

Agents are required to take out Professional Indemnity Insurance to the value of \$500 000. PII protects agents and their employees against civil liability claims in connection with their business dealings and instances of professional negligence.

There are potentially two types of competition restriction associated with compulsory PII. Firstly, agents are required to take out PII in order to be licensed as a realty agent. This means that those persons who are unable to afford or obtain such cover are excluded from offering agency services.

The other potential restriction on competition is in the supply of PII. Under Section 108 of the Act provision is made for REINT to negotiate insurance on behalf of agents who are members of REINT and for the Registrar to do likewise for other agents with authorised insurers. Agents are then 'billed' for the cost of the PII. This provision has not as yet been exercised. Conveyancers are required to take out indemnity insurance with authorised insurers. As REINT, or the Registrar as the case may be, may enter into an arrangement with an insurer for the provision of PII on behalf of agents, competition between insurers to supply agents with indemnity insurance could be restricted. Potentially, if the provision was exercised, only one or two insurers might supply the market.

Benefits of requiring agents to have Professional Indemnity Insurance

PII provides an avenue for consumers adversely affected by agent negligence to seek recompense, thereby furthering the notion of consumer protection. Submissions to the review suggested that compulsory PII was necessary so as to further consumer protection. Denis Power noted

PI Insurance is there to protect the public and those agents who may inadvertently digress e.g. a Branch Manager is responsible equally with a defaulting employee under his/her control. (Denis Power submission, page 4)

The rationale for allowing REINT (and the Registrar) to arrange PII for agents may lie in the ability of these parties to negotiate cheaper insurance premiums due to the bargaining power that is associated with representing a large number of agents. Any such role for the Registrar is unnecessary and undesirable, as argued below.

Costs of requiring agents to have Professional Indemnity Insurance

Requiring agents to take out Professional Indemnity Insurance can impose a significant cost on a realty business. For example, PII cover for ten employees to the value of \$2 million will cost around \$1985 per annum, although this is largely dependent on the number of people and activities being insured.

However, no submissions to the review considered the cost of PII significant enough to exclude some realty providers from the marketplace.

We believe the cost of Professional Indemnity Insurance is reasonable compared with other business expenses. (Institute of Conveyancers submission, page 14).

If it is felt that the [PII] cost cannot be afforded then the potential operator is obviously undercapitalised, and therefore a danger to themselves. (Denis Power submission, page 4)

Assessment of requiring agents to have Professional Indemnity Insurance

Given the extent of monies involved in real property transactions, the review team considers Professional Indemnity Insurance to be an important component of consumer protection. By one view, compulsory PII is 'heavy' regulation generating costs that are passed on to consumers whether they want that level of (indirect) protection or not. As consumers may not know or think to ask if agents (and therefore their employees) are covered by PII, or if cover is adequate, requiring agents to take out PII as a condition of their licence is a means by which consumers can be protected against agent (or employee) negligence. Effective consumer education about the benefits of PII is a possible alternative but the costs of this are unknown and the benefits problematic.

There are justifiable claims that existing education requirements for agents' representatives do little to reduce the risk to consumers arising from negligence or incompetence. Employer screening is, and will remain, imperfect. Principals themselves will, from time to time, err. While these risks remain, what is the best way of dealing with them?

Effective *voluntary* PII would rely on consumer awareness of the implications of PI cover, or lack of it. One way of achieving this might be through a public education campaign to encourage consumers to ask for evidence of PI cover and to enable them to evaluate such evidence.

Further issues then arise. What would be the likely cost of such a campaign for it to be effective? Who should fund such a campaign? Should those in the industry who chose to continue to provide clients with this comfort carry this burden? In the absence of frequent claims, would competitive pressures ensure that no insurance was the optimal strategy for all agents, leaving consumers again with the prospect of remedy through the courts? The fact that there have been no recent instances of calls on PII does not mean that the risks of such events are negligible.

Given these uncertainties, and the evidence in submissions that suggested that compulsory PII was not a cost impost that was in any way entry preventing, the net consumer benefit seems on balance to argue against moving to an alternative with highly uncertain costs and outcomes. The review team considers that the benefits of compulsory PII outweigh the costs.

The ALB is best placed to set the (minimum) level of PII required by agents.

To the extent that professional bodies can arrange PII at more competitive rates than individual agents, then the arrangement is of benefit in terms of lowering agency business costs. The Institute of Conveyancers agreed.

If the Professional body can arrange a more competitive policy at a more reasonable cost, agents would benefit from these arrangements. This has been successful in other States and therefore we agree that Professional bodies should have such provisions. (Institute of Conveyancers submission, page 14)

The Realtors Guild also noted benefits from letting professional bodies arrange PII, but did not agree with exclusive authority, noting in answer to an Issues Paper question on the desirability of exclusivity,

Not prescribed or exclusive authority – group schemes are often successful in obtaining lower general premiums. Each provider must retain the option to insure outside of the group scheme. (Realtors Guild submission, page 16)

The review team agrees with the Realtors Guild – agents should have the operational freedom to decide with whom they take out PII. While the provision in the Act for exclusive provision of PII has not been exercised, the review team considers it an unnecessary and potentially significant restriction on agency operation should it be exercised. The review team therefore recommends that professional bodies should be allowed to

arrange PII on behalf of members and agents, but agents should have the freedom to insure outside of the arranged scheme.

The review team does not see a role for the Registrar in entering into agreements with insurers on behalf of agents. Though Section 108 of the Act apparently provides for this, it is understood that the Registrar does not undertake such a role. Agents who are not represented by the Institute, could, if they so wished, collectively approach insurers to negotiate rates. The Act should be amended to remove any suggested role for the Registrar in this area that could involve commercial arrangements. The regulatory role in setting minimum PII cover requirements should not be mixed with what could be negotiations on behalf of agents.

Recommendations

The review team recommends that Professional Indemnity Insurance remain a requirement of an agent's licence. The ALB is best placed to set the (minimum) level of PII required by agents. However, the Act should be amended to remove any suggested role for the Registrar in entering into agreements with insurers on behalf of agents.

The review team recommends that professional bodies should continue to be allowed to arrange Professional Indemnity Insurance on behalf of agents, but not be able to mandate uptake of that insurance — agents should have the freedom to insure outside of the arranged scheme if they so choose.

Compulsory Fidelity Fund contributions

Since its establishment in 1979, the balance of the Fidelity Fund has grown steadily and is now around \$6.5 million. The Fund comprises:

- contributions and levies paid under the Act;
- fees paid to the ALB with respect to licences and registrations;
- payment of fines imposed by the ALB;
- interest accruing from investment of Fund moneys; and
- interest paid on moneys held by agents in trust accounts.

To the extent that a portion of licence and registration charges are required for the purpose of building the Fidelity Fund, there is, in much the same way as requiring agents to take out professional indemnity insurance, some restriction on competition.

Benefits of the Fidelity Fund

The Fidelity Fund protects consumers of realty services against fraud committed by agents. Persons suffering monetary losses arising out of defalcation of trust monies or misappropriation of property by licensed agents (or their representatives) can claim against the Fidelity Fund for compensation. Claims against the Fidelity Fund are capped at \$50 000. This figure has not been amended since the legislation was introduced and its adequacy may now be in question. A review of the limit is required.

Costs of the Fidelity Fund

In addition to making funds available for consumer recompense, the Fidelity Fund covers all of the costs associated with administration of the Act and as noted above, funds education subsidies. However, there does not appear to be a clear distinction between monies going to the Fund for the purpose of covering administration costs, and monies for the purpose of providing compensation to consumers should their funds be misappropriated. The review team was not able to ascertain the cost impost on agents by the 'consumer protection' role of the Fund.

DIB has advised the review team that if consumers were not able to make claims against the Fidelity Fund – that is the consumer protection function was removed – then agent licence fees would not drop. Currently, agents do not make an additional or separate payment to the Fidelity Fund for the purpose of providing an avenue for consumer recompense. Licence fees go towards covering the cost of administering the Act and not towards increasing the pool of funds available for fidelity claims. In this sense the consumer protection offered by the Fidelity Fund is currently 'free' to agents, enabled through the interest earnings of invested Fund monies and an absence of claims against the Fund. If there were to be a run of claims against the fund, and available monies were insufficient to satisfy liabilities, then a levy of \$20 per agent and per each agent's representative employed by that agent may be imposed for the purpose of 'restocking' the Fidelity Fund. Current circumstances leave the actuarial soundness of the Fidelity Fund unclear. These arrangements deserve review, especially in the light of the recommendation to review the limit on claims.

Assessment of compulsory Fidelity Fund contributions

As agents cannot insure themselves against committing fraud and given the extent of monies involved in property transactions, the review team considers the consumer protection offered through the Fidelity Fund to be

an important part of the suite of consumer protection measures. An absence of claims against the Fidelity Fund and the possibility of other legal remedies open to victims of any future agent defalcation are not, in the review team's judgement, adequate reason for abandoning compulsory contributions.

Experience with agent fraud elsewhere, brought to light for example in a recent review of property agent regulation in NSW, has shown that it is failing businesses where principals are at greatest risk of dishonest conduct. In such cases, it is not possible to rely on concern for reputation on the part of the agent to protect consumers.

When defalcation does occur, redress for consumers through the courts can be slow, costly and ultimately unproductive when there are no assets to be recovered from dishonest agents.

A voluntary, as opposed to compulsory, fidelity fund is not a viable alternative. Such an arrangement would either invite free riding (if all consumers were covered) or would require the same kind of consumer education as would be needed if professional indemnity insurance were made voluntary (see above).

Therefore, while there are good grounds for reviewing both the cap on claims and the level, transparency and basis of contributions to the Fidelity Fund, we conclude that, its compulsory nature is justified.

The review team recommends that the Fidelity Fund consumer protection arrangement remain in place – the cost to agents is low yet the (potential) benefits to consumers following agent fraud would be significant. Protection through the Fidelity Fund is seen to be complimentary to protection offered through Professional Indemnity Insurance.

Recommendation

The review team recommends that the Fidelity Fund consumer protection arrangements remain in place. However, the actuarial soundness of the Fund should be reviewed along with the current cap on claims.

Legislated Rules of Conduct

The Act establishes the Rules of Conduct for realty agents. These rules are expanded in the Agents Licensing Regulations, which specifies further general Rules of Conduct for licensed agents and additional rules

applicable to conveyancing agents. The Rules of Conduct outline the ethics, standards and business practices that agents are to abide by when undertaking business as a licensed agent. In addition, the Regulations require real estate and business agents to comply with *rules of real estate practice* published or endorsed by REINT; and conveyancing agents to comply with the *good conveyancing practice rules* issued by the Law Society of the Northern Territory (LSNT).

The real estate agent Rules of Conduct contained in the Act and its Regulations have been (broadly) adopted from the Code of Ethics specified by the national real estate body – the Real Estate Institute of Australia (REIA). REIA is soon to implement updated and timelier Rules of Conduct. The Australian Competition and Consumer Council has deemed that the new Rules of Conduct do not contain anticompetitive elements. The Northern Territory's Real Estate Institute is expected to adopt and implement the new rules as written.

The Realtors Guild however noted an objection to agents being required to abide by an industry body's code of ethics when membership of that industry body is not compulsory.

There are...substantial objections to linking the Act to a separate compulsion to comply with the REIA's 'Code of Ethics'. As the Act does not require a subject agent to compulsorily be a member of the REINT, therefore the Act should not be linked to any membership criteria of that body. (Realtors Guild submission, page 18)

The same objection could be extended to requiring conveyancing agents to abide by the Law Society's rules.

The review team considers that the Code of Conduct contained in the Act and its Regulations should set minimum conduct standards required by agents to ensure an adequate level of consumer protection. If industry bodies wish to implement their own codes or rules which promote higher professional standards, then that is their choice. The decision to pursue higher standards may provide a source of competitive advantage in the marketplace and allow consumers to differentiate between agents.

However, as the Realtors Guild pointed out, it is not appropriate that an industry body, in which membership is voluntary, should be setting the conduct requirements for all agents. It may be the case that REINT's rules of real estate practice seek to achieve industry best practice, and not to simply achieve an adequate level of consumer protection at lowest cost. Imposing higher than necessary conduct requirements on agents will reduce their operational flexibility.

Standards should be set at the minimum level necessary to achieve the intended benefit, and this may not always coincide with industry views of best practise.

The review team recommends that if needed, the Rules of Conduct be amended so as to contain a comprehensive listing of the minimum conduct standards required by agents to ensure an adequate level of consumer protection. The requirement for all real estate agents and all conveyancing agents to abide by REINT's and LSNT's rules of practice (respectively) should be removed from the Act.

Recommendations

The review team recommends that, if needed, the Rules of Conduct be amended so as to contain the minimum conduct standards required by agents to ensure an adequate level of consumer protection.

The requirement for all real estate agents and all conveyancing agents to abide by REINT's and LSNT's rules of practice (respectively) should be removed from the Act.

Composition of the Agents Licensing Board

As noted in chapter 3, the Agents Licensing Board consists of 5 members, namely:

- a public servant;
- a legal practitioner;
- a consumer advocate; and depending on whether the Board is sitting on real estate agency or conveyancing agency matters;
- two persons who are members of REINT, or at the Minister's discretion, two licensed conveyancing agents.

With respect to the two REINT members of the ALB, Denis Power advises that the current situation is that one member is drawn from the northern area of the Northern Territory while the second member is drawn from south of the 28th parallel. There may be concerns among agents not members of REINT that their interests are not adequately represented on the Board.

Benefits of the current ALB composition

All submissions to the review suggested that it was necessary and desirable to include industry representatives in the licensing process, with comments by the Realtors Guild being typical of submissions received.

Relevant contemporary views are essential in administration [of the Act], particularly those that arise in the delivery of services. (Relators Guild submission, page 4)

The review team agrees that industry opinions can add value and practical experience to the licensing process and other matters falling under the ALB's jurisdiction. Consequently, realty practitioner representation is essential.

Costs of the current ALB composition

Currently, when the Board is addressing real estate issues, industry representation on the ALB is restricted to REINT members only. This may mean that the opinions, ideas and needs of non-REINT real estate agents are not given adequate representation on the ALB. In discussions with stakeholders it was suggested that this might lead to anticompetitive practices.

Restricting industry representation of real estate agents to REINT members may have a small cost for real estate agents that are not members of REINT. The Realtors Guild thought it unlikely that the current arrangement restricted competition, but did note

...dissemination of information only through the REINT may lead to those agents who are not members to be uninformed of essentials. This could restrict non-members. (Relators Guild submission, page 6)

When the Board is sitting as the licensing authority on conveyancing issues, the Institute of Conveyancers has suggested that leaving industry representation to the *discretion* of the Minister may also lead to anticompetitive practices.

As the Act stands, the views of the conveyancing industry may well be ignored should a Minister decide that way. This situation could well promote an uncompetitive market. (Institute of Conveyancers submission, page 3)

The potential for lack of specific conveyancing industry representation on the ALB may see the views, opinions and needs of conveyancers being marginalised.

Assessment of the current ALB composition

The ALB regulates both real estate agents and conveyancing agents. Its composition at any sitting should vary according to which group it is dealing with.

Representation of real estate agents

Real estate agents need to be represented when their matters are dealt with and the industry representation should be broad based.

In commenting on the issues paper, REINT thought that industry representation should be restricted to REINT members. In responding to the question 'should industry representatives be restricted REINT members?', REINT stated

Yes, or until another Industry body had sixteen years experience representing Members of the Real Estate Industry. Also you could not have someone who was not a Member of an Industry organisation on the Agents Licensing Board because that person would not have direct contact with Industry Members as REINT Representatives do and know the needs of the Industry or obtain Industry opinion. (REINT submission, page 2)

The review team agrees that being a member of an industry body would greatly facilitate the soliciting of the ideas, opinions and needs of those individuals who are members of that industry body. However, the review team believes that industry representatives should be selected on the basis of merit – the best people for the job – and not according to which industry body they belong to. So long as the industry representatives can establish and maintain realty networks and canvass industry views and opinions, it should not matter which, if any, industry body they belong to. To this end the review team recommends that specific reference to REINT be removed from the composition of the ALB as set out in the Act.

Representation of conveyancing agents

Unlike real estate agents, conveyancing practitioners do not have *automatic* representation when their interests are dealt with. However, while it is at the discretion of the Minister whether conveyancers are appointed, in practice, the review team understands they always have been. In practice then, the Board operator as two separate Boards – one for real estate agents and one for conveyancing agents.

Nevertheless, the review team believes that conveyancers should have direct representation on the ALB when matters relating to conveyancers are being discussed *as a matter of course* – representation should not be left to the Minister's discretion. While the Chairman of the Board must be a legal practitioner, this does not necessarily entail adequate or accurate representation of the conveyancing industry (as opposed to legal practitioners undertaking conveyancing) in ALB decisions.

6 OPERATIONAL RESTRICTIONS ON REALTY SERVICE PROVISION

On representativeness, the review team agrees with the Institute of Conveyancers.

To protect the interests of all conveyancers, the industry representatives should not have to be members of the professional body... (Institute of Conveyancers Submission, page 3)

Changes are needed to reflect that the Board effectively sits as two separate Boards depending on whether it is considering real estate agents' matters or conveyancing agents matters. Appropriate industry representation should be provided for by the Act in each case.

Recommendations

The review team recommends that the Act be amended so that it requires the appointment by the Minister of two licensed real estate agents, who will sit on the Board when it is dealing with real estate agents' matters. Reference to membership of REINT should be removed.

Similarly, the review team recommends that the Act be amended so that the composition of the Board requires the appointment of two licensed conveyancing agents who will sit on the Board when conveyancing agents' interests are dealt with.

7

Alternative arrangements

AN IMPORTANT STEP in the NCP review process is to consider whether the objectives of the legislation can be achieved in a less restrictive manner. This includes assessment of non-legislative approaches. Alternative arrangements should be assessed on the basis of:

- whether the proposed form of regulation can achieve the current objectives of the legislation;
- the effect on market contestability and competition between incumbent agents and representatives;
- the level of compliance costs for those being regulated; and
- the practicality and cost of administration and enforcement.

The main alternatives to currently regulatory arrangements that were either suggested in submissions to the review or arose during the review team's analysis include:

- removal of industry specific regulation (deregulation);
- self-regulation;
- co-regulation, via an independent industry body sanctioned by the government;
- negative licensing;
- partial deregulation; and
- maintenance of the current system but with amendments to address areas where costs are likely to be greater than benefits, or where benefits can be achieved in a less restrictive way.

Of submissions commenting on regulatory arrangements, the predominant opinion was to maintain the existing regulatory arrangement (occupational licensing). Only the Institute of Conveyancers suggested otherwise, identifying self-regulation as a potentially more pro-competitive option to reducing costs but still providing consumer protection.

Removal of industry specific regulation

Under this approach all regulation of agents would be removed, meaning that any person, irrespective of education, experience and character, could offer realty services. The performance of agents would be determined by market forces, the effectiveness of industry bodies, consumer awareness campaigns and general consumer protection offered through the Northern Territory's *Crimes Act*, *Consumer Affairs and Fair Trading Act*, the Commonwealth's *Trade Practises Act 1974* and through criminal law proceedings.

It is possible that commercial pressures relating to the industry's reputation would encourage reputable agents to organise, for example by an industry association, to ensure industry standards. Such an arrangement could be supported by an information campaign targeted at ensuring consumers were aware of how to obtain the services of a skilled and reputable agent. Realty agents could choose to comply with industry-determined standards and consumers of realty services could seek out and pay for that potentially better standard.

However, the review team considers complete deregulation undesirable and unlikely to achieve the objectives of the Act. Recapping, the objective of the Act is to protect consumers of real estate, business and conveyancing services from agent misconduct or negligence. The current Act seeks to achieve this through legislating that agents be licensed, accountable, and meet certain standards of professional competence.

The review team believes that the nature of property transactions makes consumers candidates for significant financial detriment should agents be fraudulent or negligent. In the complete absence of any regulation, it is probable that incompetent and possibly dishonest people would enter the industry. A similar opinion was submitted by the Realtors Guild.

Without the constraints, disciplines and guidelines imposed by this Act a procession of chaotic proportions would arrive daily at court seeking solutions and justice. (Realtors Guild submission, page 4)

There would be several adverse outcomes arising from complete deregulation of the industry. Consumers would be exposed to significant financial risk, consumer confidence in realty agents would diminish, leading consumers to either undertake property transactions themselves or to resort to legal practitioners in all cases – both of which would increase the cost of buying or selling property. Finally, the costs to consumers of searching out appropriately qualified and/or experienced service providers would escalate. None of these outcomes are desirable.

Why not rely on other legislation that protects consumers?

Comment by Denis Power represents the opinions of most parties who made submissions to the review.

Consumer protection Acts [such as the *Trade Practices Act 1974* or the *Consumer Affairs and Fair Trading Act 1990*] cannot encompass the wider aspects of law and practice as a generality. Consumer protection Acts are designed to cover all industries and would be too burdensome if they covered all aspects required. (Denis Power submission, page 3)

The review team agrees with such comments. Although consumer protection Acts such as the *Trade Practices Act 1974* provide the wider legislative framework for achieving consumer protection, and some protection is provided through these channels, they are unlikely to be sufficiently detailed to ensure adequate protection for consumers of agent services.

Furthermore, while alternative legislation may be useful in establishing blame and responsibility, if the agent is insolvent or does not hold PII, then the consumer will not be able to recover compensation.

Finding

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

Self-regulation

Under this scenario a government body, private organisation or industry body carries out a non-mandatory assessment of agents and accredits those that satisfy certain requirements. Agents are free to choose whether or not they undergo assessment. Self-regulation and accreditation is a likely outcome of the 'no regulation' and 'partial deregulation' approaches detailed above.

Membership of REINT is an example of accreditation by an industry body. In the absence of agent licensing, accreditation could give consumers the choice between utilising accredited or non-accredited agents, with the knowledge that accredited agents meet certain minimum standards and is a sign of quality. If applied to employees, it would give employers a similar choice. Accreditation potentially offers a simpler form of regulation and control than licensing. It is not, of itself, a restriction on entry to a market.

Accreditation is often used in professions such as accounting – where there is no legislation regulating the profession – as a means of signalling quality. Most accountants are members of industry bodies such as the Australian Society of Certified Practising Accountants, which promotes high professional standards. Publicity has ensured that the public is aware that such accountants are of the highest standards, allowing the public to make an informed choice when choosing an accountant.

In the NCP review of South Australia's *Land Agents Act 1994*, the Office of Consumer and Business Affairs noted several problems with self-regulation. Firstly, it was suggested that 'industry groups have a tendency to engage in anti-competitive behaviour rather than enhancing it' (Office of Consumer and Business Affairs 1999, page 15). This raises the prospect that self-regulation may decrease competition rather than increase it.

Furthermore, the industry body(ies) charged with setting standards only have control over those practitioners who are members of the particular industry association. People who are not members could engage in conduct detrimental to consumers.

A final area of cost relates to consumer knowledge – under self-regulation consumers will need to know what standards are associated with the various industry bodies and which best meet their needs. Search costs associated with finding an appropriate agent may rise as a result. Publicity can be used to increase consumer awareness, but this is costly and the effects are unlikely to be experienced in the short term.

Finding

The review team believes that self-regulation by itself is not appropriate for regulating the industry. A form of self-regulation may arise regardless of the regulatory approach adopted.

Co-regulation

This approach entails a partnership between government and industry in the regulatory process. Typically, co-regulation sees government, via the legislation, granting an independent industry body responsibility for setting the standards for accreditation or licensing of agents. The role of government would be at the higher level – ensuring that the regulation operates in the public interest, is not anticompetitive and that the industry body is accountable.

The current regulatory regime incorporates elements of co-regulation. For example, two members of the industry body REINT are required to sit on the Agents Licensing Board and REINT receives funding to provide realty educational modules. REINT also specifies the rules of real estate practice that real estate agents are required to adhere to under the legislation. REINT's involvement in regulation is to be furthered through having input into the development of competency based training packages.

Co-regulation is often considered to be less intrusive than most other forms of regulation, as the government is not directly involved in setting standards for the occupation. It recognises the cost of maintaining the special knowledge and systems relating to an occupation within government and the cost of compliance function relating to those standards (Dept. of Fair Trading 1997, page 68).

Co-regulation is often used when occupational licensing is preferred but it is considered that the private sector can undertake regulation duties more effectively and efficiently than government, due to, for example, greater knowledge of the industry.

In its review of the *Land Agents Act 1994*, the South Australian Office of Consumer and Business Affairs outlined the requirements for successful co-regulation:

- 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 in place; and
- evidence of the capacity to handle the delegations (Office of Consumer and Business Affairs 1999, page 20)

It is difficult for any one industry body to satisfy all of these criteria. For example, REINT would an obvious candidate for the regulatory body. It already has, albeit limited, co-regulatory involvement and has around 79 per cent of active real estate agents as members. However, with the recent introduction of the Realtors Guild, REINT's position as the pre-eminent industry body may be challenged, and REINT may not have industry wide support. The review team is aware that what constitutes 'industry wide support' is debateable. The review team's concern about industry wide support for one particular industry body is highlighted by comments from Denis Power.

The REINT expresses concern that the [Realtors] Guild appears to be attracting those firms that are in one way or the other disaffected with the representative body. [However] Not all members of the Guild are in this position... (Denis Power submission, page 2)

The Office of Consumer and Business Affairs also noted that while co-regulation may 'reduce costs to government, it does not necessarily make any difference to the restrictions on competition. It is more of a cost-shifting exercise' (Office of Consumer and Business Affairs 1999, page 20).

Co-regulation would involve similar disadvantages to that inherent in occupational licensing and self-regulation. Even if the community wanted occupational licensing, co-regulation would have the additional disadvantage that the private body granted authority to regulate the profession may fall out of favour with sections of the industry and/or be prone to industry capture which may see anti-competitive behaviour arising.

Finding

The review team considers that co-regulation cannot achieve consumer protection in a less restrictive or costly manner than the current regulatory arrangement.

Negative licensing

Negative licensing is a form of occupational regulation that typically involves a statutory requirement that provides for anyone to practice a particular occupation as long as that person does not breach legislated requirements associated with the activity. For example, legislation could be worded such that those agents who fail to meet practising requirements, who are not fit and proper and who do not obtain the required insurance are prevented from operating as an agent. The term 'negative' refers to an absence of licensing and not to an absence of regulation.

Under a negative licensing approach service providers would not be screened or assessed prior to starting business, but only prohibited from practising if short-comings in their operations are identified. Hence negative licensing is a 'reactionary' approach to licensing and would not attempt to prevent detrimental instances from occurring.

The Regulator would therefore be devoted to detecting and removing from the industry those agents or their representatives who fail to comply with the legislated standards. Compliance could be enforced through audit,

inspection or in response to complaints by consumers. However, it would not be easy for the Regulator to know the identity and location of all participants in the industry, making inspections difficult. Consequently, identification of non-conforming agents is likely to fall to consumers. Realty service consumers will therefore bear the cost of bringing non-conforming agents to disqualification without any offsetting benefits to them.

These problems would not be as severe were negative 'licensing' to apply to licensed agents' representatives rather than to the licensed agents themselves.

Negative licensing limits entry to an industry in some sense. It offers advantages in the sense that it provides an in principle mechanism for prohibiting entry into a market if certain conditions are not met, and forcing exit if conditions are breached. It has advantages in reducing administration costs for realty agents and the Regulator, although costs associated with bringing non-conforming agents to disqualification are transferred onto consumers. Negative licensing tends to work well when consumers are well informed and resources are made available to advise consumers of complaint resolution procedures and of agents who have failed to meet legislated standards.

However, given the nature of the property market and the large some of monies involved, the review team believes that negative licensing is an inappropriate form of regulation for realty agents and will not ensure adequate consumer protection. Under a negative licensing approach consumers bear the cost of bringing non-conforming agents to disqualification. With no ready means for consumers of identifying conforming agents it is possible that there would be an increased risk to consumer funds.

Finding

The review team believes that negative licensing is an inappropriate form of regulation for agents in the realty industry, but may have merit in dealing with agents' representatives.

Maintain existing regulation

The existing form of agent regulation – based on occupational licensing – could be maintained but amended to address the areas of concern raised in previous chapters. The review team believes the objective of the Act – consumer protection – can be achieved through occupational licensing. The benefits of such regulation are considered to outweigh the costs.

However, the review team considers that the current regulatory arrangement imposes some unnecessary restrictions on competition, which is costly to the community. By implementing the recommendations made in chapters 5 and 6, the review team believes that the objective of the legislation can be achieved in a less restrictive manner. This will deliver net benefits to the community.

Finding

The existing regulatory regime delivers benefits to the community, but imposes some unnecessary and costly restrictions on competition.

Partial deregulation

Such a scheme would see business principals needing to hold a realty licence, but their employees not requiring to meet any legislated standards. Such an arrangement would put the emphasis on the licensed agent to identify competent staff – but good agents would likely undertake this anyway. As noted in chapter 6, at the end of the day a licensed agent, as owner of the business, is ultimately responsible for the decisions and actions made by staff and the success of the business. Principals would be free to decide on what basis their staff are hired – formal education, experience, personality or ability to sell a product. Similarly, potential employees would be free to decide on what formal qualifications, if any, to pursue and what skills to develop so as to gain employment.

As employees are covered by the agent's Professional Indemnity Insurance and Fidelity Fund provisions, should employees be negligent or dishonest then there is an avenue for consumers to seek recompense. But it will be in the business's best interest to ensure that such a situation never arises – such an event may jeopardise the agent's ability to get future indemnity insurance and consequently put at risk his/her licence. Even if the agent were able to obtain insurance, the adverse reputation effects are likely to be

disastrous for the business, especially in a relatively 'small' market like the Northern Territory's.

The review team considers the partial deregulation option to have merit. It ensures that those persons in charge of the business are licensed and meet specified requirements while greatly reducing the market entry requirements for employees. The review team considers that such an arrangement could deliver the objective of consumer protection – as it is in the business's best interest – and overcome the costs associated with occupational licensing and restricting market entry. The partial deregulation approach would be consistent with the recommendation made in chapter 6 to remove the requirement that office managers need to be licensed agents in all circumstances.

Lighter regulation of agents' representatives

Partial deregulation would allow two important changes to be made with respect to agents' representatives. One would see their presently stipulated educational attainments made a matter for their employers (licensed agents) and for themselves. This would put pressure on registered training organisations to offer highly relevant material. The other would replace the current 'strong' form of regulation of agents' representatives with a weaker form akin to negative licensing.

This would see persons who satisfy the modified fit and proper person test recommended in this review able to be registered by the Board as agents' representatives. No further regulatory requirements would be applied except to *deregister* that agent's representative in the event of conduct that violated the other requirements of the Act. A negative list would be kept by the Board of these disqualified persons.

Agent's representatives could be either employees of the agent or contracted to the agent with an authorisation to act on the agent's behalf. Agents' representatives who were contractors rather than employers would have to hold their PII.

In considering more light handed regulation of agents' representatives, it is worth stating that the Act makes no provision for the explicit regulation of conveyancing agents' employers as a category. The review team has received no arguments to suggest that this should change. Nor has it been presented with reasons why real estate and business agents' representatives and the employees of conveyancing agents should be treated very differently.

Partial deregulation as outlined here would move the treatment of these two categories closer together.

The review team believes that it is important to note that the main purpose of the consumer protection objective is to protect consumers from financial and consequential loss; it is not to impose standards of service on consumers that might become outdated, or which do not apply across all realty consumers. Partial deregulation would avoid some of the higher costs associated with occupational licensing, which arise as a result of erecting entry barriers to the market and ensuring compliance with imposed standards.

Competent staff are crucial to the success of any business in any industry, and employers know this. Partial deregulation would leave licensed employers responsible for the competence of their staff with 'competitive edge' as the incentive to high standards and indemnity and fidelity insurance as the fall back when employer screening fails. Some form of self-regulation may eventuate. Partial deregulation can therefore offer consumer protection and minimise the restrictions on competition associated with industry wide occupational licensing.

Finding

The review team considers that partial deregulation of real estate and business agents — where business principals need to hold a realty licence, but their employees are registered but not required to meet any further *legislated* standards for admission — is able to deliver consumer protection at lower cost than the current occupational licensing regime. Legislated barriers to market entry for realty employees could be eliminated under the partial deregulation regime without sacrificing consumer protection.

Recommendation

The review team recommends that the partial deregulation scheme be implemented.

APPENDICES

A

Terms of Reference

THE REVIEW OF THE LEGISLATION shall be conducted in accordance with the principles for legislation review set out in the Competition Principles Agreement. The underlying principle for the review is that legislation should not restrict competition unless it can be demonstrated that:

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

Without limiting the scope of the review, the review is to:

- clarify the objectives of the legislation, clearly identifying the intent of the legislation in terms of the problems it is intended to address, its relevance to the economy and contemporary issues and whether or not the legislation remains an appropriate vehicle to achieve those objectives;
- identify the nature of the restrictions to competition for all relevant provisions of the specified legislation. This analysis should draw on the seven ways identified by the National Competition Council in which legislation could restrict competition, which include:
 - governs the entry or exit of firms or individuals into or out of markets,
 - controls prices or production levels,
 - restricts the quality, level or location of goods or services available,
 - restricts advertising and promotional activities,
 - restricts price or type of input used in the production process,
 - is likely to confer significant costs on business, or
 - provides some advantages to some firms over others by, for example, shielding some activities from the pressure of competition;
- analyse the likely effect of any restriction on competition and on the economy generally;

- assess and balance the costs and benefits of the restrictions for each anticompetitive provision identified;
- consider alternative means for achieving the same result and make recommendations including non-legislative approaches; and
- clearly make recommendations. These should flow clearly from the analysis conducted in the review. If change is not recommended and restrictions to competition are to be retained, a strong net benefit for retention must be demonstrated.

When considering the matters referred to above, the review should, where relevant, consider:

- 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 equity;
- the interests of consumers generally or of a class of consumers;
- government legislation and policies relating to ecologically sustainable development;
- economic and regional development including employment and investment growth;
- the competitiveness of Australian business; and
- the efficient allocation of resources.

The review shall consider and take account of relevant legislation in other Australian jurisdictions and any recent reforms or reform proposals including those relating to competition policy in other jurisdictions.

The review shall be conducted as a public review in accordance with the Guidelines for NCP legislation reviews document that has been endorsed by the NCC. In accordance with the appropriate review model used under these guidelines, the review shall consult with and take submissions from those organisations and individual stakeholders affected or regulated by the legislation, other interested Territory and Commonwealth Government organisations, other State and Territory regulatory and competition review authorities and members of the public.

B

Submissions received

THE REVIEW TEAM received six written submissions. Table B.1 provides details of submissions received. In addition to considering submissions, the review team held extensive discussions with DIB officers, consulted with stakeholders in the Northern Territory and relevant parties in other jurisdictions, and took account of comments by members of an independent steering committee. Details of persons consulted with during the course of the review are presented in table B.2.

B.1 Submissions received

<i>Submission by</i>	<i>Affiliation</i>
Peter Clements	Australian National Real Estate Private Sales
Bob Johnson	
Jim Maclean	Reallors Guild
Jude Pickering	Real Estate Institute of Northern Territory
Denis Power	Real Estate Agent
Trish Viede	Australian Institute of Conveyancers — NT Division

B.2 Stakeholder consultations

<i>Stakeholder</i>	<i>Affiliation</i>
Danny Masters	Law Society of Northern Territory
Fiona Terrell	Department of Industries and Business
Guy Riley	Law Society of Northern Territory
Jeff Hockley	Institute of Conveyancers – NT Division
Jim Maclean	Northern Territory Relators Guild
Jude Pickering	Real Estate Institute of Northern Territory
Maria Ceresa	Law Society of Northern Territory
Michael Bonglomo	L.J. Hooker Alice Springs
Raelene Stephens	Department of Industries and Business
Ray Hanrahan	Northern Territory Relators Guild
Trish Viede	Institute of Conveyancers – NT Division

References

Department of Fair Trading 1997, Review of the *Property, Stock and Business Agents Act 1941*, Issues Paper, NSW Government, September 1997.

Office of Consumer and Business Affairs 1999, National Competition Policy Review of the *Land Agents Act 1994*, Final Report, South Australian Government, December 1999.