

Discussion paper

National Competition Policy Review of the
Land and Business (Sale and Conveyancing)
Act 1994
- Final Report

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National Competition Policy Review
Land and Business (Sale and Conveyancing) Act 1994

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National Competition Policy Review
Land and Business (Sale and Conveyancing) Act 1994

Executive Summary

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

It should be noted that many of the provisions of this Act interact with provisions in the *Conveyancers Act 1994* and the *Land Agents Act 1994*, which are also the subject of competition policy reviews. Final Reports for those Acts have been released concurrently with this report.

There are a number of risks to a consumer which are inherent in any transaction involving the sale of real estate or a business. The Act seeks to increase the level of protection for consumers by imposing certain conditions on the way vendors, land agents, sales representatives and conveyancers conduct these transactions, and by providing the consumer with meaningful forms of redress where problems arise with the transaction through the fault of the agent or vendor.

The Act attempts to deal with a broad range of problems which may be experienced in the real estate and related industries, problems which do not necessarily bear any relation to each other.

A number of markets are affected by the operation of the Act:-

- the real estate market;
- the market for the sale of businesses;
- the market for the provision of real estate sales services;
- the market for the provision of services relating to the sale of a business; and
- the market for the conveying of land and/or businesses.

The Review Panel notes that transactions involving the sale of land or a business is one in which consumers are at a significant disadvantage *vis-a-vis* other participants in the industry. Consumers tend to lack knowledge of the industry and will usually be unfamiliar with any rights that they do possess. Consumers are also placed at risk of significant financial loss if transactions are performed in an incompetent, negligent or dishonest fashion. The Review Panel therefore concludes that there is continuing justification for the continued regulation of transactions involving land or businesses.

The Act contains a number of conduct restrictions. Part 2 of the Act (which contains the cooling-off and provision of particulars requirements) applies to the sale of land or a "small business" which is defined as a business sold for not more than \$200,000 (excluding the value of any land sold in fee simple under the contract for the sale of the business). A number of submissions indicated the inadequacy of an arbitrary dollar value. The Review Panel notes that any move to increase this value would broaden the scope of transactions to

which the Act would apply, and would therefore be increasing the level of regulation. Accordingly, the Review Panel does not propose any change to the current prescribed amount of \$200,000.

The Act requires a considerable amount of information (specified in the regulations) to be provided to a prospective purchaser of land or a small business, prior to settlement. Provision of this information initiates the cooling-off period (see below). The objective of the requirement is to ensure that purchasers of land and small businesses are able to make informed decisions before title to the property is passed irrevocably.

While there are obvious costs involved in acquiring or providing this information, the Review Panel considers that the benefits of requiring this information to be provided outweigh the costs. Purchasers of property do not normally possess the same amount or quality of information about a property or business that the vendor does, a phenomenon known as information asymmetry. The best way to address this is to require vendors to provide relevant information.

The Act requires that this information be provided in a prescribed and standardised form. This is viewed by the Review Panel as a trivial restriction.

The Act also provides for a cooling-off period in relation to the sale of land and the sale of small businesses. The benefit of the cooling-off period is that it provides the consumer with time to analyse the disclosed information, which can reduce the magnitude of information asymmetry. The costs of the cooling-off period are minimal, and the Review Panel therefore concludes that the cooling-off period should be retained.

The Act currently prohibits the making of certain representations in relation to the sale of subdivided land. While general consumer protection laws have developed over the last twenty years to address such misrepresentations, the Review Panel considers that there is still a place for the specific prohibition contained in this Act, which makes it clear that the making of such representations is unacceptable conduct on the part of agents.

Land agents are prohibited from holding an interest in the purchase of a property that they have been commissioned to sell, to prevent conflicts of interest and the potential for consumer detriment which might arise from such conflicts. The Review Panel has concluded that this prohibition is justified and should be retained.

The Act prohibits the payment of any or all of the commission or other consideration to which a land agent is entitled for services as an agent, to any person other than an officer or employee of the agent. The intention of the prohibition was to prevent a licensed agent acting as a "front" for an unlicensed agent, and to prevent secret commissions. The Review Panel considered a proposal that a provision be included requiring agents to disclose any benefits received or given to a third party in exchange for referral of business or other benefits in relation to the client. However, upon analysis the Review Panel has concluded that the benefits of the prohibition on the sharing of commissions outweighs the costs and that the restriction should be retained.

The preparation of conveyancing instruments by agents or people in a prescribed relationship to an agent is prohibited. Like many provisions in the Act, it aims to prevent conflicts of interest which may arise. While seemingly a restriction, the Review Panel is of the view that the "restriction" actually promotes competition - in the absence of the

provision agents and conveyancers could engage in anti-competitive conduct, and it would be difficult to prove that such conduct took place. Accordingly, the Review Panel concludes that the provision be retained.

The Act also prohibits conveyancers and legal practitioners from referring business for consideration. The intention is to protect consumers from unscrupulous conduct, and to promote competition by ensuring that the consumer has a choice as to whom to instruct. The Review Panel concludes that this prohibition should be retained.

Dual representation (ie acting for both vendor and purchaser) by a conveyancer is permitted in certain circumstances where both vendor and purchaser are in a close relationship, and where all parties provide written authorisation. The intention is to prevent a conflict of duties to each client, but is a sensible and efficient practice where both vendor and purchaser are in agreement. The Review Panel concludes that a prohibition on dual representation in circumstances which are not within the permitted types is a trivial restriction on competition, and therefore concludes that the general prohibition on dual representation be retained.

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

PART A: INTRODUCTION

1. PURPOSE OF THE REVIEW

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

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

National competition policy ("NCP") is about

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

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

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

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

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

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

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

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

² Clause 5(1), Competition Principles Agreement

³ Clause 5(3), Competition Principles Agreement

⁴ Clause 5(6), Competition Principles Agreement

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

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

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

2. SCOPE OF THE REVIEW

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

Accordingly, this Review applies to:-

Land and Business (Sale and Conveyancing) Act 1994 ("the Act"); and
Land and Business (Sale and Conveyancing) Regulations 1995 ("the regulations")

3. THE REVIEW PANEL

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

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

⁵ Clause 1(3), Competition Principles Agreement

4. THE REVIEW PROCESS

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

An Issues Paper was released for public consultation on 15 March 1999. Seven submissions were received by the Review Panel. A schedule showing the distribution of Issues Papers can be found in **Appendix 4**. A schedule of submissions received can be found in **Appendix 5**.

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

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

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

PART B: OVERVIEW OF LEGISLATION

1. HISTORY

In 1994 the Government decided to repeal the *Land Agents, Brokers and Valuers Act* and create three separate Acts to deal with the occupational licensing of the three occupations governed by that Act. This decision was based on a recognition that the interests of consumers in relation to those three occupations varied considerably: although all related to interests in real estate, the types of interests involved and the way those interests could be affected by the conduct of agents, conveyancers and valuers respectively were vastly disparate.

In addition to licensing those carrying on those occupations, however, the *Land Agents, Brokers and Valuers Act* contained a number of provisions which regulated the conduct of those involved in the sale of land and businesses and the preparation of conveyancing instruments. While some of those provisions were no longer relevant or no longer provided a recognisable community benefit, there were many which were deemed to be of continuing importance to the protection of the community and the maintenance of appropriate professional standards. These provisions were therefore enacted in a fourth new Act, the *Land and Business (Sale and Conveyancing) Act 1994* ("the Act").

1.1 What are the objectives of the Act?

The rationale for the retention of some of these provisions can be found in the Parliamentary Debates leading up to the enactment of the Act. For many, however, the rationale can only be found by reference to the period when they were first enacted, which involves charting the history of the *Land Agents, Brokers and Valuers Act 1973* and its predecessors.

The Act attempts to deal with a broad range of problems which may be experienced in the real estate and related industries, problems which do not necessarily bear any relation to each other. Thus it is necessary in each instance to identify the problem which the Act seeks to address on almost a section by section basis, as the objectives and justifications for each section may be varied.

It is therefore difficult to identify an overarching problem which the Act seeks to address. The closest may be to acknowledge that the real estate industry is one in which consumers are at a significant disadvantage *vis a vis* other participants in the industry. They tend to lack knowledge of the industry, and will often be unfamiliar with any rights that they do possess.

There are a number of risks to the consumer inherent in any transaction involving real estate. These risks are outlined in greater detail in the reports dealing with the *Land Agents Act 1994* and the *Conveyancers Act 1994*. It is anticipated that readers of this report will also peruse one or other of those reports. It is therefore proposed to deal only briefly with the risks to the consumer arising from real estate transactions in the course of this report.

In summary, consumers face risk to fundamental rights, namely property rights. A number of actions by persons dealing with those rights can lead to consumer detriment. What this Act aims to do is to control the conduct of those who are practising the occupations of land

agent, sales representative or conveyancer. Barriers to entry afford the consumer one kind of protection, and this protection is provided by licensing legislation. This Act seeks to increase the level of protection of consumers by imposing certain conditions on the way such people conduct their businesses, and by providing the consumer with meaningful forms of redress where problems arise with the transaction through the fault of the agent or vendor. It seeks to ensure that consumers are provided with appropriate information at an appropriate time of the dealing to ensure that those consumers are able to make an informed choice without undue pressure being placed on them.

The Act seeks to achieve these objectives in four main ways:-

- it provides for a cooling off period in which the buyer may decide not to proceed with the purchase of a land or business;
- it provides for certain particulars to be supplied to the consumer before that cooling off period commences, to give the consumer sufficient time to digest such information and make an informed decision about the property or business. There would be little point in having a cooling off period if the purchaser possessed little or no knowledge about fundamental aspects of the property which the consumer proposed to purchase;
- it creates certain rules relating to the contractual relationship between agent and vendor; and
- it contains rules relating to the preparation of conveyancing instruments which are designed to ensure that the conveyancing is performed in an environment where the conveyancer is not open to undue influence or conflicts of interest.

2. CURRENT OPERATION OF THE ACT

2.1 What is the relevant market?

This Act affects a number of markets. It affects:-

- 1) the real estate market (ie the market in which the sale and purchase of real estate occurs);
- 2) the market for the sale of businesses;
- 3) the market for the provision of real estate sales services;
- 4) the market for the provision of services relating to the sale of a business; and
- 5) the market for the conveyancing of land and/or businesses.

There are a number of participants in these markets. Consumers participate as both vendors and purchasers of land and businesses. Registered land agents, sales representatives and legal practitioners participate in the provision of services relating to the sale of land and businesses, while these occupations are joined by liquidators in relation to the sale of businesses. Conveyancers and legal practitioners both participate in the market for the conveyancing of land and businesses. Consumers participate both as vendor and purchaser/buyer and seller (in relationship to each other) and as consumers of services relating to that sale.

The market is confined geographically to the state of South Australia.

Conclusion

There are a number of relevant markets. These markets are:-

- the real estate market (ie the market in which the sale and purchase of real estate occurs)
- the market for the sale of businesses
- the market for the provision of real estate sales services
- the market for the provision of services relating to the sale of a business
- the market for the conveyancing of land and/or businesses

The market is confined geographically to South Australia.

2.2 Provisions of the Act

The Act sets requirements for the conduct of agents, conveyancers and vendors of property in a number of different ways.

2.2.1 Information provision and cooling-off

The Act creates a cooling off period for contracts for the sale of land and small businesses. This period begins on the date of the provision of required particulars or of the signing of the contract, whichever is the latter, and is two days for contracts for the sale and purchase of land, and five days for contracts for the purchase of small businesses. However, this cooling off period does not apply in a number of circumstances, including where the purchaser has received independent legal advice prior to entering into the contract, where the sale is by auction, and where land is purchased by a body corporate.

A number of particulars relating to the land or business must be provided to the purchaser. The particulars are prescribed by regulation, and include in relation to land details of encumbrances on the title, dealings in the title over the last twelve months, environmental particulars relating to the property and other orders or requirements of such property. In relation to businesses they include details of takings, gross income, costs, trading profit/loss and net profit/loss, details of any encumbrances or interests held by third parties over other assets that will be sold with the business, including stock in trade, plant and equipment, details of an lease, tenancy agreement or licence and details of employees and Work Cover.

2.2.2 Subdivided land

The Act creates specific offences in relation to subdivided land. Sections 18 and 19 relate to representations made in the sale of subdivided land, regarding the future purchase of land or the assurance of profit in the future. It is prohibited to state:-

(a) that the person or some other person will buy at a profit to be received by the prospective purchaser other land or a chattel then owned by the prospective purchaser; or

(b) that the person or some other person will at some future time obtain for the prospective purchaser a profit on the subdivided land or part of it.

2.2.3 Relationship between agent and principal

Part 4 of the Act sets out the agent's obligations to the client. The agent must immediately supply a copy of all offers, contracts and agreements relating to a transaction to the person who signs them.⁶ An agent must have written authority to act, and must provide a copy of the instrument giving that authority to the principal.⁷ No commission is payable where the a contract for the sale or purchase of land or a business is avoided or rescinded under the Act.⁸

Neither the agent nor its officers and employees may have an interest in the purchase of land or a business that the agent is commissioned to sell.⁹ An agent may not pay any part of the commission received except to employees or another agent.¹⁰

2.2.4 Preparation of conveyancing instruments

Part 5 sets out certain requirements for the preparation of conveyancing instruments.

Such instruments may not be prepared by anyone other than a conveyancer or a legal practitioner,¹¹ and in particular may not be prepared by an agent or a person standing in a prescribed relationship to the agent.¹² Conveyancers and legal practitioners must not pay commissions to agents for referring business to them, and agents must not attempt to put clauses into contracts of sale which require the use of a particular person for the conveyancing.¹³

Conveyancers must not act for both parties to the transaction, except as specifically authorised by regulation. The regulations provide that the conveyancer may act for both parties when:-

(a) the transferor and transferee or the grantor and grantee (in this Part referred to as both parties) –

⁶ Section 20

⁷ Section 21.

⁸ Section 22.

⁹ Section 23

¹⁰ Section 24.

¹¹ Section 27

¹² Section 28.

¹³ Section 29.

- (i) are related to one another by blood, adoption or marriage; or
 - (ii) are putative spouses (whether or not a declaration has been made under the Family Relationships Act 1975 in relation to the parties); or
 - (iii) are bodies corporate that are related to each other for the purposes of the Corporations Law; or
 - (iv) are a proprietary company and a person who is a shareholder or director of that company; or
 - (v) are registered as the proprietors of the relevant land as tenants in common or joint tenants with one another; or
 - (vi) carry on business in partnership with each other; or
- (b) the conveyancer has obtained from both parties a written acknowledgment, or general authority, in the form set out in schedule 4.

Even in these circumstances, if there is a conflict of interest, or if one arises, the conveyancer must cease to act.¹⁴

2.2.5 Representations

The Act forbids misrepresentations and false representations, and provides that a contract cannot exclude claims based on misrepresentation, nor can any of the rights conferred under the Act be excluded by contract.

¹⁴ Regulations 17 and 18.

PART C - CONCLUSIONS AND RECOMMENDATIONS OF THE REVIEW PANEL

1. RESTRICTIONS ON COMPETITION - CONDUCT RESTRICTIONS

The following sections of the Report discuss areas of restriction upon competition within the Act and regulations identified by the Review Panel.

The Act restricts the market conduct of all participants in the real estate and related service markets in a number of ways. Each restriction will be highlighted, with background to the restriction provided where appropriate.

1.1 Scope of interest to which Part 2 applies

Part 2, which relates to cooling-off and the provision of particulars, currently applies to the sale of land or a "small business".

The Act currently defines a "small business" as one which is to be sold for \$200,000 or less, excluding the value of any land sold in fee simple under the contract for the sale of the business. Part 2 only applies to a business which comes within this definition. Larger businesses are therefore excluded from the statutory cooling-off period and the requirement to provide particulars. Thus the definition is crucial to the application of these provisions, which restrict competition. If the definition is set too high, there will be an inappropriate restriction on competition.

The submissions indicated that the opposite was the case. Most felt that the current definition was too low, and was therefore not encompassing the range of businesses which it should encompass. For example, the Australian Institute of Conveyancers (hereafter "AIC") pointed out in its original submission that:-

"Many restaurants, pharmacies and newsagents, for example, which would be regarded as 'small businesses' in a colloquial sense, often sell for between \$200,000 and \$500,000 and occasionally for \$1,000,000 or more."

The Law Society of South Australia (hereafter 'the Law Society') said that there was:-

"no real justification for having the requirement for cooling off and provision of particulars in relation to a 'small business' only... The risk of financial loss where the price is more than \$200,000 is obviously greater than in a 'small business' and it is argued that the same protection should be put in place regardless of the size of the business."

While it was noted that the current limit could be raised, it was felt that "any limit would remain arbitrary".

It may be questioned whether there is any necessity to have a special protection applicable to "small business" only. However, as pointed out by the Law Society:-

"there are usually greater risks to purchasers of small business on the basis that they are not often experienced in business or possess good commercial skills and they must be protected from unscrupulous vendors taking advantage of their possible naivety in business."

In addition:-

"in general, proprietors of small businesses do not have the level of business acumen and the legal and accounting resources available to larger businesses." (AIC)

The Real Estate Institute of South Australia (hereafter 'REISA') considered that the purchaser of a small business is more vulnerable because:-

- *"that person is more likely to be buying his or her first business and may have no idea of some of the fundamental questions to ask;*
- *while there are several places and professions that could advise the purchaser on his or her intended investment, many purchasers are totally reliant on the information provided within the Form 2 as the foundation of enquiries;*
- *the Form 2 provides a standardised format/measure of financial and non-financial variables that are important in the assessment of a business. Moreover, it allows the purchaser to compare businesses using the standardised format of the Form 2 as the basis of that comparison;*
- *The Form 2, in some respects, protects a class of purchaser against their own ignorance. The Form 2 is not all encompassing but it may at least prompt the purchaser to enquire further."*

Thus the risks faced by purchasers of small businesses place them in a special position requiring particular protection.

The AIC suggested that no maximum limit be imposed, but that where a business sold for over \$1,000,000 it could be possible to waive one's right to cool-off and a Form 2 without the need for independent legal advice. REISA believed that it would be appropriate to raise the amount to between \$250,000 and \$300,000.

Raising the limit at which a business is defined as a small business would represent an increased restriction on competition, and thus is beyond the scope of this review. However, all submissions certainly appeared to agree that the current limit is not too high. It is therefore the conclusion of the Review Panel that the scope of work to which the Act applies is not too high, and therefore does not constitute an inappropriate restriction on competition.

Conclusion

The scope of work to which the Act applies is not too high, and therefore does not constitute an inappropriate restriction on competition.

1.2 Cooling off period

The Act sets a cooling-off period in relation to the sale of land and the sale of small businesses. This period begins on the date of the provision of required particulars¹⁵ or of the

¹⁵ Note that the particulars provided must be accurate, otherwise the cooling-off period will not begin to run. In *Myles Pearce & Co Pty Ltd v Leuci* the Court held that a failure to provide correct particulars justified cooling-off by the purchaser, notwithstanding that the purchaser's motives for cooling-off were unrelated to the failure to provide particulars.

signing of the contract, whichever is the latter, and is two days for contracts for the sale and purchase of land, and five days for contracts for the purchase of small businesses. However, this cooling off period does not apply in a number of circumstances, including where the purchaser has received independent legal advice prior to entering into the contract, where the sale is by auction, and where land is purchased by a body corporate.

The Act gives the purchaser the right to rescind the contract at any time until the completion of the cooling-off period by giving notice to the vendor that the purchaser does not intend to be bound by the contract. If the purchaser chooses to rescind the contract within the cooling-off period, then the purchaser is entitled to receive back any money paid under the contract other than money paid in consideration of an option to purchase or a deposit, provided that deposit does not exceed \$100.00.

This is, *prima facie*, a restriction on market conduct, because it requires vendors of property to conduct the sale in a certain way.

Some submissions did not consider that this provision was a restriction on market conduct. The Law Society, for example, took the view that the provision only restricts the market conduct of "*unscrupulous vendors who would take advantage of the situation and sell businesses at either an inflated value from their true worth or provide misleading information*". REISA considered that it was not a restriction on market conduct as such, but did put a bias towards auctions (in land sales). However, the Review Panel considers that the mandatory cooling off period is a restriction on the conduct of sales, because it prescribes a certain kind of conduct.

Having determined that the mandatory cooling off period is a restriction on market conduct, the costs and benefits of that requirement must be considered.

The benefit of a cooling off period is that it provides the consumer with the time to analyse this information, and thus is of further assistance in reducing information asymmetry. As was pointed out by the Law Society, in the absence of a mandatory cooling-off period:-

"people can easily be lured into signing a contract for a business based on incorrect assumptions, or information given, misrepresentations as to how good a business it really is, and without having the opportunity to take advice about the terms of the contract and clauses that should be inserted to protect their interests."

A further benefit, as pointed out by the AIC, is that "*consumers are given a chance to reflect on what may be the largest financial transaction into which they will enter*".

The costs of the cooling off period are minimal. The vendor loses a few days during which the land or business could have continued to be marketed, if the purchaser decides not to proceed. However, the vendor gets to retain any deposit paid, up to the amount of \$100.00, which provides some measure of compensation for the loss of the sale.

On balance, the Review Panel does not consider, and no evidence was presented to suggest, that the costs of cooling off are significant. While some submissions pointed to the costs of getting professional advice, the Review Panel does not consider that this is a cost flowing from the requirement for a cooling off period. The choice to seek professional advice is left to the individual.

It is therefore the conclusion of the Review Panel that the benefits of the mandatory cooling off period outweigh the costs. The only alternative would be to make the cooling-off period optional. However, this would reduce the protection of consumers without any great corresponding reduction in costs.

The Review Panel therefore recommends that the mandatory cooling-off period be retained.

Conclusion

The benefits of the mandatory cooling off period outweigh the costs.

Recommendation

The Review Panel recommends that the mandatory cooling off period be retained.

1.3 Abolition of Instalment Contracts

The Act prohibits the use of instalment contracts. Instalment contracts are contracts where part of the purchase price, other than a deposit, is paid before the date of settlement. Any contract which provides for such payment will be void, and any money paid under the contract may be recovered by the purchaser. Again this is, *prima facie*, a restriction on market conduct.

This prohibition was introduced to protect purchasers. Prior to the introduction of this prohibition, vendor and purchaser would sometimes enter into a contract which allowed the purchaser to pay the purchase price in instalments over a period of years. In the interim, the vendor would continue to be hold title and be the registered proprietor of the land. Although it was possible for the purchaser to place a caveat on the title, many did not do so, either because they were unaware that they could or because they simply refrained from doing so. Thus, an inspection of the certificate of title would only reveal that the vendor held title to the land, and would not reveal the interest of the purchaser, even where the purchaser had paid almost the full purchase price. There were instances where the vendor then mortgaged the land, and eventually failed to keep up the mortgage payments, and the mortgagee exercised the right to sell the land. The original purchaser lost both the money paid and the land which was being purchased.

The Law Society submitted that the prohibition on the use of instalment contracts is a restriction on market conduct, in that it:-

"deems certain types of transactions illegal, even if that transaction could be beneficial to both parties."

The costs were considered to be:-

"removal of some types of transactions which, it is suggested, could be beneficial to both parties - including purchasers (provided purchasers are given appropriate protection)."

The AIC, on the other hand, was firmly opposed to the use of instalment contracts. It submitted that that market conduct of vendors and agents is restricted 'very little' and that

there are no adequate alternatives, in particular, rejecting the suggestion that a caveat could be lodged. The benefits were considered to be that the restriction 'removes the potential for fraud'.

REISA concurred with the approach taken by the AIC. However, it agreed that there were some costs associated with the blanket prohibition, namely:-

"inflexible paying arrangements may prevent vendor and purchaser from carrying out a business deal in the manner that they consider appropriate in the circumstances; eg 'hire purchase' type arrangements."

REISA was also concerned about how default under the terms of the instalment contract would be governed. It pointed out that:-

"It may be unconscionable for a purchaser to forfeit the right to the interest in land after paying 90% of the purchase price over a period of time and then forfeiting that right on the basis of a default."

The Consumers Association of South Australia (hereafter 'CASA') submitted that:-

"Instalment contracts would allow consumers to purchase property possibly without a loan thus giving them greater financing options. Requiring a caveat may be a restriction to conduct but it would mean more consumers can obtain property without the restrictions imposed by credit providers."

However, the submission of the AIC, that there is no evidence of consumer demand for the reintroduction of instalment contracts, and that there is now far greater choice in terms of obtaining a mortgage, is a powerful one.

One alternative that was considered was to allow instalment contracts, but to require a caveat to be lodged in favour of the purchaser wherever such contracts were entered into. Alternatively, a requirement to disclose the availability of the caveat and the ramifications of not lodging a caveat could be used to protect consumers. However, one difficulty with the latter option would be ensuring that the disclosure requirement is framed so as to ensure that consumers are genuinely made aware of the existence of a caveat. Another difficulty with either option would be that where property is sold privately, and neither party is aware of the existence of the caveat requirements, then despite the requirement, it may be that no caveat is lodged and the purchaser is left unprotected.

A further difficulty with the use of caveats is that it does not deal with the question of default. Even if the purchaser were to lodge a caveat, that will be of no use if the purchaser, having paid 90% of the purchase price, becomes unable to pay. The issue of what happens if the purchaser defaults is an important one, and one which does not lend itself to easy resolution.

On balance, the Review Panel considers that the benefits of restricting instalment contracts, which in the past were notoriously imbalanced, outweigh the costs of reduced flexibility. While there may be some circumstances in which instalment contracts could be used without detriment to the purchaser, the Review Panel has not been able to establish a means by which it could be ensured that this was done. In the light of the increased competition in the mortgage market, the desirability of and necessity for instalment contracts in general terms may be open to question. In reality, it is probable that no great costs are incurred by

an inability to enter into instalment contracts. Although the Review Panel indicated in the Draft Report that it would be open to suggestions as to how consumers could be protected were instalment contracts reintroduced, no suggestions were forthcoming. The Review Panel therefore considers that the restriction on instalment contracts should be retained.

Conclusion

The benefits of restricting instalment contracts outweigh the costs.

There are no viable alternatives to the prohibition on instalment contracts.

Recommendation

The Review Panel recommends that the prohibition on instalment contracts be retained.

1.4 Requirement to provide particulars

The Act requires a considerable body of information to be provided to a prospective purchaser of land or a small business prior to settlement. The information required to be provided is set out in the regulations, and includes:-

- in relation to land - details of encumbrances on the title, dealings in the title over the last twelve months, environmental particulars relating to the property and other orders or requirements of such property;
- in relation to businesses - details of takings, gross income, costs, trading profit/loss and net profit/loss, details of any encumbrances or interests held by third parties over other assets that will be sold with the business, including stock in trade, plant and equipment, details of any lease, tenancy agreement or licence and details of employees and Work Cover.

Provision of this information initiates the cooling-off period.

Failure to provide the required information is an offence, punishable by a fine. Where a vendor has failed to provide the information, or has provided incorrect information, and the purchaser has been unfairly prejudiced as a result, the purchaser can make an application to have the contract avoided, be awarded damages and any other orders that are just in the circumstances. Additionally, failure to provide the correct information will enable the purchaser to cool off. In *Myles Pearce & Co Pty Ltd v Leuci & anor*¹⁶ the Full Court of the Supreme Court held that a failure to provide all the relevant particulars correctly would result in an invalid statement, giving rise to a right to cool off, even where the reason for such cooling-off was unrelated to the failure to provide the information.

The objective of this requirement is to ensure that purchasers of land or small businesses are able to make an informed decision before the property is passed irrevocably. However, requiring the provision of this information restricts the market conduct of vendors and their agents and may increase their costs.

The Law Society submitted that:-

¹⁶ Unreported, Doyle CJ, Duggan and Bleby JJ 4 August 1997; 12 September 1997, S6360.

"The fact that a vendor has to provide certain information to a purchaser is a restriction on a totally free market."

while the AIC felt that:-

"the requirement means properties cannot be marketed immediately, and the costs to the vendor are lost if the property is not sold."

REISA felt that current requirements should be *"scrapped completely"*, while CASA also acknowledged that they are restrictions on competition.

1.4.1.1 What are the costs of the restriction?

The direct costs of this requirement are \$151.00 for non-strata title searches, and \$201.00 for strata title searches. The Law Society noted that *"the cost of searches through government authorities is spiralling"*.

The indirect costs are any additional fees charged by agents as a result of preparing a Form 1 as well as the cost of updating searches to maintain the accuracy of the information supplied.

The costs of this restriction appear to fall primarily on vendors. The Law Society submitted that:-

"Vendors' costs are increased through the cost of searches themselves, and the cost of agents, conveyancers, etc in compiling them, completing the forms, arranging signing and service."

The AIC said that:-

"Vendors' costs are increased by the cost of the searches which have no value if the property is not sold or not sold within a reasonable period of receipt of responses to the searches."

And REISA submitted that:-

"Vendors' costs are increased. This is partly due to the costs of the searches themselves which, if lowered, would provide a saving to the consumer. The additional cost is in time and money associated with the preparation of the Form 1 and Form 2 documents which are unnecessarily long, complicated and open to transcription error."

1.4.1.2 What are the benefits of this restriction?

The benefits of this restriction are to be found in addressing risks to consumers and decreasing the level of information asymmetry between vendor and purchaser.

The risks to purchasers if they are not provided with this information were considered to be that:-

- *"a purchaser could buy a property without knowing much about it"* (The Law Society)

- *“purchasers may have a misunderstanding as to the nature and viability of the land or business being purchased” (REISA)*

The AIC, on the other hand, submitted that while in some circumstances, very great risks are posed to purchasers, in most cases:-

“there are minimal risks, which can be demonstrated by the fact that information available demonstrates that no searches are being conducted on a significant amount of properties.”

The benefits of requiring the particulars to be given were felt to be:-

- *“the requirement for particulars to be given makes the process more efficient, in the end” (the Law Society)*
- *“certainty. Everyone knows what they are and vendors are generally concerned about providing false information because they know that the provision of accurate information is a statutory requirement.” (AIC)*
- *“they aid in consumer protection by addressing the market failure of information asymmetry.” (CASA)*

Those making submissions were asked to identify what difficulties purchasers would have in acquiring this information if the Act did not require its provision. Submissions were divided on this. The Law Society considered that:-

“Most purchasers properly advised by conveyancers would revert to issuing requisitions on title.”

The Law Society felt that most of the information required could be obtained by purchasers from the relevant authorities, but submitted that *“there is some information... which has to be obtained from the vendor”*.

The AIC said that:-

“Purchasers would need sufficient time to obtain searches which would slow the process. In addition, there could be difficulty in ascertaining when the cooling off period commence”.

REISA thought that purchasers would presumably face no more difficulty in acquiring the information than the vendor. However, REISA indicated its belief that:-

“it is not unreasonable for vendors to provide the search information.”

Most submissions felt that prudent purchasers would involve accountants, conveyancers or lawyers in the purchase process. These people would normally obtain the relevant information on behalf of their clients, but, as submitted by the AIC, *“it would be likely to prolong negotiations and increase costs”*.

The requirement to provide particulars helps to address information asymmetry. The vendor of a property knows much more about that property than the purchaser. This information asymmetry is partially addressed by requiring all vendors to provide particulars. This requirement is particularly relevant because of the magnitude of the purchase involved.

1.4.1.3 Do the benefits outweigh the costs?

While there are obviously some costs involved in acquiring or providing this information, the Review Panel considers that the benefits of requiring this information to be provided outweigh the costs. This is because purchasers of property are in a position of considerable information asymmetry when purchasing property. The best way for this information asymmetry to be addressed is to require vendors to provide information about the property. If vendors were not required to do so, the costs of acquiring the information would probably increase, and some purchasers would be left without the information and may make less than optimal decisions as a result.

1.4.1.4 What are the alternatives?

There do not appear to be any viable alternatives. The nature of the information sought is such that the vendor is in the best position to provide it. The existence of a statutory obligation increases the probability of the vendor providing accurate information.

Conclusion

The benefits of requiring the provision of particulars outweigh the costs, and there are no viable alternatives.

Recommendation

The Review Panel recommends that the requirement to provide particulars is retained.

1.5 Use of prescribed forms

The Act also requires the vendor to use specific forms for notification of the prescribed particulars. This may also increase the costs to business. It may be possible to specify the required content and leave the construction of the form up to the individual. On the other hand, use of a standard form may ensure that all particulars are addressed and that the information is given to the purchaser in a way that is clear and precise.

The Review Panel considers that provided the requirement to provide prescribed particulars is justified, the requirement to provide those particulars on a prescribed form is only a trivial restriction on competition.

However, if it is not accepted that this is a trivial restriction on competition, the Review Panel further considers that there are a number of benefits in requiring the use of a prescribed form. These benefits include that:-

- the information is presented in a format which is relatively easy to understand, even if the purchaser does not get advice from a lawyer, conveyancer or accountant. While REISA argued that the requirement to use prescribed forms means that purchasers are given a 'filtered' version of the searches, rather than the source documents themselves, the Review Panel considers that it is for precisely this reason that the requirement to

provide particulars on prescribed forms is of benefit to purchasers. A purchaser confronted with the initial source documents may well have little comprehension of their meaning. The forms, on the other hand, condense this information into a more readily comprehensible format. This means that purchasers are neither presented with information that they cannot understand, nor given so much information that it is difficult to discern what is relevant and what is not.

- As pointed out by the AIC in its submission, other practitioners, such as legal practitioners and conveyancers, are familiar with the forms and know what to look for. If every practitioner used individually designed forms, it may take longer for legal practitioners and conveyancers to distil all relevant information, thereby reducing efficiency and increasing the overall cost of the transaction.

The AIC was unable to provide an accurate estimate of the costs of using the prescribed forms.

REISA, on the other hand, was firmly opposed to the use of prescribed forms. It proposed an approach whereby the vendor and land agent *"would provide the Section 7 searches from the Department of Employment Housing and Aboriginal Affairs (sic) and the relevant local council"*. Information within the particular knowledge of the vendor would need to be given separately.

Its submission was that the benefits of this approach are that:-

1. *"It ensures that vendors and land agents undertake the appropriate searches.*
2. *It avoids the possibility of transcription errors from the Section 7 searches to the Form 1 document, which, in turn, will lead to potential for purchasers to cool-off at a whim.*
3. *Purchasers are given the primary source materials before the sale and not a filtered version prepared by the vendor or land agent.*
4. *The costs to the vendor and land agent for the production of the prescribed forms are greatly reduced.*
5. *The purchaser is provided with all information concerning the property."*

The AIC also suggested possible alternatives. Firstly, it suggested that:-

"It might be possible to change the system so that the vendor was not required to provide information, in which case it would be up to the purchaser to make the relevant searches. In this case, the searches would be paid for once, not twice or more as under the present system."

In the alternative, it was suggested that the present system could be "fine-tuned". A problem with the present system was identified as being that:-

"the purchaser has to undertake further searches to ascertain whether the information provided by the vendor is correct. The reason for this is that the forms must be accurate as at the time of service. The searches, however, may be months old or may not have been done at all. As a result, a purchaser's conveyancer feels obliged to check the accuracy of the form. This problem could be overcome by compelling the agent to attach a copy of the searches to the disclosure statement with the proviso that the searches should not be more than fourteen days old. This could be achieved by requiring government departments to allow the vendor the ability to recheck the accuracy of the information which was provided to the agent and for that update or verification to be attached to the form 1."

The Review Panel made inquiries with the Department of Environment, Heritage and Aboriginal Affairs, and was informed that once an initial enquiry has been made in respect of a property, a refresher service is available, albeit at a cost of \$26.00.

One alternative which the Review Panel considered was to require use of the prescribed forms, but to allow a person who has developed an alternative form which addresses all the particulars to seek Ministerial exemption. However, there were two problems with this option. The first problem is that changes to the required particulars may not be reflected in exempt forms. The second problem is that the use of various forms would reduce the benefits of practitioners' familiarity with the forms. As pointed out above, it would be harder, and therefore less efficient, for practitioners' to distil all relevant information.

A final issue which was raised in the early stages of the review relates to the interaction of the Form 2 and the Franchising Code of Conduct. The Franchising Code of Conduct is a mandatory code under the *Trade Practices Act 1974 (Cth)*. The Review Panel considered the possibility of releasing vendors from their obligation to provide particulars under the *Land and Business (Sale and Conveyancing) Act* where they were already obliged to provide particulars under the Franchising Code.

The Review Panel first raised the issue in the Issues Paper. In response, the Law Society submitted that "additional costs are significant", when complying with both requirements. The AIC, on the other hand, felt that "it would be too confusing to have different rules of disclosure depending on whether a business was a franchise or not". However, the Review Panel considered that as vendors are required to provide the required particulars wherever a business is a franchise, having made the first step of determining whether a business was a franchise or not, it should not be too difficult to then determine the relevant particulars to be provided.

REISA believed that "there may be a need to examine the overlap where a small business is a franchise".

The Review Panel compiled the following table, which indicates a comparison of disclosure requirements under the *Land and Business (Sale and Conveyancing) Act* and under the *Franchising Code of Conduct*:-

<ul style="list-style-type: none"> • <u><i>Land and Business (Sale and Conveyancing) Act Form 2 (disclosure document for the sale of a business)</i></u> 	<ul style="list-style-type: none"> • <u><i>Franchising Code of Conduct subclause 6(2) Annexure 2 (disclosure document for the transfer of a franchise)</i></u>
	<ul style="list-style-type: none"> • Franchisor's name, ACN or ABRN, business address, phone number
<ul style="list-style-type: none"> • Name of vendor 	<ul style="list-style-type: none"> • Franchisee's name, ACN or ABRN, business address
	<ul style="list-style-type: none"> • Name and business/residential address of each director of the franchisee.
<ul style="list-style-type: none"> • Length of time vendor has carried on business. • Length of time vendor has carried on business at the present location 	<ul style="list-style-type: none"> • Summary of business experience in last 10 years of franchisee and each director of franchisee, including length of experience in operating the franchised

<ul style="list-style-type: none"> • Date vendor commenced in the business. 	business.
<ul style="list-style-type: none"> • Location of business 	<ul style="list-style-type: none"> • Description of franchised business and its business address
	<ul style="list-style-type: none"> • Copy of existing franchise agreement of franchisee
<ul style="list-style-type: none"> • Name of registered proprietor in fee simple or location at which business presently carried on. • Name of person who granted vendor lease or licence to occupy that location. • Particulars of the lease (including adjustments, rates and taxes, etc) • Written notices relating to terms of lease not complied with • Written notices served on landlord/licensor which may affect business 	<ul style="list-style-type: none"> • where transfer of lease is proposed - copy of lease/agreement to lease, or summary of conditions of each lease/agreement to lease
<ul style="list-style-type: none"> • depreciated value of plant and equipment • details of goods to be included/not included in the sale 	<ul style="list-style-type: none"> • Details of assets of franchised business
<ul style="list-style-type: none"> • trading statement for last 3 financial years 	<ul style="list-style-type: none"> • profit/loss statements and balance sheets of franchisee or franchised business for last <u>2</u> years
	<ul style="list-style-type: none"> • Summary of obligations in relation to franchised business to be assumed by transferee
	<ul style="list-style-type: none"> • Summary of conditions under existing franchise agreement
<ul style="list-style-type: none"> • Details of employees, including Workcover Statement (if applicable) (including position/ functions, name (if work over 20 hours), relationship to vendor, days per week, hours per day, rate of pay, leave entitlements 	<ul style="list-style-type: none"> • Details of employees in the franchised business, including name, position, length of service, rate of pay, outstanding obligations of franchisee.
	<ul style="list-style-type: none"> • Any other information that franchisee wants to give
<ul style="list-style-type: none"> • details of any directions given under the <i>Food Act</i> prohibiting the use of unclean/insanitary equipment for manufacture, transportation, storage or handling of food for sale. 	
<ul style="list-style-type: none"> • Details of plant or equipment requiring exemption under the <i>Environment Protection Act</i> (relating to ozone) 	
<ul style="list-style-type: none"> • Details of asbestos in plant 	
<ul style="list-style-type: none"> • Details of maintenance of business incl. Circumstances adversely affecting the 	

business, average weekly sales, daily hours of trading	
• Asking price of business	
• Estimate value of stock	
• Whether business operates as company, partnership, sole trader, association etc	
• Last income tax return lodged	
• Where land is being sold/title passing, all the details of Schedule 2	

As can be seen from this comparison, while there is some overlap between the particulars required under the two regimes, there are a number of items which must be detailed under the *Land and Business (Sale and Conveyancing) Act* which are either not dealt with at all or not dealt with as comprehensively under the *Franchising Code of Conduct*.

Further, there may be problems where there is uncertainty as to whether the vendor is required to comply with the Code. Currently, only corporations or persons engaged in interstate trade and commerce are required to comply with the Code, because of constitutional limitations. If a natural person in South Australia wished to transfer their interest in a franchise to another natural person in South Australia, the Code may not apply to them. If, however, they were under the misapprehension that it did, and supplied the disclosure document under the Code rather than the Form 2, then the consumer may be put at risk. They would not have the protection of the Code, since the provision of the disclosure documents would not be enough to bring it within the Code. At the same time, they would not have the protection of the Act, unless specific provisions were enacted to ensure that they would retain that protection. This could raise complicated issues of redress.

Another difficulty relates to the cost of enforcing rights under the Code. Currently, actions in relation to the Code must be made under the *Trade Practices Act*, in the Federal Court. Actions under the *Land and Business (Sale and Conveyancing) Act* may be taken in any court, depending on the amount in dispute. This is a less expensive option for the purchaser. Denying the purchaser this option may diminish the purchaser's rights.

The Review Panel has therefore concluded that the requirements of the *Franchising Code of Conduct* do not adequately address all the information which it is desirable to have provided about businesses generally.

Conclusion

The requirement to use a prescribed form is a trivial restriction on competition.

1.6 Restrictions in relation to the sale of subdivided land

The restriction on representations in relation to subdivided land restricts the way in which agents may market particular types of land.

This restriction arose out of a practice which was occurring in the 1920's, and which was the original impetus for regulation of land agents. In the 1920's there was a boom in suburban land, and in particular, in subdivided land. As a result, many traders move into the area of real estate. A number of these traders were preying on farmers who would be tricked into buying subdivided land by representations regarding future profits. In the second reading speech for amendments to the *Land Agents Act 1925*, the then Attorney-General stated that :-

*"It is common practice for a salesman, in order to gain the confidence of a prospective purchaser and thus induce him to buy land at an inflated price, to offer to buy or obtain a buyer for some land already owned by the purchaser, or to promise the re-sale at a profit of any land which the purchaser buys. In many cases a purchaser is induced by these promises or representations to buy land, only to find that he has been misled by some worthless document which he wrongly thought to be a contract to buy some of his old land at a profit, or by the valueless promise of a salesman against whom he has no prospect of enforcing any claim for performance or damages."*¹⁷

It appears that this practice was particularly directed towards farmers.

Since 1925, the development of the law of fair trading and misrepresentation has provided the consumer with substantial protection against the types of practices outlined above. It may well be that these laws provide the consumer with sufficient protection, without necessitating specific regulation.

The Law Society submitted that it "*presumed that it has stamped out the practice it was aimed at and there appears to be no strong reason to change it*". The AIC, on the other hand, felt that while the risks posed to the consumer in the sale of subdivided land still exist, the prohibition in the *Land and Business (Sale and Conveyancing) Act* was "*probably superfluous*" in the light of the provisions of the *Misrepresentation Act* and the *Fair Trading Act*. REISA did not believe that any prohibition was necessary, while CASA felt that consumers were adequately protected by the *Fair Trading Act* and the *Misrepresentation Act*.

The Review Panel gave serious consideration to recommending the repeal of these provisions. However, on balance, the Review Panel considers that the retention of these provisions is justified. They deter market conduct which would see agents inducing a purchase of property on the grounds that he or she will obtain a purchaser for the existing property of the purchaser. While other Acts may cover the same ground, these provisions make it expressly clear that such representations are prohibited. It places beyond doubt that the making of such representations is inappropriate conduct for an agent. This is a trivial restriction on agents'/vendors' conduct. There are no significant costs flowing from the restriction, and there is a clear benefit to consumers in the prevention of misconduct. The Review Panel therefore recommends that these provisions be retained.

Conclusion

¹⁷ SA Parliamentary Debates, August 17 1927, p410. For further detail regarding the type of transaction, see pp 406-409.

While laws dealing with misrepresentation deal to some extent with the problems relating to subdivided land, the Review Panel considers that the benefits of the restriction on representations relating to subdivided land outweigh the costs.

Recommendation

The Review Panel recommends that sections 18 and 19 be retained.

1.7 Requirements of the agent in the agent/principal relationship

The Act requires an agent to provide copies of all offers, contracts or agreements that are signed by a person to that person. Failure to do so is punishable by a fine.

The Law Society did not agree that *“it is a restriction of market conduct to ensure that a party to a contract is given a copy of the contract”*. The AIC felt that it was only a minimal restriction, and one which is *“of great benefit to purchasers who may refer to the documents”*. It was submitted that the costs of additional printing would be *“relatively small”*, and that, in any case, *“any inconvenience to the land agent is outweighed by the fairness to the parties”*. REISA agreed that *“the benefits of the restriction outweigh the costs”*, which were considered by REISA to be only *“minor financial cost and time cost in producing copies and providing them”*.

The Review Panel considers that this is a trivial restriction on agents' conduct. It is therefore unnecessary for the Review Panel to analyse the costs and benefits of the restriction.

Conclusion

The requirement that an agent provide copies of all offers, contracts or agreements that are signed by a person to that person is a trivial restriction on competition

1.8 Requirement to have written authority to act

The Act prohibits an agent acting unless that agent has written authority to do so. Again, failure to do so is punishable by a fine.

The Law Society submitted that:-

“some vendors have unfairly taken advantage of agents through this section. The vendor will say to the agent 'you get me an offer I like, and I will sign an agency agreement'. The vendor then either finds out who the buyer is before signing the agency agreement, or screws the agent down on commission as the agent is so keen to close the deal”.

However, it concluded that:-

“there are benefits to the restriction, as it provides certainty to the agency arrangement. The restriction should be maintained.”

The AIC considered that this requirement only restricts the market conduct of land agents "to a very small degree". It was thought that "greater problems would arise if there were no written authority to which both parties could refer. ...the restriction creates certainty for both parties", and that the cost would be "outweighed by the cost of resolving disputes where a written authority was not obtained".

REISA submitted that:-

"the requirement to provide written authorisation before acting may restrict the conduct of agents in the market. There are circumstances where it may be impractical for a vendor to provide written instructions before a property is marketed for sale. Verbal instructions are quite common. In some cases, it may be more appropriate for written authorisation to be obtained at some point in the process."

The Review Panel considers that this is a trivial restriction on agent's conduct. It is therefore unnecessary for the Review Panel to analyse the costs and benefits of the restriction.

Conclusion

The requirement to have written authority to act is a trivial restriction on competition.

1.9 Restriction on agent's acting if interest in property

Agents must not have an interest in the purchase of a property that they have been commissioned to sell. This is a clear restriction on the conduct of the agent. It is one, however, which may be easily justified on the grounds of preventing conflicts of interest and the potential for consumer detriment which may result from such conflicts.

It may be, however, that such conflicts could be dealt with in other ways. One example of an alternative would be to require agents to declare any interest that they held in the purchase of the property. Assessment would need to be made of the extent to which this would protect the consumer.

The Law Society submitted that:-

"on balance, there appears to be no reason to change the laws relating to agents purchasing property they have been commissioned to sell."

REISA thought that:-

"from the number of exemptions that are granted under Section 23, it would appear that there is little restriction on market conduct at all"

The benefit was considered to be that "it removes any doubt of unfair trading in the eye of the vendor", while the cost was that "an application must be made to the Minister". REISA suggested that the only way consumer could be completely protected is if the agent or employee provided an independent valuation for the property. It was also suggested that there is other Federal and State legislation dealing with unconscionable conduct that will adequately deal with this situation (eg Trade Practices Act and Fair Trading Act).

CASA submitted that the restriction is justified. It was considered that:-

“an agent with an interest has too much at stake and may orchestrate an unfair sale if they were to participate in the negotiations. Declaring their interest may be sufficient to protect consumers against the chance of an unfair deal as they would be able to choose whether or not to continue using the agent.”

The restrictive nature of this provision is somewhat ameliorated by the fact that an exemption may be granted to an officer or employee of an agent who has an interest in property that the agent has been commissioned to sell.

While there may be circumstances where there are costs as a result of this restriction, in most cases the benefit derived by the restriction in terms of avoidance of conflict of interest clearly outweighs the costs of its existence. In those circumstances where there is a good reason to allow agents and sales representatives to have an interest in the property that they have been engaged to sell, it is always possible to seek an exemption.

Conclusion

The benefits of requiring agents and sales representatives not to have an interest in the purchase of property that they have been commissioned to sell outweigh the costs.

Recommendation

The Review Panel recommends that the restriction on agents and sales representatives having an interest in property that they have been commissioned to sell be retained.

1.10 Restriction on payment of commission to person other than agent

The Act prohibits the payment of the whole or any proportion of the commission or other consideration to which the agent is entitled for services as an agent to a person other than an officer or employee of the agent or a registered agent.

This section was initially intended to prevent the practice of licensed land agents allowing salespersons who were not employed by the agent to use the agent's license as a front. However, it has also prevents the use of undisclosed 'kick-backs', particularly between agents and conveyancers.

This is an intermediate restriction on the organisation of a business. Recent concerns have been raised with the Office of Consumer and Business Affairs in relation to this issue. In particular, difficulties may arise with this section where independent contractors are engaged to provide real estate services on the basis of a shared commission, where such contractors are not themselves registered agents.

The issue of non-employee sales representatives was discussed in the National Competition Policy Final Report into the *Land Agents Act 1994*. The *Land Agents Act 1994* allows that sales

representatives must be employees of an agent.¹⁸ This issue has relevance to the prohibition on commission sharing in so far as the present regime requires sales representatives to be employees. It is on the basis of their employee status that sales representatives are presently entitled to share commission.

An alternative "contractor" sales representative model was considered by the Review Panel in that Report. This model would allow for non employee sales representatives, and therefore has implications for the prohibition on commission sharing.

However, most submissions were opposed to the idea of allowing sales representatives to operate on a contractor rather than an employee basis. The Law Society submitted that:-

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

while REISA submitted that:-

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

On this issue, the Real Estate Employers' Federation of South Australia submitted that "the structure in place has worked successfully for many years" and that:-

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

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

The Review Panel concluded in that Report that there were no viable alternatives to the requirement that sales representatives be employees and that the benefits of this prohibition outweighed the costs..

For the purposes of analysis of the prohibition, the Review Panel considers that the findings in the *Land Agents Act 1994* Final Report in relation to sales representatives have an on flow effect. If the independent contractor model is not a viable alternative, then no competition restriction issues arises in relation to the prohibition in terms of sales representatives. It is simply the case that they are required to be employees under the *Land Agents Act 1994* and can therefore share commission.

In the Issues Paper and Draft Report for this Review, the Review Panel raised the possibility of removing the restriction on commission sharing. In response, the AIC submitted that in practice, this would lead to the payment of secret commissions, and would encourage

¹⁸ *Land Agents Act 1994* section 11

“coercion of consumers to use third parties who might benefit from payment by an agent”. Thus the benefit of the restriction is perceived to be that:-

“it prevents arrangements between agents and third parties which, in practice, would not be properly disclosed to consumers which would result in coercion to use the services of third parties.”

REISA submitted that the restriction:-

“avoids secret payments being made to individuals and a degree of certainty that the land agent is acting in the client's best interests.”

CASA submitted that “the statute may better reflect its intention if it includes payments to shareholders, other beneficiaries of a company and employees from time to time”.

The Review Panel acknowledges that there is a further benefit of the section in the reduction of undisclosed commissions. REISA was particularly concerned that the repeal of this restriction would result in spotter's fees and other kickbacks becoming common within the market. It was pointed out that many of these sorts of kickbacks will never be known or disclosed to the client. There is the potential for commissions to increase if various percentages of the commission are paid by way of kickback or other fee to third parties to the transactions. This would be to the disadvantage of vendors who negotiate the commission with the agent. The Review Panel considers that REISA's argument is particularly powerful given that it is their members who would stand to benefit from the repeal of this provision.

The Review Panel considered enacting a specific disclosure requirement, rather than by the indirect method of limiting the sharing of commissions, under which agents would be required to disclose any benefits received from or given to a third party in exchange for a referral of business or other benefit in relation to the client. An informed consumer could then decide whether to continue to make use of that agent's services or to engage another agent. However, the Review Panel is concerned that nonetheless undisclosed commissions would be more likely to occur in the absence of this provision, as it would be much harder to detect such commissions.

No submissions pointed to any serious restrictions on competition in practice arising from this restriction.

It is therefore the recommendation of the Review Panel that this section be retained.

Conclusion

The benefits of the prohibition on the sharing of commissions outweigh the costs.

Recommendation

The Review Panel recommends that section 24 be retained.

1.11 Restrictions on relationship between agent and conveyancer

The Act prohibits the preparation of conveyancing instruments by agents or people in a prescribed relationship to an agent, which includes employees, partners and employees or beneficiaries of bodies corporate of which the agent is a director, shareholder¹⁹, employee or in a position to control the conduct of the companies affairs. The only people who are exempt from this provision are those who have been continuously employed by the agent since 1973.

This is a significant restriction of the conduct of both agents and conveyancers. It places limitations on the way they can structure their business arrangements, thereby reducing the flexibility to introduce structures which may yield economies.

It is also a significant restriction on the conduct of those who are qualified as both land agents and conveyancers. Effectively, it means that a person may only operate as one or the other.

However, there are a number of benefits which flow from this restriction. For example, restricting the relationship between conveyancer and agent may extend the choice consumers have in selecting a conveyancer. Although it may restrict competition on the one hand, it may encourage it on the other by providing consumers with a realistic choice of conveyancer and preventing anti-competitive behaviour.

It may also protect consumers from the potential conflict of interest where a conveyancer is acting in the same transaction as the agent. Once the sale is complete, the agent's and client's interests may diverge, leaving the conveyancer in a position of conflict of interest.

The Law Society saw this as a "significant" restriction. However, it considered that:-

"there is always a possibility of a conveyancer for the vendor having to give advice concerning the conduct of the agent or the documents prepared by the agent. It cannot be envisaged how a conveyancer, who either is the agent as well, or is employed by the agent, would not be in a serious conflict in these circumstances. Also it seems certain that removing the restriction would lessen competition in practice, as consumers would have even less choice as to their conveyancer"

The Law Society considered that there would be "few economies achieved if agents and conveyancers were able to conduct their respective business arrangements [jointly]".

Finally, it was submitted that:-

"the risks posed to consumers where there is a prescribed relationship are greater than any alleged restriction on competition. The risks of conflict of interest and choice of conveyancer already exist where there is a 'quasi-prescribed relationship' which often exists currently between conveyancers and agents. If this were to be officially endorsed, the risks would increase and, arguably anti-competitive behaviour would increase."

¹⁹ This does not apply to public companies.

The AIC submitted that *“any restriction imposed on the relationship between agents and conveyancers is more than offset by the avoidance of conflicts of interest”*.

The risk posed to consumers in the absence of such a restriction is that:-

“vendors and/or purchasers could not expect independent advice to be provided by an employed conveyancer. An agent might wish to effect a settlement regardless of a party's rights, and it is unlikely that this would be challenged by an employed conveyancer.”

Thus it was considered that the restriction:-

“promotes consumer choice, individual representation of consumers, and the avoidance of conflicts of interest.”

It was submitted by the AIC that in Western Australia, where there is no restriction on agents owning settlement agencies (the equivalent to conveyancers), there:-

“appears to be no difference between the charges to consumers where the settlement agency is independently owned, or where it is owned by a real estate agent”

REISA submitted that the benefits of this restriction are that *“unbiased and professional attention to the consumer's obligations is given by independent operators”*.

CASA considered that *“prohibiting a person from acting as both agent and conveyancer seems to have been justified on the basis of greater consumer choice and reducing any conflict of interest”*.

The Review Panel considers that this restriction is of significant benefit in promoting competition. In the absence of the provision, it would be very easy for agents and conveyancers to engage in anti-competitive conduct, and it would be very difficult to ever establish that such conduct took place. There would always be an inference that the agent had influenced the consumer to use a conveyancer with whom the agent was in a prescribed relationship, but it would be very difficult as an evidentiary issue to ever establish that such influence had taken place.

Thus the conclusion of the Review Panel is that the benefits of this restriction outweigh the costs. The Review Panel cannot see any viable alternatives to this restriction. Although notifying the consumer of the prescribed relationship may be one alternative, this would still not eliminate the element of pressure being placed on the consumer. There is anecdotal evidence of such conduct occurring in the current marketplace. If there were no restriction, it is likely that this situation would be exacerbated.

Conclusion

The benefits of restricting the relationship between agents and conveyancers outweigh the costs.

There are no viable alternatives to restricting the relationship between agents and conveyancers.

Recommendation

The Review Panel recommends that the restriction on the relationship between agents and conveyancers be retained.

1.12 Restriction on procuring or referring conveyancing business.

The Act restricts the way in which conveyancers may acquire business by prohibiting the procurement of business by conveyancers or legal practitioners or the referring of business by agents, where the agent receives any form of consideration for doing so. Agents also must not procure a document requiring the use of particular conveyancer or legal practitioner in the preparation of the conveyancing instruments.

This is an intermediate restriction on the conduct of conveyancers, legal practitioners and agents.

The Law Society submitted that:-

"there is already in existence a significant practice of procurement or referral of business in contradiction with the provisions of the Act... [which] has the effect of significantly restricting consumers choice as to whom to instruct and restricts competition. The restriction against this behaviour should remain to protect consumers from unscrupulous practices and to increase competition based on price and quality of service."

The AIC pointed out that "land agents may still refer business to conveyancers or solicitors, but not for consideration". It perceived the benefits of the restriction as being that:-

"it would prevent payments to third parties which were not properly disclosed to the consumer. In addition, consumers are not coerced by land agents in the choice of a conveyancer and have the ability to make their own choice in their own time."

and that

"consumers do not have to make an instant decision under pressure".

REISA considered that the benefits of this restriction were that:-

"independent conveyancing is a viable financial business which would not exist if the present rules were to be relaxed or withdrawn."

The costs were considered to be that:-

"it may encourage 'secret' arrangements between agents and conveyancers which should otherwise be disclosed."

CASA submitted that:-

"prohibiting procurement of business and referrals for consideration is a consumer protection that must endure. Allowing these practices for consideration promotes anti-competitive conduct within the industry."

The Review Panel considers that this restriction is easily justified, on the basis of the reasoning for restricting the relationship between agent and conveyancer. It prevents conflicts of interest arising, which can result in significant consumer detriment. There are no viable alternatives to this restriction, as any disclosure requirement fails to address the issue of pressure being placed on the consumer.

Conclusion

The benefits of restricting the procurement and referral of conveyancing business outweigh the costs.

There are no viable alternatives to restricting the procurement and referral of conveyancing business.

Recommendation

The Review Panel recommends that the restriction on the procurement and referral of conveyancing business be retained.

1.13 Restrictions on the conduct of the conveyancer (dual representation)

The Act restricts the conduct of the conveyancer by prohibiting dual representation except in certain defined circumstances. Dual representation is permitted where:-

- the transferor and transferee or the grantor and grantee ³/₄
 - (i) are related to one another by blood, adoption or marriage; or
 - (ii) are putative spouses (whether or not a declaration has been made under the *Family Relationships Act 1975* in relation to the parties); or
 - (iii) are bodies corporate that are related to each other for the purposes of the *Corporations Law*; or
 - (iv) are a proprietary company and a person who is a shareholder or director of that company; or
 - (v) are registered as the proprietors of the relevant land as tenants in common or joint tenants with one another; or
 - (vi) carry on business in partnership with each other; or
- the conveyancer has obtained from both parties a written acknowledgment, or general authority, in the form set out in schedule 4 of the regulations.

This requirement aims to prevent conflicts of interest, which could lead to the interests of one consumer being elevated to the detriment of another consumer.

Most submissions considered that the current restriction does not amount to much of a restriction in practices, as conveyancers normally obtain the authorities prescribed by Schedule 4 of the regulations.

The Law Society advised that it has agreed with the AIC and REISA that 'the practice of dual representation should be outlawed except in the circumstances where there is a prescribed relationship between the parties as currently defined'. The submitted reason for this is:-

“the prevention of conflicts of interest which lead to the interests of one consumer being elevated to the detriment of the other consumer. There is anecdotal evidence of many instances of conflict of interest arising (eg the purchaser being late in settlement due to the delay in the provision of funds from a bank; the vendor removing items from the property that were to remain under the terms of the contract; one party wishing to terminate the contract for failure to comply with its terms). In practice, these 'conflicts' are resolved by the conveyancer acting as quasi-mediator between the parties to resolve the issue. However, neither party is being properly advised of their rights or obligations and although the matter may have been 'resolved', it is often to the detriment of one party who has been persuaded to settle the dispute on that basis without having proper advice.”

The Review Panel considers that this is, in practice, a trivial restriction on conveyancers' conduct. It is therefore unnecessary to analyse the costs and benefits.

Conclusion

Restrictions on dual representation are, in practice, a trivial restriction on competition.

2. EXEMPTIONS

2.1 South Australian Housing Trust

The South Australian Housing Trust is exempt from section 6 of the Act, which abolishes instalment contracts. This exemption appears to have been based on the need to enable disadvantaged consumers to purchase homes under the Housing Trust's various purchase schemes, including the Rental Purchase Agreement.

Any exemption from a statutory requirement may represent a distortion the market. In addition, an exemption for a Government corporation may appear to conflict with principles of competitive neutrality. In this case, however, the exemption may be justified by the promotion of social welfare in that disadvantaged consumers are given the ability to purchase real estate, which may otherwise be beyond their means.

The Law Society submitted that it could see *“no reason to remove the exemption of the Housing Trust from Section 6”*.

The AIC felt that the exemption was justified *“because consumers are dealing with a Government agency”*.

It thought that:-

“removal of the exemption could prevent low income earners from ever acquiring real estate of their own. Some consumers would have no chance of obtaining finance under any other system”

REISA, on the other hand, was opposed to the exemption. It submitted that removal of the exemption 'is unlikely to affect disadvantaged consumers to buy real estate if the Housing

Trust grants a “cheap” loan, which it is effectively doing by entering into an instalment contract anyway¹.

The South Australian Housing Trust provided significant detail about the operation of the Rental Purchase Agreement. It said that:-

“the Rental Purchase Agreement existed for many years prior to the introduction of the Progressive Purchase Scheme. It operated as an Agreement for Sale and Purchase, with a deposit payable on the signing of the agreement and the balance, increased by certain additions including an interest component, payable by weekly instalments. A date was set for settlement, although the date could be varied. The purchaser was able to settle early. The Trust has first right to ‘repurchase’ the purchaser’s interest in the property, within the first seven or ten years of the agreement, if the purchaser wanted to sell, but if the Trust did not exercise its right of repurchase, or such right no longer existed, then the purchaser could sell to another person.

“If the purchaser got into default, the agreement could be cancelled, but a valuation had to be undertaken and if the market value of the property was greater than the balance of the price remaining owing to the Trust, the purchaser was entitled to the difference. There was also a provision under which the purchaser could request cancellation of the agreement and the Trust could allow the purchaser to remain in possession as a Trust tenant.

“The agreements were fairly complex, and reflected the terminology used in previous years, but they were not unfair on the purchaser. The subsidy involved was less than that required in most Trust tenancies, but more than would be required if the purchaser bought the property with HomeStart mortgage finance”

It was suggested by the Housing Trust that the best way to protect purchasers under instalment contracts would be:-

“to ensure that the vendor was a statutory body, subject to the control of the Crown”

2.2 Industrial and Commercial Premises Corporation

A further submission was received from the Industrial and Commercial Premises Corporation (hereafter 'ICPC'), highlighting that it, too, is exempt from section 6 by virtue of the regulations. It indicated that its exemption is also based on a public benefit, namely that:-

“it assists in ICPC’s role of attracting and assisting business development projects that benefits the State.”

ICPC submitted that the risks upon which the abolition of instalment contracts is based do not apply in its situation, for two reasons:-

- (a) it is a Crown corporation. The Crown is a reputable vendor, and the purchaser is not exposed to the possibility of bankruptcy or exit from the jurisdiction.
- (b) where ICPC enters into instalment contracts, purchasers are invariably corporations who are independently advised as to the implications of entering into the contract with ICPC.

ICPC submitted that there is no adverse impact on competition as a result of the exemption as "ICPC does not 'compete' in any relevant market". ICPC said that it does not compete with private enterprise for two reasons:-

"(a) it confines its activities to projects where the business involved meets the criteria set out in its charter and requires some government incentive to either locate in South Australia or maintain or expand its presence in this State. ICPC is principally looking to bring business opportunities into the State that would not have otherwise located in South Australia and to maintain and enhance the benefits provided to the State by businesses already located here. There is no benefit to ICPC to become involved in projects which are more appropriately handled by private developers.

(b) ICPC only becomes involved in projects identified as being of significant public benefit to the State of South Australia, assesses against the criteria mentioned in its charter. Therefore the vast majority of projects undertaken in the State will not attract any assistance or involvement from ICPC."

It was further submitted that the exemption 'operates to correct an existing market failure'. This was on that basis that:-

"large job creating projects or projects that assist with industry development, export promotion, research, or the expansion of the knowledge and technology base within the State, carry with them large positive externalities. These externalities are not identified or rewarded by the normal market mechanism. As a consequence, less of these projects will be established within the State than would otherwise be desirable.

"The deferred purchase agreements entered into by ICPC are a mechanism for correcting this market failure. Entering into an instalment contract with ICPC reduces the overall costs and impediments of a project to a prospective relocating or expanding business.

"The reduction in costs to projects identified as having a substantial benefit for the State provides an incentive for such projects to be undertaken here. The use of instalment projects by ICPC thus increases the quantity of those desirable projects and acts as a mechanism for the correction of the failure of the market to reach the optimum outcome."

Further, it was submitted that the public benefit of this exemption outweighs any costs which might be incurred by its existence. This is because:-

"ICPC only offers instalment contracts when businesses are identified as carrying with them a significant public benefit as described in the Strategic Direction for ICPC as set out in its charter...As a statutory corporation, ICPC is in an appropriate position to assess whether the public benefits of a project are in accordance with Crown objectives and are of sufficient benefit to the State to warrant support. Such benefits include employment and investment growth...ICPC will...not offer the advantages of an instalment contract to a prospective business project unless the benefits of that project as a whole outweigh the costs of the project to the government and to the State."

2.3 Analysis of the exemptions

The Review Panel considers that it is of the utmost relevance that both the South Australia Housing Trust and the ICPC are operating in areas of the market which tend not to overlap with the general work of land agents. The Review Panel considers that it is unlikely that

either exemption is having a significant effect on competition within the relevant markets. It is only an exemption from one provision of the Act. There is no evidence that this is giving either organisation any competitive edge.

Even if it were considered that there was a significant advantage given to either organisation by having this exemption, this must be weighed against the significant public benefit which is derived from it. In relation to the South Australia Housing Trust, there is the benefit of disadvantaged consumers being able to purchase homes. While there are other programs which are also able to assist with this, this is a further means for the Housing Trust to be able to effect such assistance.

In relation to the ICPC, the exemption enables the ICPC to use the instalment contract as an incentive for businesses to invest in South Australia, which has significant benefits for the State.

It should be noted that in both cases, the usual risks applicable to instalment contracts do not apply.

The Review Panel finds that the exemptions do not have any significant impact on competition within the relevant markets. Even if it were considered that the exemptions impact on competition in a greater way than assessed by the Review Panel, the Review Panel considers that the benefits of these exemptions easily outweigh the costs. In each case, there is a significant public benefit in assisting these organisations to carry out work that is of great benefit to the public as a whole.

It is therefore the recommendation of the Review Panel that these exemptions be retained.

Conclusion

The exemptions of the South Australian Housing Trust and the Industrial and Commercial Premises Corporation from section 6 have minimal impact on competition.

The benefits of the exemptions outweigh the costs.

Recommendation

The Review Panel recommends that the exemptions of the South Australian Housing Trust and the Industrial and Commercial Premises Corporation from section 6 be retained.

Appendix 1 - Conclusions and recommendations**1. CONCLUSIONS****Conclusion 1**

There are a number of relevant markets. These markets are:-

- the real estate market (ie the market in which the sale and purchase of real estate occurs)
- the market for the sale of businesses
- the market for the provision of real estate sales services
- the market for the provision of services relating to the sale of a business
- the market for the conveyancing of land and/or businesses

The market is confined geographically to South Australia.

Conclusion 2

The scope of work to which the Act applies is not too high, and therefore does not constitute an inappropriate restriction on competition.

Conclusion 3

The benefits of the mandatory cooling off period outweigh the costs.

Conclusion 4

The benefits of restricting instalment contracts outweigh the costs.

Conclusion 5

There are no viable alternatives to the prohibition on instalment contracts.

Conclusion 6

The benefits of requiring the provision of particulars outweigh the costs.

Conclusion 7

There are no viable alternatives to requiring the provision of particulars.

Conclusion 8

The requirement to use a prescribed form is a trivial restriction on competition.

Conclusion 9

While laws dealing with misrepresentation deal to some extent with the problems relating to subdivided land, the Review Panel considers that the benefits of the restriction on representations relating to subdivided land outweigh the costs.

Conclusion 10

The requirement that an agent provide copies of all offers, contracts or agreements that are signed by a person to that person is a trivial restriction on competition

Conclusion 11

The requirement to have written authority to act is a trivial restriction on competition.

Conclusion 12

The benefits of requiring agents and sales representatives not to have an interest in the purchase of property that they have been commissioned to sell outweigh the costs.

Conclusion 13

The benefits of the prohibition on the sharing of commissions outweigh the costs.

Conclusion 14

The benefits of restricting the relationship between agents and conveyancers outweigh the costs.

Conclusion 15

There are no viable alternatives to restricting the relationship between agents and conveyancers.

Conclusion 16

The benefits of restricting the procurement and referral of conveyancing business outweigh the costs.

Conclusion 17

There are no viable alternatives to restricting the procurement and referral of conveyancing business.

Conclusion 18

Restrictions on dual representation are, in practice, a trivial restriction on competition.

Conclusion 19

The exemptions of the South Australian Housing Trust and the Industrial and Commercial Premises Corporation from section 6 have minimal impact on competition.

The benefits of the exemptions outweigh the costs

2. RECOMMENDATIONS

Recommendation 1

The Review Panel recommends that the mandatory cooling off period be retained.

Recommendation 2

The Review Panel recommends that the prohibition on instalment contracts be retained.

Recommendation 3

The Review Panel recommends that the requirement to provide particulars is retained.

Recommendation 4

The Review Panel recommends that sections 18 and 19 be retained.

Recommendation 5

The Review Panel recommends that the restriction on agents and sales representatives having an interest in property that they have been commissioned to sell be retained.

Recommendation 6

The Review Panel recommends that section 24 be retained.

Recommendation 7

The Review Panel recommends that the restriction on the relationship between agents and conveyancers be retained.

Recommendation 8

The Review Panel recommends that the restriction on the procurement and referral of conveyancing business be retained.

Recommendation 9

The Review Panel recommends that the exemptions of the South Australian Housing Trust and the Industrial and Commercial Premises Corporation from section 6 be retained.

Appendix 2 - Assessment of restrictions

Restriction	Relevant Section	Assessment
Cooling-off period	section 5	Intermediate
Abolition of instalment contracts	section 6	Intermediate
Requirement to provide particulars	section 7 and 8	Intermediate
Restriction on agent's acting if interest in property	section 23	Intermediate
Payment of commission to person other than agent	section 24	Intermediate
Restriction on relationship between agent and conveyancer	section 28	Intermediate
Procuring or referring conveyancing business	section 29	Intermediate
Scope of interest to which Part 2 applies	section 4	Trivial
Use of prescribed forms	section 7 and 8	Trivial
Subdivided land	section 18 and 19	Trivial
Requirements of agent in agent/principal relationship	section 20	Trivial
Requirement to have written authority to act	section 21	Trivial
Dual representation	section 30	Trivial

Appendix 3 - Terms of reference

The *Land and Business (Sale and Conveyancing) Act 1994* and associated regulations are referred by the Minister for Consumer Affairs to the Office of Consumer and Business Affairs for evaluation and report by September 1999. The review is to focus on those parts of the legislation which restrict competition or which impose costs or confer benefits on business.

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

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

1. METHODOLOGY AND TIMETABLE FOR REVIEW

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

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

2. CONSULTATION

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

3. THE REVIEW PANEL

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

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

4. CONTACT OFFICER

The contact officer for the review is:-

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Appendix 4 - Consultation List

- * Acting Commissioner for Consumer Affairs (Northern Territory)
- * Acting Director, Office of Consumer Affairs and Fair Trading
- * Acting Director, Office of Fair Trading and Business Affairs
- * Assistant Manager, Consumer Education and Representation Unit, Consumer Affairs Division, The Treasury, ACT
- * Australian Institute of Conveyancers (SA Division) Inc
- * Australian Property Institute (SA Division)
- * Australian Small Business Association
- * Australian Society of Certified Practising Accountants
- * Chief Executive - Department of Human Services
- * Chief Executive Officer, Ministry of Fair Trading (Western Australia)
- * Chief Executive, Department of Transport, Urban Planning and the Arts
- * Commissioner for Consumer Affairs (Queensland)
- * Committee of Investigating Mortgagees
- * Consumers Association of South Australia Inc
- * Delfin Property Group
- * Department of Justice (Tasmania)
- * Director-General, Department of Fair Trading (NSW)
- * E.C.Dixon
- * Executive Director, ACT Consumer Affairs Bureau
- * Industrial and Commercial Premises Corporation
- * Institute of Chartered Accountants in Australia
- * Insurance Council of Australia Ltd
- * Knight Frank
- * Local Government Association
- * Peter Wood
- * Real Estate Employers Federation of South Australia
- * Real Estate Institute of South Australia
- * Regional Director, Australian Competition and Consumer Commission
- * Retail Traders Association of South Australia Inc
- * Senior Policy Officer, NSW Consumer Protection Agency
- * Small Business Advocate
- * Society of Auctioneers and Appraisers
- * South Australian Employers Chamber of Commerce and Industry Inc
- * The Law Society of South Australia

Appendix 5 - Submissions received

SUBMISSIONS RECEIVED

Organisation	Issues Paper	Draft Report
Australian Institute of Conveyancers	✓	✓
Consumers Association of South Australia	✓	✗
Department for Administrative and Information Services	✗	✓
Department for Environment, Heritage and Aboriginal Affairs	✗	✓
Department of Fair Trading (NSW)	✗	✓
Industrial and Commercial Premises Corporation	✓	✗
Real Estate Institute of SA	✓	✓
South Australian Employers Chamber of Commerce and Industry	✓	✗
South Australian Housing Trust	✓	✗
The Law Society of South Australia	✓	✗