



**Government
of South Australia**



NATIONAL COMPETITION POLICY REVIEW

of the

LAND AGENTS ACT 1994

SUPPLEMENTARY REPORT

The views expressed in this Supplementary Report are the views of the Review Panel only and do not represent the views of the South Australian Government. Any action taken in anticipation of the outcomes of this Supplementary Report or the review process is solely at the risk of persons taking such action.

National Competition Policy Review

Land Agents Act 1994

Supplementary Report

Supplementary Report prepared by the Review Panel

March 2001



Government
of South Australia

Review Panel
National Competition Policy Review
Land Agents Act 1994
GPO Box 2605
Adelaide SA 5001

26 March 2001

The Honourable K Trevor Griffin
Minister for Consumer Affairs
Parliament House
ADELAIDE SA 5000

Dear Minister

As announced in your Ministerial Statement to Parliament of 7 November 2000, the Review Panel responsible for the National Competition Policy Review of the *Land Agents Act 1994* has reconvened to consider the "legal qualifications" recommendation of its Final Report.

The Review Panel is now pleased to present a Supplementary Report on the "legal qualifications" recommendation of the National Competition Policy Review Final Report into the *Land Agents Act 1994*, representing the unanimous conclusions and recommendation of the Review Panel.

This supplementary review has been conducted in accordance with the Terms of Reference set in your letter to the Review Panel dated 1 December 2000 and reflects the research and deliberations of the Review Panel, as well as the evidence, both oral and written, received during the course of this supplementary review process.

The Review Panel would like to acknowledge the valuable contributions received from the various individuals and organisations who have assisted our understanding of the many issues we have considered.

The Review Panel notes that while you confirmed Ms Kate Tretheway's continuing appointment to the Review Panel, due to extended leave Ms Tretheway has not taken any part in the deliberations of the Review Panel nor in the preparation of this Final Report.

We commend our unanimous Supplementary Report for your consideration

Yours sincerely




Margaret Cross (Chair)



Cliff Hawkins



Alan Sharman



Adam Wilson

NATIONAL COMPETITION POLICY REVIEW

LAND AGENTS ACT 1994

SUPPLEMENTARY REPORT

TABLE OF CONTENTS

PART 1: INTRODUCTION	1
1.1 Why Was The Act Reviewed?	1
1.2 What Is Being Reviewed?	5
1.3 The Review Panel.....	5
1.4 Process	7
PART 2: THE "LEGAL QUALIFICATIONS" RECOMMENDATION	8
2.1 Background to the Recommendation.....	8
2.1.1 Systematic selling of real estate not part of legal practise.....	10
2.1.2 One Act approach	11
2.2 The Submissions of the Real Estate Institute of South Australia	12
PART 3: ARE LEGAL QUALIFICATIONS APPROPRIATE FOR REGISTRATION PURPOSES?	14
3.1 Qualifications required for registration as a land agent	14
3.1.1 What is a "land agent" and what do they do?.....	16
3.1.2 The legal significance of the definition	17
3.2 Effect of current qualifications requirements on competition.....	18
3.3 Analysis of current restriction	22
3.4 Legal Qualifications Alternative.....	25
3.4 Comparison of Bachelor of Laws and Bachelor of Business.....	28
(Property)	28
3.5 Analysis of skills not provided by a law degree	32
3.5.1 Trust accounting.....	32
3.5.2 Real Estate Documentation.....	34
3.5.3 Property Management Services	37
3.5.4 Appraisal	39
3.5.5 Listing	40
3.5.6 Methods of sale.....	43
3.6 Conclusions on comparison of degree courses.....	45
3.7 Recommendation of the Review Panel regarding legal qualifications ..	48
PART 4: COST BENEFIT ANALYSIS	49
4.1 Benefits of recognising further qualifications.....	49
4.2 Costs of the recognising further qualifications.....	50
4.2.1 Conflict of Interest - the potential for costs	52
4.3 Cost Benefit Analysis.....	55

PART 1 : INTRODUCTION

1.1 WHY WAS THE ACT REVIEWED?

Economic and social imperatives, not only in Australia but also globally, have in recent times required the imposition of more rigorous market conditions on every sector of the economy. This process has affected the agricultural, mining, manufacturing and utilities sectors of the economy, and is ever increasingly impacting on the occupational and professional fields.

Formal governmental recognition of this process came at the Council of Australian Governments meeting on 11 April 1995 with the adoption by the Commonwealth and all State and Territory Governments of the National Competition Policy package.

The package comprised three separate agreements aimed at facilitating the implementation of National Competition Policy objectives:-

- **The Competition Principles Agreement** consisting of six distinct areas of competition reform:-
 - Legislative review;
 - Process oversight for government business;
 - Structural reform of public monopolies;
 - Competitive neutrality;
 - Access to essential infrastructure; and
 - Application of competition principles to local government.
- **The Conduct Code Agreement** committing all governments to implementation of uniform competition laws as set out in the schedule version of Part IV of the *Trade Practices Act 1974*. Under this code all persons, including governmental bodies and professional and occupational bodies, are now subject to competition laws.
- **The Agreement to Implement Competition Policy and Related Reforms** committing all signatories to a reform timetable. The Commonwealth is also committed to making payments to State and Territory Governments subject to their meeting the necessary reform timetables.

It is the legislative review element of the Competition Principles Agreement which formed the basis for the review of the *Land Agents Act 1994* during 1999. In this context, it must be borne in mind that legislative reviews, such as that review, do not occur in isolation but rather form a part of a fully comprehensive economy-wide policy agreed to by all Australian governments.

The legislative review process extends not only to existing legislation, but also to new legislation. Further, the concept of "legislation" encompasses all Acts, Regulations, Rules, Proclamations, Notices, Amendments and By-Laws. The reform timetable contained in the Agreement to Implement Competition Policy and Related Reforms requires the legislative review process to be completed by the end of June 2002.

While competition is a notoriously difficult term to define globally, it may perhaps be most simply considered as a process of rivalrous behaviour by suppliers in a market that has many actual and potential buyers. National Competition Policy aims to make better use of competitive forces as a means to enhance overall material living standards, to improve Australia's social and environmental outcomes, and to extend the productivity enhancing effects of competition to virtually all sectors of the economy.

It has been said that National Competition Policy 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

Underlying National Competition Policy is the notion that greater competition will create incentives for producers:-

- to use their resources better, resulting in higher productivity;
- to increase their efforts to constrain costs and therefore lower prices;
- and

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

- to be more responsive to users' demands in terms of improved quality.

It is important to acknowledge at the outset that many laws restrict competition. It is also important to acknowledge that often these restrictions are essential to achieve a significant community benefit. However, National Competition Policy requires that all laws restricting competition be identified, so that the community benefits they provide and the necessity for the restriction can be reviewed in an objective fashion.

In this sense, National Competition Policy embraces competition as a means, not an end in itself. Any increase in competition in a sector of the economy can therefore only be justified under Competition Policy Principles insofar as it provides an increase in net public benefit.

That said, any National Competition Policy review must start with the presumption that any identified restriction on competition should be repealed unless it can be demonstrated that a net public benefit arises from its existence. In line with Competition Policy Principles, those who wish to maintain a legislative restriction on competition bear the onus of proving that there is such a net public benefit.

This presumption arises from the text of the Competition Principles Agreement, which states at clause 5(1):

The Guiding Principle is that legislation (including Acts, enactments, ordinances or regulations) should not restrict competition unless it can be demonstrated that:

a) the benefits of the restriction to the community as a whole outweigh the costs;

and

b) the objectives of the legislation can only be achieved by restricting competition.

Therefore, the only restrictions on competition permitted under the Competition Principles Agreement are those that are demonstrably in the public interest. However, clause 5(1)(b) further requires that those restrictions, which are so justified, must also be the most appropriate way of meeting the legislation's objectives.

To put matters another way, while a public interest defence is a necessary step for retention of a legislative restriction, it is not in itself a sufficient one; if the policy objectives can be achieved by other means, then the legislative restriction may be removed, even if in the public interest, and replaced by the less restrictive alternative.

The process of determining whether a restriction is in the public interest is known as the "public benefit test". Clause 5(1)(c) of the Competition Principles Agreement requires that competition and associated economic impacts be assessed under this test.

The Review Panel notes that in this regard clause 1(3) provides guidelines on the content of public benefits tests such that, without purporting to limit what may be considered, the following matters must be taken into account where relevant:

- (a) *government legislation and policies relating to ecologically sustainable development;*
- (b) *social welfare and equity considerations, including community service obligations;*
- (c) *government legislation and policies relating to matters such as occupational health and safety, industrial relations and access and equity;*
- (d) *economic and regional development and investment growth;*
- (e) *the interests of consumers generally or a class of consumers;*
- (f) *the competitiveness of Australian businesses; and*
- (g) *the efficient allocation of resources.*

These criteria contain a clear expectation that social, environmental and regional concerns will be considered alongside the more narrow economic criteria in arriving at an assessment of overall benefits and costs. However, it should also be appreciated that, where relevant, matters beyond those specifically set out in the Competition Principles Agreement, including rural issues, have been considered by the Review Panel.

However, the Review Panel notes that a restriction does not have to be removed if the conclusion concerning that restriction falls within a range of outcomes that could reasonably be reached based on the information available. Within that

range of outcomes, Governments have a policy discretion to determine which particular outcome is in the public interest.

1.2 WHAT IS BEING REVIEWED?

A National Competition Policy review of the *Land Agents Act 1994* conducted under the auspices of the Competition Principles Agreement was completed in December 1999. The review process involved the release of an Issues Paper in March 1999, followed by the release of a Draft Report in June 1999. On each occasion submissions were sought from interested parties on not only issues discussed in the report, but also on any other matters which those submitting considered had an effect on competition within the market.

Based on the submissions received, and further research conducted by the Review Panel, a Final Report was submitted to the Minister for Consumer Affairs in December 1999. That report contained a number of recommendations intended to remove unjustified restrictions on competition contained in the legislation.²

On 7 November 2000, the Minister for Consumer Affairs announced that the Review Panel would be reconvened to consider one of its recommendations in light of certain supplementary submissions received from the Real Estate Institute of South Australia Incorporated.

The recommendation the Review Panel has been asked to reconsider is as follows:-

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

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

1.3 THE REVIEW PANEL

The original Review Panel for the review of the Act was:-

² National Competition Policy Review of the *Land Agents Act 1994* - Final Report. A summary of the conclusions and recommendations may be found at pages 63 to 66 of that report.

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

In his Ministerial statement, the Minister for Consumer Affairs announced that a person with expertise in the real estate industry, Mr Cliff Hawkins, had been appointed to the reconvened Review Panel. The Review Panel as reconvened by the Minister therefore comprises:-³

- Ms Margaret Cross, *Director, Consumer and Regulatory Affairs, Office of the South Australia Independent Industry Regulator;*
- Mr Cliff Hawkins, *Director, Cliff Hawkins Real Estate Pty Ltd;*
- Mr Alan Sharman, *Registrar-General, Land Services Group, Department for Administrative and Information Services;*
- Mr Adam Wilson, *Senior Policy Officer (Competition Policy), Office of Consumer and Business Affairs.*

Mr Hawkins has made it clear to the Review Panel throughout its deliberations, and would wish to emphasise through this Supplementary Report, that his role on the Review Panel has not been to represent the interests of the Real Estate Institute of South Australia, or of the real estate industry in general, but has rather been the provision of expert advice on the nature of the industry.

³ Ms Kate Tretheway is also a member of the Review Panel reconvened by the Minister for Consumer Affairs. However, due to extended leave, Ms Tretheway has taken no part in the deliberations of the Review Panel nor in the preparation of this Supplementary Report.

Similarly, those on the Review Panel with legal qualifications also stress that their role has been to provide expert advice on legislative review matters and not to represent the interests of legal practitioners.

The Review Panel notes that it was appointed by the Minister for Consumer Affairs in accordance with the Department of Premier and Cabinet's guidelines for the conduct of legislative reviews under the Council of Australian Governments Competition Principles Agreement.⁴

1.4 PROCESS

In accordance with the terms of reference set by the Minister for Consumer Affairs, the Review Panel has conducted a series of meetings and conducted further research in its consideration of the issues. The timetable for these meetings is set out below.

- 12 December 2000;
- 9 January 2001;
- 14 February 2001;
- 19 February 2001;
- 9 March 2001; and
- 16 March 2001.

As a result of those meetings, research undertaken and evidence received by the Review Panel, this Supplementary Report has now been prepared.

⁴ "Guidelines Paper for Agencies conducting a Legislation Review under the CoAG Competition Principles Agreement", Department of Premier and Cabinet, February 1998, Part E, page 19 et seq.

PART 2: THE "LEGAL QUALIFICATIONS" RECOMMENDATION

2.1 BACKGROUND TO THE RECOMMENDATION

One recommendation of the Final Report was that legal qualifications in combination with demonstrated competency in appraisal should be sufficient to satisfy the "qualifications" entitlement criterion of the Act.⁵ For ease of reference, this recommendation will be referred to as the "legal qualifications" recommendation throughout this Supplementary Report.

The qualifications criterion is one of five, set out in section 8(1) of the Act, which a natural person applicant must satisfy in order to be granted registration as a land agent. The complete set of entitlement criteria is as follows:-

Entitlement to be registered

8. (1) *A natural person is entitled to be registered as an agent if the person-*

(a) has-

(i) the qualifications required by regulation; or

(ii) subject to the regulations, the qualifications that the Commissioner considers appropriate; and

(b) has not been convicted of an offence of dishonesty; and

(c) is not suspended or disqualified from practising or carrying on an occupation, trade or business under a law of this State, the Commonwealth, another State or a Territory of the Commonwealth; and

(d) is not an undischarged bankrupt or subject to a composition or deed or scheme of arrangement with or for the benefit of creditors; and

(e) has not, during the period of five years preceding the application for registration, been a director of a body corporate wound up for the benefit of creditors-

(i) when the body was being so wound up; or

(ii) within the period of six months preceding the commencement of the winding up.

(Emphasis added)

⁵ The "qualifications" entitlement criteria is section 8(1)(a) of the Act.

Therefore, the recommendation of the Review Panel relating to legal qualifications deals only with the restriction on competition contained within section 8(1)(a) of the Act.

In identifying section 8(1)(a) as constituting a restriction on competition, the Review Panel notes that the requirement to be registered is of itself a significant barrier to entry, but concluded that it is justified in the public interest. Nonetheless, the Competition Principles Agreement requires that even if a restriction is so justified, alternative means of achieving the regulatory objectives must also be examined.⁶

In light of this requirement, the Review Panel examined other occupations to ascertain whether they might appropriately equip a person to carry on a business involving some or all of the skills presently related to land agents with the same low levels of risk to consumers as do land agents. If such occupations could be identified, the Competition Principles Agreement requires that these alternatives to the current regulatory scheme be applied in relation to the entitlement criteria.

The two occupational groups examined in detail by the Review Panel, based on submissions received in response to the Issues Paper, were legal practitioners and accountants.

In terms of accountants, the Review Panel concluded that, while unarguably competent in matters relating solely to the sale of a business, accountants do not have the same level of competence in relation to dealings in land. As it is rare to have a business sale which does not carry some interest in real property, be it a lease, licence or freehold title, the Review Panel concluded that at this point accounting qualifications are not of themselves an appropriate alternative to the current qualifications required under the Act. The Review Panel did note however the potential for industry bodies and the Office of Consumer and Business Affairs to explore this issue further.⁷

As evidenced by the "legal qualifications" recommendation, the Review Panel reached a different conclusion in relation to the appropriateness of legal qualifications.

In coming to this recommendation, the Review Panel considered a number of arguments for and against allowing legal practitioners to perform the work of land agents. In doing so, it reached a number of important sub-conclusions and

⁶ Clause 5(1) of the Competition Principles Agreement

⁷ For the discussion of accounting qualifications see pages 30-32 of the National Competition Policy Final Report into the *Land Agents Act 1994*.

it is convenient to briefly consider these at the outset. The Review Panel notes that discussion on the adequacy or otherwise of legal qualifications does not fall within this category, as this issue forms the basis of this Supplementary Report, and will be considered in detail subsequently.

2.1.1 Systematic selling of real estate not part of legal practise

A land agent is defined for the purposes of the Act as a person who carries on a business that consists of or involves selling or purchasing or otherwise dealing with land or businesses on behalf of others, or conducting negotiations for that purpose or selling land or businesses on his or her own behalf, or conducting negotiations for that purpose.⁸

However, the Act also allows that legal practitioners may in specific and limited circumstances carry out the activities of a land agent, which would otherwise require them to be registered, without being registered.⁹

In its submission to the Issues Paper, the Law Society of South Australia acknowledged that whilst legal practitioners engage in a number of activities relating to land, including the preparation of contracts and leases and the negotiation of the private sales on behalf of vendor clients approaching them for that purpose, they do not:-

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

In effect, this submission acknowledged the limits of "land agent" work open to legal practitioners under the terms of the exemption.

⁸ Sections 4(1)(a)&(b)

⁹ Section 4(2)(a)

Later however, in its submission to the Draft Report, the Law Society argued that solicitors should not be required to be registered under the Act to carry on any of the activities of a land agent, as they had not been required to do so in the past.

The Review Panel did not accept this submission on the basis that it did not agree that solicitors had not been required to gain registration in the past. Rather, the Review Panel concluded, as contended in the Law Society's earlier submission, it is simply the case that solicitors had not performed such work. It was therefore concluded that the systematic selling of real estate not occurring in connection with a legal practitioner's practice does not form part of "legal work" and therefore that legal practitioners are presently restricted from participating in this market by reason of the Act's provisions.

The Review Panel has again considered this matter for the purposes of this review and has come to the same conclusion; the systematic sale of real estate does not fall within the ambit of legal practise.

2.1.2 One Act approach

It is also important to note the conclusion reached by the Review Panel that although legal qualifications were considered to provide appropriate levels of consumer protection, it is nonetheless crucial that everyone who carries on business such that they fall within the definition of a land agent should be registered under the *Land Agents Act 1994*.

While it was accepted that legal practitioners are subject themselves to a regulatory regime aimed at providing consumer protection, the means by which that outcome is achieved are different from those of the Act.

Requirements placed on legal practitioners, such as trust accounting and disciplinary proceedings, are in form common to the two regulatory schemes, but have different regulatory aims. In the case of the *Land Agents Act 1994*, the regulatory regime achieves its aims by regulating the conduct of those involved with the sale of land and/or a business. In the case of the *Legal Practitioners Act 1981*, it is the regulation of the conduct of those practising the law which achieves the aims of the legislation.

If one sector of the real estate market were regulated under one scheme, while another sector providing the same services were to be regulated under a different scheme, there is a real prospect of market failure arising. By way of example, there is a Legal Practitioner's Guarantee Fund in place to compensate consumers

who suffer loss by reason of the fiduciary default of a legal practitioner, which is similar in operation to the Agents Indemnity Fund. However, there are some significant differences between these two funds and there could be no guarantee that the Legal Practitioner's Guarantee Fund would cover activities that are truly within the realm of a land agent's work.

In light of the difficulties which would arise from having services providers within the one market regulated under a number of statutory schemes, with the potential for different standards being applied amongst them, the Review Panel concluded that it is more sensible that all who provide the same services to consumers should be regulated under the same scheme. In this case that means that anyone falling within the definition of a land agent by reason of his or her activities should be regulated under the *Land Agents Act 1994*.

2.2 The Submissions of the Real Estate Institute of South Australia

The Review Panel notes at the outset that the Real Estate Institute was specifically consulted throughout the earlier review process. This consultation consisted of an invitation to an information session in early 1999 on the National Competition Policy Review process conducted by the Office of Consumer and Business Affairs in conjunction with the Department of Premier and Cabinet, and targeted consultation on the Issues Paper and Draft Report.

However, since the time that the Final Report was provided to the Government, the Real Estate Institute has raised concerns over the "legal qualifications" recommendation and has outlined those concerns in two supplementary submissions to the Minister for Consumer Affairs.

The Minister for Consumer Affairs has forwarded these submissions to the Review Panel as material to be taken into consideration during its deliberations on the issues of the "legal qualifications" recommendation.

The Review Panel notes that these submissions have been used in its deliberations merely to identify general areas of concern with the recommendation. The Review Panel has not been asked by the Minister for Consumer Affairs to address issues raised by the Real Estate Institute which do not relate to the "legal qualifications" recommendation. Further, the Review Panel does not consider it appropriate to attempt to do so, as many of the topics raised are beyond the scope of not only this reconsideration of the "legal qualifications" recommendation, but also the Terms of Reference for the review, which were set in accordance with the Competition Principles Agreement.

Therefore the following discussion of the "legal qualifications" recommendation, while initiated by the concerns expressed by the Real Estate Institute, represents the deliberations of the Review Panel on this issue. The conclusions reached and the recommendation made are therefore the result of the research conducted by the Review Panel and the evidence it has received in the course of its deliberations.

PART 3: ARE LEGAL QUALIFICATIONS APPROPRIATE FOR REGISTRATION PURPOSES?

3.1 QUALIFICATIONS REQUIRED FOR REGISTRATION AS A LAND AGENT

As discussed at Part 2, section 8(1) of the Act contains five separate entitlement criteria which every natural person applicant for registration must satisfy before the Commissioner for Consumer Affairs may grant a registration. Section 8(1)(a) provides that an applicant must possess certain qualifications:-

Entitlement to be registered

8. (1) A natural person is entitled to be registered as an agent if the person-

(a) has-

(i) the qualifications required by regulation; or

(ii) subject to the regulations, the qualifications that the Commissioner considers appropriate; and

(b) has not been convicted of an offence of dishonesty; and

(c) is not suspended or disqualified from practising or carrying on an occupation, trade or business under a law of this State, the Commonwealth, another State or a Territory of the Commonwealth; and

(d) is not an undischarged bankrupt or subject to a composition or deed or scheme of arrangement with or for the benefit of creditors; and

(e) has not, during the period of five years preceding the application for registration, been a director of a body corporate wound up for the benefit of creditors-

(i) when the body was being so wound up; or

(ii) within the period of six months preceding the commencement of the winding up.

In line with earlier comments made by the Review Panel, it should be noted that the scope of this Supplementary Report is limited to a consideration of section 8(1)(a), the qualifications criterion, and does not extend to other entitlement criteria listed in section 8(1).

The *Land Agents Regulations 1996* set out the qualifications which are currently prescribed for the purposes of section 8(1)(a)(i):-

Entitlement to be registered as agent-qualifications

5. For the purposes of section 8(1) (a) of the Act, to be entitled to be registered as an agent a natural person must hold at least one of the following qualifications:

(a) Certificate in Real Estate Agency conferred by the Department for Employment, Training and Further Education;

(b) degree of Bachelor of Business (Property) conferred by the University of South Australia, including satisfactory completion of (or status granted in) the following subjects:

(i) Commercial Property Management; and

(ii) Real Estate Business and Marketing Management;

(c) Graduate Diploma in Property, or Master of Business in Property, conferred by the University of South Australia including satisfactory completion of (or status granted in) the following subjects:

(i) -

(A) Property Law 1G and 2G; or

(B) Property Law 2M; and

(ii) -

(A) Real Estate Valuation 1 and Property Case Studies; or

(B) Real Estate Valuation G; and

(iii) -

(A) Real Estate Business Management and Real Estate Case Studies; or

(B) Real Estate Business and Marketing Management G;

(d) degree of Bachelor of Business in Property conferred by the University of South Australia, including satisfactory completion of (or status granted in) the following subjects:

(i) Property Management; and

(ii) Real Estate Field Work 1 and 2; and

(iii) Property Marketing;

(e) degree of Bachelor of Business in Property conferred by the University of South Australia, together with satisfactory completion of (or status granted in) the following subjects offered by the Department for Employment, Training and Further Education as part of the course for the Certificate in Real Estate Agency:

(i) Practice II; and

(ii) Practice III.

In order to put these various qualification requirements into context it is necessary to go back to first principles and consider what it is that a land agent does.

3.1.1 What is a "land agent" and what do they do?

Section 4 defines the term "land agent" for the purposes of the Act:-

Meaning of agent

(1) A person is an agent for the purposes of this Act if the person carries on a business that consists of or involves –

(a) selling or purchasing or otherwise dealing with land or businesses on behalf of others, or conducting negotiations for that purpose; or

(b) selling land or businesses on his or her own behalf, or conducting negotiations for that purpose.

(2) However, a person does not act as an agent in so far as –

(a) the person sells or purchases or otherwise deals with land or businesses on behalf of others, or conducts negotiations for that purpose, in the course of practise as a legal practitioner; or

(b) the person sells land or businesses, or conducts negotiations for that purpose, through the instrumentality of an agent; or

(c) the person engages in mortgage financing.

Within this definition there are some terms which are further defined.¹⁰ Of particular note for the purposes of this Supplementary Report is that the terms "land", "dealing with land" and "sell" greatly expand the definition of a land agent.

"land" includes –

(a) an interest in land; and

¹⁰ See section 3 of the Act

(b) an exclusive right (whether deriving from the ownership of a share or interest in a body corporate or partnership or arising in some other way) to the separate occupation of land or a building or part of a building;

"dealing with land" includes granting or taking a lease or tenancy agreement over land

"sell" includes auction and exchange, and "purchase" has a corresponding meaning.

3.1.2 The legal significance of the definition

The legal significance of the expanded definition is that the work of a land agent is extended from merely negotiating or arranging for transfers of ownership of land to include negotiations or arrangements involving "lesser" interests in land, such as exclusive possession, or leases, and licences to occupy. The practical significance is that those who arrange weekly (or other periodic) accommodation at holiday beach houses are caught by the definition of a land agent, as are those who sell or lease valuable major commercial or industrial properties. All of these people are required to be registered under the Act.

Having considered the scope of a land agent's work as defined by the Act, the Review Panel notes that it is the level of qualifications required to adequately perform this scope of work which is under consideration in this review.

While it may be true that some see a land agent's role as in some way greater, or more expanded, than that specified by the Act, and indeed may themselves take on extra activities in the market, such activities do not attract the regulatory controls of this Act.

It needs to be remembered that regulatory control aims only to ensure that those who wish to participate in the market have the basic skills necessary to do so without presenting risk to the consumer. The Act sets out the areas which Parliament has determined are the basic skill set a land agent must have. This skill set is necessarily founded on the notion of what a land agent does, which is itself set by the definition discussed above, and also includes matters expressly dealt with in the Act such as trust accounting and proper treatment of trust monies.

The Review Panel does recognise that there are skills which market participants develop over time, and which can, over time, become perceived as being "best

practise" for that industry. Such skills include provision on advice on real property project management, as well as specialist skills in rural or commercial property matters. However, these industry "best practise" or "specialist" skills are often far removed from base level consumer protection area, and it is the latter which are regulated by the Act. It must be remembered that the purpose of regulation of any sector of a market is not to ensure business efficiency or success for individuals, nor it is to protect the public from all possible risk; regulation which sought to achieve these ends would impose unreasonable costs and burdens on both market participants and consumers.

It follows that although matters such as general financial advising on real property projects may fall within the ambit of an established land agent's practise, such work is not per se the work of a land agent for the purposes of the Act. It is true that this type of work may be a natural consequence of participation within the market, but it is another matter entirely to require a new entrant to the market to display these skills. New entrants to the markets are simply required to display the skills which Parliament has deemed necessary for any person wishing to act as a land agent.

Ultimately then, when considering which types of qualification are appropriate for satisfaction of section 8(1) it is necessary to at all times have regard to the functions of a land agent as defined by the Act.

3.2 EFFECT OF CURRENT QUALIFICATIONS REQUIREMENTS ON COMPETITION

In the Final Report, the Review Panel identified the existence of any pre-requisite to entry into the market as a barrier to entry. While the concept of barriers to entry was dealt with in that report, it is convenient that the Review Panel revisit this topic for the purposes of this Supplementary Report. In order to do so appropriately, it is also necessary for the Review Panel to revisit the concept of the relevant market for the purposes of the Act.

"Market" is a term which is often used when discussing economic matters, both in a general sense describing the extent of competition, and in a more specific sense describing the physical location of a market. For the purposes of this review, the Review Panel is more concerned with the former, as the latter is by and large governed by the constitutional limitations on the powers of the South Australian Parliament.¹¹

¹¹ The Review Panel does however note the operation of the *Mutual Recognition (South Australia) Act 1993*.

The more general sense of market was perhaps best defined by the Trade Practices Tribunal in *Re Queensland Co-operative Milling Association Ltd and Defiance Holding Ltd*:-

*"A market is the area of close competition between firms or, putting it a little differently, the field of rivalry between them. (If there is no close competition there is of course a monopolistic market). Within the bounds of the market there is substitution - substitution between one product and another, and between one source of supply and another, in response to changing prices. So a market is the field of actual and potential transactions between buyers and sellers amongst whom there can be strong substitution, at least in the long run, if given a sufficient price incentive."*¹²

So what then is the field of actual and potential transactions between buyers and sellers in terms of the *Land Agents Act 1994*?

Perhaps the best way to address this question is to consider what the "bounds of the market" are under the Act. In adopting this approach, the Review Panel is able to define the outer limits of the market, which in turn allows it to use the scope of a land agents work, as defined by the Act, to establish the market for the purposes of this review.

Quite simply then, the "bounds of the market" as set by the Act are consonant with the definition of a land agent as set out in section 4, bearing in mind the expansion of the definition by the further definition of the terms "land", "dealing in land" and "sell".

However it is important to note that it is not the conduct of those within this market vis a vis each other that is the concern of this review; such matters are dealt with by the provisions of Part IV of the *Trade Practices Act 1974* and the *Competition Policy Reform (South Australia) Act 1996* (the "Competition Code").

Put simply, the focus of a National Competition Policy Review in terms of the market is whether the relevant Act:-

- Sets the boundaries of a market too narrowly; and/or
- Creates barriers to entry to that market which are too high; and/or

¹² *Re Queensland Co-operative Milling Association Ltd and Defiance Holding Ltd* (1976) 8 ALR 481 at 517; ATPR 40-012 at 17,247.

- Imposes conduct restrictions on market incumbents which restriction competition.

Of course, the overriding test in each case is not simply whether there is a negative economic outcome arising from the restriction, but rather whether the restriction is justified in the public interest. If it can be demonstrated that the retention of the restriction is founded on a demonstrated public interest which itself falls within a range of outcomes that could be reasonably reached based on the information available, then the restriction may be maintained.

Therefore, the relevant market for the purposes of the Supplementary Review is, as was the case in the Final Report, the market for the provision of services other than conveyancing relating to the sale of land and businesses in South Australia.

The Review Panel would now turn to a discussion of barriers to entry, which is effectively the sole focus of this Supplementary Review.

A barrier to entry is, in essence, anything impeding, howsoever, the entry of new competitors to a market. The requirement for any registration is itself a considerable barrier to entry. A more complete description of barriers to entry is that they are factors preventing or deterring the entry of new competitors into a market even when incumbents within that market are earning excess profits, and provides that barriers may fall within one of two broad classes; structural (or innocent) and strategic.

Structural barriers to entry arise from basic market characteristics such as technology, costs and demand. The widest definition suggests that these barriers to entry arise from factors such as product differentiation, the absolute cost advantages enjoyed by market incumbents and economies of scale.

- Product differentiation creates advantages for incumbents because entrants are required overcome the accumulated brand loyalty of existing products as part of the market entry process if they are to take any profits from the market.
- Absolute cost advantages imply that a new entrant to the market will be faced with higher unit costs at every rate of output. This is generally attributable to matters such as inferior technology and knowledge of practical application of production processes in the market.

- Scale economies will also restrict the number of suppliers who are able to operate at minimum costs in a market of given size.

A narrower definition of structural barriers suggests that barriers to entry arise only when entrants must incur costs not borne by incumbents, and excludes scale economies as a barrier.

The importance of sunk costs as a barrier to entry may also be emphasized. Since it is entrants who must incur these costs, which have already been borne by incumbents, a barrier to entry is created. In addition, sunk costs reduce the ability to exit and thus impose extra risks on potential entrants.

Strategic barriers to entry arise from the behaviours of incumbents within a given market. In particular, incumbents may act to heighten structural barriers or threaten to retaliate against entrants if they do enter.

Therefore, in terms of the Act, the various preconditions, or entitlement criteria, which must be satisfied prior to the grant of registration, are barriers to entry. It necessarily follows that the prescription of specific qualifications is also a barrier to entry.

The conclusion reached by the Review Panel in the Final Report was that the requirement that those wishing to become registered land agents should hold qualifications is a justified restriction on competition. Underpinning this conclusion is the undeniable fact that those who act as agents on behalf of consumers in transactions which are, in many cases, the most significant transaction which those consumers will enter during their lives, should be required to complete some level of training.

Having reached this conclusion however, it is clear that there is a further restriction on competition underlying this requirement. While the fundamental requirement to hold qualifications is justified, the issues of which qualifications are appropriate needs to be further explored.

The limitations on the qualifications acceptable for registration purposes have an effect on competition in so far as other qualifications, which might be appropriate but are not listed in the regulations, do not lead to registration. What the Review Panel is required to test is whether there are alternatives which achieve the same outcomes in a less restrictive manner.

If other qualifications exist which address market and provider failure issues in the market in the same way as the currently prescribed qualifications, then it

follows that precluding those with such other qualifications is restricting supply. Fundamental economic theory predicts that where supply is limited within a market there will be upwards pricing pressures. Further, the theory of contestability predicts that with little or no threat of new competitors in the market, the impetus for incumbents to explore service efficiencies and innovation is reduced.

Of course, the Review Panel recognises that it is not sufficient that market and provider failure issues be addressed; the costs and benefits of those alternatives to the community as a whole must also be taken into consideration.

The Review Panel has identified that the current restrictions on qualifications leading to registration as a land agent are an **intermediate restriction on competition**.

3.3 ANALYSIS OF CURRENT RESTRICTION

When tracing through the current prescribed courses set out in regulation 5, it becomes clear that there are three distinct streams by which a person can satisfy the qualifications requirement; by attaining a certificate, a degree or a graduate diploma/masters course.

While the general nature of these three qualifications are, in the Review Panel's opinion, widely understood, their particular place within the current Australian educational system are perhaps not so well appreciated.

A scheme known as the Australian Qualifications Framework was established on 1 January 1995 by agreement between Territory, State and Commonwealth governments. In essence, the Australian Qualifications Framework is a twelve level system of national qualifications involving schools, vocational education and training providers and the higher education sector as described in the following table:-¹³

¹³ Australian Qualifications Framework, www.aqf.com.au, accessed 16/01/01

Australian Qualifications Framework Overview

Schools Sector	Vocational Education and Training Sector	Higher Education Sector
Senior Secondary Certificate of Education	Advanced Diploma Diploma Certificate IV Certificate III Certificate II Certificate I	Doctoral Degree Masters Degree Graduate Diploma Graduate Certificate Bachelor Degree Advanced Diploma Diploma

As is apparent from the structure of the table, the nature of a qualification becomes more complex the higher it is in the framework. Thus a degree course is more complex than a diploma course, which is in turn more complex than the certificate courses. The Review Panel does not make this point to denigrate in any way any of the qualifications within the framework, but simply to note that there are very real differences in complexity and focus between various qualifications.

Therefore, while it has been identified that there are three streams of qualification leading to registration as a land agent, a certificate, a degree and a graduate diploma/masters qualification, it must be recognised that those undertaking the various courses undergo very different methods of education and emerge with very different skill sets. The important point to appreciate is that despite these differences it has been determined that each of these qualifications provides, in its own manner, a person with a skill set which properly equips them to carry on the business of a land agent successfully.

As an aside, the Review Panel notes that while the regulations list a certificate course in real estate sales as a method of satisfying section 8(1)(a), this course is no longer offered by TAFE. The certificate course presently offered, certificate IV in Business (Real Estate Sales) simply allows a graduate to work as a sales representative. The course which is now offered by TAFE as entry level for registration purposes is a diploma level course entitled Diploma in Business (Real Estate Management). The Review Panel understands that since this course is not prescribed by regulation, the Commissioner for Consumer Affairs has

exercised his discretionary powers under section 8(1)(a)(ii) to accept this qualification as an appropriate alternative to those set out in the regulations for registration purposes.

The Review Panel also notes that this course is also provided by the Real Estate Institute of South Australia,¹⁴ and its course has also been accepted by the Commissioner for Consumer Affairs through an exercise of the appropriate alternative qualification discretionary power in section 8(1)(a)(ii).

Notwithstanding these matters however, the conclusion drawn by the Review Panel in respect of the differing ways in which a person can satisfy the qualifications criterion is that whilst land agents are required to display certain skills, these skills can be derived from widely varying sources and in widely varying ways. Both the gaining of specific competency through a vocational education course and the attainment of a more intellectual body of knowledge which can be applied to specific situations gained through completion of a degree course equally equip a person to be a land agent.

Therefore, while a person undertaking a TAFE diploma course may receive competency based training in Real Estate Law for South Australia, and another person undertaking the University of South Australia's Bachelor of Business (Property) undertakes a more general course in the Law of Property, both are considered equally able to deal with property law issues in the course of acting as a land agent.

In adopting such an approach, the Review Panel has noted the reasoning of the Commercial Tribunal in the matter of an Application to Vary Common Rule brought by the (then) Land Brokers Society Incorporated in 1989. Whilst this matter concerned the educational qualifications applicable to conveyancers (then known as land brokers), the reasoning followed by the Tribunal in its decision not to delete the TAFE course in favour of sole reliance on a degree course is useful in the context of this review.

Having noted that regard must always be had to the scope of work authorised by a licence when considering which qualifications should be considered acceptable for registration purposes, the Tribunal went on to say that:-

"We believe that as long as any course provides appropriate training and instruction in relation to the activities of a land broker as envisaged by the Act,

¹⁴ Real Estate Magazine, Volume 2 Issue 1 February 2001, page 30.

together with the background and ancillary matters that we have mentioned, then that course should be regarded as acceptable.”¹⁵

3.4 LEGAL QUALIFICATIONS ALTERNATIVE

In terms of its reconsideration of the original “legal qualifications’ recommendation, the Review Panel notes that it will have to assess the skill set provided by such qualifications against the work performed by a land agent. While it is possible to do this in isolation, the Review Panel has come to the conclusion that a useful tool in this analysis is a comparison of legal qualifications with other qualifications leading to registration as a land agent.

Any comparison of qualifications in the current Australian context needs to take into consideration the nature of the Australian Qualifications Framework. As noted above, the various levels of qualification are very different, and the only sensible comparison which can be drawn is between “like” qualifications.

In the case of legal qualifications, which are degree courses offered by Universities, the like qualification is the degree course, Bachelor of Business (Property) conferred by the University of South Australia.

While there are obviously other qualifications which also allow a person to satisfy the qualification criteria, these qualifications are at a lower level in the Australian Qualifications Framework. While the Review Panel acknowledges the adequacy of these other qualifications, it notes that the focus of the various types of qualification is very different.

The certificate in real estate sales provided by TAFE, as listed in regulation 5(a), is a certificate IV within the Australian Qualifications Framework. Within that scheme, certificate courses are aimed at preparing people for employment, and are intended to replace the former category of trade certificates. It has been noted that certificate IV courses:-

- recognise skills and knowledge that meet nationally endorsed industry/enterprise competency standards as agreed for those qualifications by the relevant industry, enterprise, community or professional group;
- include preparatory access and participation skills and knowledge such as:

¹⁵ Application to Vary Common Rule, CD 16/88, Reasons for Decision at page 8.

- o literacy and numeracy;
 - o communication skills;
 - o working in teams;
 - o workplace technology; and
 - o industry specific competencies, of increasing complexity and personal accountability at each level of the Certificate qualification; and
- may be gained through a wide range of pathways, including: New Apprenticeships (including traineeships); work-based and/or school/institution-based training; and recognition of prior learning (which may include training programs or an accumulation of short courses).

While a diploma course is not listed in the regulations as a prescribed qualification, it is nonetheless useful to note the focus of such courses within the Australian Qualifications Framework. Diploma and advanced diploma courses are aimed at preparing candidates for self-directed application of skills and knowledge based on fundamental principles and/or complex techniques. These qualifications are intended to recognise capacity for initiative and judgment across a broad range of technical and/or management functions. Diploma and advanced diploma courses involve:-

- the self-directed application of knowledge and skills, with substantial depth in some areas where judgment is required in planning and selecting appropriate equipment, services and techniques for self and others;
- breadth, depth and complexity covering planning and initiation of alternative approaches to skills or knowledge applications across a broad range of technical and/or management requirements, evaluation and co-ordination; and
- participation in development of strategic initiatives, as well as personal responsibility and autonomy in performing complex technical operations or organising others.

In contrast, the Bachelor of Business (Property) conferred by the University of South Australia, as listed in regulation 5(b), is a degree course within the Australian Qualifications Framework. Degree courses are the basic qualification for entry into a profession, although the Review Panel notes that some professions, including law, require additional postgraduate qualifications as a

condition precedent to entry. It has been noted that degree courses are aimed at the recognition of knowledge and skills related to an academic discipline and provide:-

- the acquisition and critical application of a systematic and coherent body of knowledge;
- underlying principles and concepts applicable to that body of knowledge; and
- the associated problem-solving techniques, including independent enquiry applicable to a body of knowledge.

The Review Panel notes that unlike certificate courses and diploma, a degree course is typically gained through a minimum of the equivalent of three years full time study.

Therefore, when considering the adequacy or otherwise of legal qualifications, the Review Panel considers that it must start from a point of comparison; namely the skills and abilities provided by a degree in law must be compared with those provided by the Bachelor of Business (Property). For these reasons it is not possible to make an appropriate comparison between courses falling within different ranges on the Australian Qualifications Framework such as a comparison between a certificate IV and a degree course.

In undertaking this exercise, it became clear to the Review Panel that it required some detailed evidence in respect of the courses to be compared. At the same time, while it did not consider it necessary or appropriate to compare degree courses with other lower courses, it was determined that it would be useful to take some evidence from a training provider authorised to confer the certificate IV or diploma course.

Therefore, the Review Panel took evidence from:-

- Mr Rob Kooymans,
Program Director - Property Programs
Client Relationship Manager - Singapore Property Marketing Program
Lecturer in Corporate Real Estate
Property Group, School of International Business
Division of Business & Enterprise
University of South Australia

- Mr John Turner
Educational Manager
Business Services
Douglas Mawson Institute of TAFE
- Associate Professor Tony Moore
Dean
Faculty of Law
Flinders University

The Review Panel also received evidence from the Real Estate Institute of South Australia and the Law Society of South Australia in respect of the "legal qualifications" recommendation.

- Mr Barrie Magain
President
Real Estate Institute of South Australia
- Mr Martin Keith
President
Law Society of South Australia

3.4 COMPARISON OF BACHELOR OF LAWS AND BACHELOR OF BUSINESS (PROPERTY)

As discussed in the Final Report, the Review Panel considers that there is overwhelming evidence that the various core elements of a degree in law provide a person with the necessary skills and ability to address the contract, real property, fair trading and commercial law components of the work undertaken by land agents.

This position was supported by all parties during the course of the review process during 1999, including the Real Estate Institute of South Australia who submitted that:-

"REISA maintains that legal practitioners do not have the appropriate credentials to appraise and market property for sale. Aside from this issue, REISA believes that legal practitioners' qualifications would otherwise provide adequate consumer protection.

Unless the issues of credentials for appraisal and marketing of a property can be properly addressed, REISA cannot agree the qualifications held by legal qualifications [sic - presumably practitioners] are sufficient for registration as an agent.”¹⁶

Further, all of those providing evidence to the Review Panel during the course of this Supplementary Review expressed the opinion that legal qualifications are undoubtedly sufficient for the legal aspects of land agency practise.

The question which therefore arises is what, apart from the purely legal aspects, is the skill set required to as a land agent in terms of the Act.

As recognised in the Final Report, the Review Panel understands that a national training package for real estate is in the process of finalisation. At the time of writing however, the Review Panel has received no confirmation of the content of this package and further has received no indication of the elements of the package which the registration authority, the Commissioner for Consumer Affairs, has or will be accepting as the “core” competencies for registration purposes.

When considering the content of a degree in laws, and it should be noted that the Review Panel understands that the content of all law degree courses is very similar in South Australia, it was decided that the course offered by the Flinders University would be used as a benchmark.

As a part of the course, students are required to study as compulsory subjects the following components considered by the Review Panel to be relevant to the practise of real estate:-

- Principles of Tort Law;
- Contract;
- Lawyering: Procedures and Ethics;
- Property Law Concepts;
- Advanced Contract;
- Issues in Torts;
- Real Property Law;
- Corporate Law;
- Trusts and Assignments;
- Resolving Civil Disputes (Negotiation);

¹⁶ REISA submission to the Draft Report of the National Competition Policy Review of the *Land Agents Act 1994*, pages 1-2.

- Property Practise;
- Succession and Estates Planning
- Legal Practice Management;
- Commercial and Corporate Practise; and
- Legal Skills and Ethics.

The Review Panel notes that there are a number of other elective subjects which students may take as part of their degree which provide skills in the area of real estate, however as these are options, and thus not compulsory for all students, such courses were not considered for the purposes of this Supplementary Report.

While it is not appropriate to enter into a lengthy consideration of the content of each of these components in this Supplementary Report, it should be noted that the Review Panel has considered these components in detail and has also received considerable evidence from Associate Professor Anthony Moore with regard to their content.

In the case of the Bachelor of Business (Property) it is not necessary to draw any similar distinction between real estate and non real estate components. Therefore, the following list comprises all of the compulsory subjects taught in that course:-

- Physical Aspects of Real Estate;
- Accounting, Decisions and Accountability;
- Economic Environment;
- Business Information Systems;
- Introduction to Law
- Marketing Principles: Trading and Exchange;
- Statistical Analysis in Business;
- Urban Economics 1 EF;
- Forecasting and Business Analysis;
- Law of Property
- Finance and Investment;
- Real Estate Management and Agency Practise;
- Real Estate Valuation;
- Real Estate Documentation;
- Work and Organisation;
- Communication and the Media;
- Real Estate Market Research;
- Portfolio and Fund Management.

While the above list of subjects required in a law degree does not equate directly to the subjects offered in the Bachelor of Business (Property), nonetheless when the course content of each subject was analysed by the Review Panel, it was noted that there are many areas in which there is an overlap of skills gained.

By way of example, both courses deal with aspects of property law and, notwithstanding the more detailed legal knowledge provided by a law degree, both would appear to provide a person with sufficient skills in the legal aspects of property transactions.

Similarly, both degrees provide students with skills in areas such as negotiation, albeit through courses with entirely differing focus. However, the underlying skill of negotiation is not one necessarily specific to any given field of endeavour, and the Review Panel considers that this skill would be readily transportable between the legal and real estate markets.

While recognising that there is a high degree of consonance between the two degree courses, there are nonetheless certain skills which are covered in the Bachelor of Business (Property), but not covered completely or adequately by a degree in law.

Similarly, the Review Panel also notes that there are some skills intuitively crucial to the work of a land agent which are only partially covered the Bachelor of Business (Property). However, as the Review Panel is comparing degree courses rather than vocational education courses, there will always be some areas where a degree course will not appear to immediately address a skill, but will, in practise, provide a person with appropriate problem solving techniques to deal with any difficulties which may arise. What is more important for the purposes of this review is to identify the areas of discordance between the two degrees, rather than directly comparing the law degree against a set of competencies.

The Review Panel has concluded that there are four discreet areas in which the Bachelor of Business (Property) provides a graduate with competence over and above that provided to a law degree graduate.

The areas of difference between the two degree courses are:-

- ensure efficient and accurate trust account management;
- appraisal;
- provide property management services; and

- undertake property sale by private treaty and conduct property sales by auction.

While the first three listed areas are self explanatory, the Review Panel considers that the area of undertake property sale by private treaty and conduct property sales by auction may be further broken down as follows:-

- real estate documentation;
- listing; and
- methods of sale

3.5 ANALYSIS OF SKILLS NOT PROVIDED BY A LAW DEGREE

When one considers the areas of land agent practise regulated by the Act, it is quite clear that the elements of trust accounting, real estate documentation, property management services, appraisal, listing and methods of sale are significant consumer protection mechanisms in the context of the South Australian market. The Review Panel notes the detailed regulation of trust money provided by the Act and Regulations, and also notes the particular role and responsibilities of land agents in relation to contracts in this State. The Review Panel has also been presented with evidence of the importance of property management in the business of a land agent.

3.5.1 Trust accounting

In terms of the trust accounting skills which land agents are required to display, the Review Panel notes the conclusions drawn in the Final Report which highlighted the importance role that the trust accounting provisions of the Act have in maintaining appropriate levels of consumer protection. In the absence of these provisions there would be no regulation of the manner in which land agents dealt with their client's money, and there would be a heightened risk of defalcation in relation to that money.

When considering elements of a law degree which would provide some competency in this particular area the Review Panel noted that while issues such

as agency are dealt with in legal terms in a law degree, again the specific issues of how to actually deal with trust monies are not covered.

However, the Review Panel notes that trust accounting is specifically dealt with in the Practical Legal Training course. A component of that course entitled Law Practice contains five discrete areas of competency relating to the management of a legal practice. One of these competencies is Office and Trust Accounting, and to pass this unit students are required to participate in workshop exercises and complete an assignment in trust accounting.

Successful completion of this course leads, if all other criteria are satisfied, to a person being entitled to admission to practise law in this State. If the competencies in trust accounting provided through the course are appropriate for the practise of law, the Review Panel considers that it must follow that these same skills are appropriate in a land agent's practice. This is particularly so given that land agents' trust accounting requirements are largely based on those contained in the *Legal Practitioners Act 1981*.

The Review Panel has therefore concluded that those who have completed law degrees and are admitted, or are entitled to be admitted, to as a legal practitioner in this State have equivalent competence in the area of trust accounting to those completing the Bachelor of Business (Property).

3.5.1.1 Conclusion - Trust Accounting

The conclusion of the Review Panel is that those who have completed law degrees and are admitted, or are entitled to be admitted, to practise as a legal practitioner in this State are sufficiently skilled in the area of trust accounting to adequately perform this aspect of the work of a land agent as defined by the Act.

3.5.2 Real Estate Documentation

In South Australia, unlike other States, land agents are entitled to prepare contracts for the sale of land. This is recognised in both the *Land Agents Act 1994* and the *Legal Practitioners Act 1981*.¹⁷ Therefore, a practical knowledge of real estate documentation is paramount. While a law degree traditionally provides skills in the law of property, it does not cover what might be perhaps described as the “practical” aspects of property law, for example, how to properly draft a contract for the sale of land.

As these areas are not separately dealt with in the course of a degree, an initial conclusion which may be drawn is that those with such a qualification would not be able to perform this work at the necessary standard to ensure consumer protection is not compromised.

However, the Review Panel notes that before a law graduate is entitled to be admitted to practise as a legal practitioner, they are required to complete a further course of postgraduate training. This course is the Practical Legal Training property course offered by the Law Society of South Australia. The stated aims of this course are to:-

- develop the practical skills of newly-admitted practitioners in a range of common legal transactions, legal documentation and basic legal procedures;
- develop specific skills relating to practice management
- develop an awareness of the issues associated with legal practise; and
- emphasise the importance of ethical conduct in legal practise.

Therefore, the Review Panel has given careful consideration real estate documentation component of this postgraduate training which are required to be completed prior to admission to legal practise.¹⁸ It is clear from the materials provided to the Review Panel that those undertaking preadmission training are given a significant amount of training in this area. The course covers not only

¹⁷ In particular see section 21(3)(m) of the *Legal Practitioners Act 1981*

¹⁸ In this regard the Review Panel also notes that Universities are presently restructuring their degree courses to include these practical elements such that graduates will be entitled to admission by virtue of their degree course only.

the preparation of the documents, but extends to a consideration of related legal issues to be considered when preparing such a document.

While lengthy, it is important that the full list of topics covered be set out in this Supplementary Report:-¹⁹

Topic 1

- Land Registration system - an overview;
- Jessup LTO Practise;
- LTO Bulletins;
- Property Assist;
- Community Titles;
- Community Titles - by-laws;
- Different forms of home ownership;
- Mortgages;
- Mortgage preparation;
- Caveats;
- Supreme Court practise direction on removal of caveats.

Topic 2

- Contracts;
- Precedent nomination forms;
- Contracts for the sale and purchase of land
 - Law Society
 - Institute of Conveyancers
 - Real Estate Institute
 - Society of Auctioneers
- *Land and Business (Sale and Conveyancing) Act 1994* - provisions re Form 1 and cooling-off rights;
- Form 1 (*Land and Business (Sale and Conveyancing) 1995*);
- Form 3 - certificate of independent advice;
- Conveyancers Act s17 - authority to act for two parties;
- Conveyancers regulations - Form 4;
- Stamp duty rates;
- First home buyer information;
- Commonwealth government grant information;

¹⁹ Source: Materials provided to the Review Panel by the Law Society of South Australia.

- LTO registration rates;
- Water information;
- Acting for vendor;
- Acting for purchaser;
- Simple conveyancing matters;
- Complex settlement statements;

Topic 3

- Provisions of residential tenancies legislation: terms of tenancy and notice periods;
- Leases;
- Commercial leases;
- Anatomy of a commercial lease;
- Provisions of commercial tenancies legislation.

Topic 4

- GST Implications;
- Tax Implications.

It can be seen from this list that the range of topics covered is very broad, and that aside from the contractual land agent issues the course also covers issues such as preparation of leases and conveyancing instruments.

Having considered the material available to it and all the evidence it has received, the Review Panel has concluded that those who have completed law degrees and are admitted, or are entitled to be admitted, to practise as a legal practitioner in this State have equivalent skills in the area of real estate documentation to those completing the Bachelor of Business (Property).

3.5.2.1 Conclusion - Real Estate Documentation

The conclusion of the Review Panel is that those who have completed law degrees and are admitted, or are entitled to be admitted, to practise as a legal practitioner in this State are sufficiently skilled in the area of real estate documentation to adequately perform this aspect of the work of a land agent as defined by the Act.

3.5.3 Property Management Services

Arguments were put to the Review Panel in the course of its deliberations that skills in property management were essential in a land agent's practice. However, the force of these submissions varied between noting that such skill was an essential element required to ensure the survival of an agent's business in the current market, and noting that such skill was actually essential to ensure that consumers' real property investments were adequately dealt with.

If the first form of submissions were the sole reason for requiring skill in property management, then the Review Panel would have no hesitation in rejecting this competency as being an essential one. Restrictions on competition which are solely concerned with maintaining the health of a business or ensuring business success for individuals cannot be justified under competition policy principles.

However, while the second submission was not pressed strongly in any of the evidence received by the Review Panel, further consideration of this issue has lead the Review Panel to the conclusion that the underlying argument in this case is strong. If consumers' investments are not appropriately managed by whosoever they choose to act as their agent, then they will incur losses. The losses in such instances will easily spread from being isolated private losses to public losses through the opportunity costs of the loss.

The initial question to be asked then is how does property management fall within the ambit of a land agents work as defined by the Act? The answer to this question is quite simply that the negotiation of a lease on the behalf of a property owner, which is the fundamental element of property management, falls clearly within the definition of land agent in section 4 of the Act.

To this extent at least, the Review Panel has concluded that competency in property management is necessary for the work of a land agent to be performed appropriately.

In reaching this conclusion the Review Panel notes that there are elements of what is generically termed "property management" which do not fall within the definition of a land agents work for the purposes of the Act. Nor do these elements fall within the regulated scope of sales representatives' work per se. Matters such as the inspection of property, arranging for maintenance work and so forth are beyond the regulated scope of a land agent's work. This is reflected in the common practice within the industry to employ specialist property

managers, who are not necessarily otherwise qualified as land agents or sales representatives, to carry on these roles in land agent's businesses.

Therefore, while skills in property management form part of the work of an agent, it is limited to the negotiation of a lease, and as a corollary, the collection of rent money as trust monies.

The next question to be addressed therefore is the extent of coverage that a law degree provides in this area. The Review Panel notes that the Bachelor of Business (Property) contains a subject entitled Real Estate Management and Agency Practice which has as one of its elements a discrete topic Management of Properties. The objectives of this element are described as:-

- brief overview of the legislative requirements;
- the role of a property manager in an agency office
- how the manager derives fees for the agency; and
- an understanding of why the property manager needs to be able to show initiative.

By way of contrast, a law degree provides students with skills in the areas of not only general leasing principles, but also retail and commercial leasing matters as well as principles of agency.

Further, the elements of topics three and four of the real estate documentation course comprising part of the practical legal training requirements, outlined above at Part 3.5.2, deals expressly with leases and the commercial (including taxation) implications of leases.

Having considered these matters, the Review Panel has been drawn to the conclusion that those who have completed law degrees and are admitted, or are entitled to be admitted, to practise as a legal practitioner in this State have greater competence in the area of property management than those completing the Bachelor of Business (Property).

3.5.3.1 Conclusion - Property Management

The conclusion of the Review Panel is that those who have completed law degrees and are admitted, or are entitled to be admitted, to practise as a legal practitioner in this State are sufficiently skilled in the area of property management to adequately perform this aspect of the work of a land agent as defined by the Act.

3.5.4 Appraisal

All the evidence presented to the Review Panel during the course of this Supplementary review process highlighted the importance of this element of land agency practise in the business of a land agent and in the protection of consumers. It was submitted that competency in appraisal is one of the key underlying elements of being able to properly negotiate the sale or purchase of real property on behalf of another. As it did in the Final Report, the Review Panel accepts this reasoning.

It is noted that the Real Estate Valuation component of the Bachelor of Business (Property) provides graduates with appropriate skills in property appraisal for the purposes of carrying on business as a land agent. Having given consideration to all the components of a law degree, as well as the further skills provided through the postgraduate practical legal training course, the Review Panel has concluded, as it did in the Final Report, that there is no element of legal training which adequately addresses this skill. The Review Panel notes that this conclusion is supported by the evidence of Associate Professor Anthony Moore.

Therefore the conclusion of the Review Panel in relation to appraisal skills is that those who have completed law degrees and are admitted, or are entitled to be admitted, to practise as a legal practitioner in this State do not have equivalent competence in the area of appraisal to those completing the Bachelor of Business (Property).

3.5.4.1 Conclusion - Appraisal

The conclusion of the Review Panel is that those who have completed law degrees and are admitted, or are entitled to be admitted, to practise as a legal practitioner in this State are not sufficiently skilled in the area of appraisal to adequately perform the work of a land agent as defined by the Act.

3.5.5 Listing

Listing of property has been described to the Review Panel as the procurement by a land agent of a written authority from an owner of property to sell or lease that property. The Review Panel understands that this is often quite an involved and lengthy process, effectively involving bidding by land agents for the listings of owners on the basis of marketing proposals which sets out the agents' understanding of the relevant segment of the market as well as supporting arguments addressing why the particular agent is best able to sell or lease their property.

The Review Panel notes that this course is also a part of the Bachelor of Business (Property) in so far as it forms a discrete element within the subject Real Estate Agency Management and Practice. The identified objectives of the listing element are:-

- A knowledge of the listing process from the first call to final signature on the agents "agency agreement". An understanding of what agency means and what types of selling agencies are common (sole agency, open agency);
- An overview of residential features that will have an impact on the sale price and or marketability of the property; and
- How to get prospect for listings, in other words how does an agent get more listings?

It is unchallenged by any party that a degree in law provides a person with sufficient skills to understand the legal nature and requirements of the principles of agency. What is not apparent is whether these skills extend to the requisite levels in terms of the specific types of agency discussed at dot point one. It is important in the context of the operations of the real estate market that the

players in the market are able to operate efficiently and appropriately towards consumers. Clearly an understanding of the types of agency common within the market will be beneficial for agents prior to entry into the market, as time and money will not have to be spent after entry in exploring these matters. This will also benefit consumers, as they will not have to bear the costs of this post entry training through agents' fee structures.²⁰

Having considered the various elements of a law degree, and the elements forming the practical legal training course, the Review Panel has been unable to discern anything which demonstrated that legal practitioners are by virtue of their training skilled in the understanding of the listing process from first call to final signature or in the common types of selling/leasing agencies used in the context of the South Australian market.

Further, the Review Panel has not been able to identify any element of a legal practitioner's training which adequately addresses the area of marketable features of residential properties which may have an effect of the sale/lease price and/or marketability of a property. This would appear to be a very important element of a land agent's work, and is linked directly to the definition of a land agent in section 4 of the Act.

If a land agent is not able to assess the property in terms value or marketability in either the current market as a whole, or a particular segments of the market, then consumers face the risk of losing thousands of dollars in foregone income. Such an outcome would have a negative impact on the community as a whole, through the opportunity cost of that lost income; money which may have been more efficiently spent in one area of the community is in fact spent elsewhere. Although this might appear to be simply a distributive effect rather than a community loss per se, the Review Panel would note the efficiency aspects of this issue and stress that this loss of efficiency is perhaps more significant than is often recognized.

The final element of listing generally relates to what has been described as "prospecting" for listings. While the Review Panel does not doubt that there are certain skills necessary to competently carry out this type of activity, it notes two things.

Firstly, the Review Panel considers, and indeed has received strong evidence, that legal practitioners are required to seek out work on a daily basis. There is

²⁰ However, the Review Panel does note that there is the potential for agents to try and set off these pre-entry sunk costs when they do enter the market.

not reason to believe that there is anything particular to the real estate market which would make the task of finding work dramatically different to the task of finding work in any given sector of the economy. In short, seeking out work in the course of a business is a readily transferable skill throughout the market as a whole, and is not limited to one particular market such as the real estate market.

Secondly, skills in this area are really a business survival matter, which will simply ensure the efficiency of an individual business. Putting things another way, "prospecting" is a marketing tool to be used by competitors in the course of competition between themselves. It is therefore not a consumer protection matter, nor is it a matter which can be justified under competition policy principles.

The conclusion of the Review Panel in relation to "prospecting" is therefore that it is not a skill which relates the activities of a land agents as defined by the Act.

In relation to the area of listing as a whole, the Review Panel concludes that while those who have completed law degrees and are admitted, or are entitled to be admitted, to practise as a legal practitioner in this State may have skills in relation to certain aspects of this field, they do not have equivalent skills to those completing the Bachelor of Business (Property) in the areas of:-

- listing process from first call to final signature;
- marketable features of residential properties which may have an effect of the sale/lease price and/or marketability of a property; or
- the common types of selling/leasing agencies used in the context of the South Australian market.

The Review Panel notes that this conclusion is consistent with the evidence of Associate Professor Anthony Moore.

3.5.5.1 Conclusion - Listing

The conclusion of the Review Panel is that those who have completed law degrees and are admitted, or are entitled to be admitted, to practise as a legal practitioner in this State are not sufficiently skilled in the areas of:-

- listing process from first call to final signature;
- marketable features of residential properties which may have an effect of the sale/lease price and/or marketability of a property; or
- the common types of selling/leasing agencies used in the context of the South Australian market;

to adequately perform the work of a land agent as defined by the Act.

3.5.6 Methods of sale

The areas of methods of sale is really a compounding of two areas identified by the Review Panel as prima facie lacking from the training of legal practitioners; the conduct of sale by auction, and the conduct of a sale by private treaty.

Once again, there is a topic taught as part of the Bachelor of Business (Property) which encompasses these areas. The identified objectives of this course are to:-

- understand all three main methods of sale;
- to understand the costings and procedures for all methods; and
- to understand that one method may be more suitable for a particular property than another method.

A consideration of legal practitioner's training, a law degree and practical legal training, leads the Review to a conclusion that this training more than adequately equips them with to understand and deal with all three main methods of sale in the real estate market. No serious argument has been presented to the Review Panel at any stage which would suggest that this conclusion is in any way flawed.

It is however an entirely different matter in relation to the other two objectives identified in the Bachelor of Business (Property) methods of sale course.

Skills in the costings and procedures of any given selling method and in appreciating the suitability of one method over another in any given circumstance is quite clearly important in the real estate market. Without such skill, land agents would be at risk of not acting in the best interests of their principals (consumers) when selling their property.

By way of example, the Review Panel understands that one of the peculiar features of the Adelaide real estate market in recent times has been the trend away from sale by private treaty towards auction sales in particular geographic areas. While this may be an appropriate trend in the context of the Adelaide market generally, and the Review Panel makes no comment on this, an auction sale may not be in the best interests of a consumer in every case. If the consumer's land agent is not alert to such matters then they will not achieve the best returns for the consumer. Once again, the Review Panel would be concerned over the efficiency aspects of such an outcome.

It is also worth noting that the costings and procedures of the various methods of sale differ significantly. While legal practitioners have a high level of knowledge and understanding of the legal aspects of these matters, the actual dollar costings and formal procedures are not dealt with as part of their training. Although it may be argued that costings and procedures are things which could be learned "on the job", it would not be in the interests of consumers to allow this to occur. It is quite clear to the Review Panel that consumers could bear cost in two ways in such a situation:-

- They could bear the costs of misjudgement of service or sale price estimates by their land agent; and
- They could bear the costs of a mishandled or inappropriately conducted sale.²¹

Similarly, the Review Panel has not been able to identify any aspect of legal training which addresses the suitability of one method of sale over another on a case by case basis.

²¹ The Review Panel notes in this context that unlike legal practitioners and conveyancers, land agents are under no statutory compunction to obtain professional indemnity insurance. However, it is also noted that holding professional indemnity insurance is a prerequisite for membership of the Real Estate Institute of South Australia.

Therefore, the Review Panel has concluded that while those who have completed law degrees and are admitted, or are entitled to be admitted, to practise as a legal practitioner in this State may have skills in understanding methods of sale, they do not have equivalent skill to those completing the Bachelor of Business (Property) in the areas of:-

- understanding the costings and procedures for all methods; and
- understanding that one method may be more suitable for a particular property than another method.

3.5.6.1 Conclusion - Methods of Sale

The conclusion of the Review Panel is that those who have completed law degrees and are admitted, or are entitled to be admitted, to practise as a legal practitioner in this State are not sufficiently skilled in the areas of:-

- understanding the costings and procedures for all methods; and
- understanding that one method may be more suitable for a particular property than another method;

to adequately perform the work of a land agent as defined by the Act.

3.6 CONCLUSIONS ON COMPARISON OF DEGREE COURSES

While the Review Panel considers that there is either directly or indirectly a good deal of intersection between the content of a law degree and that of the Bachelor of Business (Property), there are some areas in which a law degree does not provide equivalent or sufficient skill.

Some of these deficiencies, notably trust accounting and real estate documentation, are adequately dealt with by legal practitioners practical legal training. However, other crucial deficiencies are not.

The Review Panel has concluded that the qualifications held by an admitted legal practitioner, or a person entitled to admission in South Australia, are not comparable to those who hold a Bachelor of Business (Property) conferred by the University of South Australia in the areas of:-

- appraisal; and
- undertaking property sales by private treaty and conducting property sales by auction, limited to the discrete areas of:-
 - listing process from first call to final signature;
 - marketable features of residential properties which may have an effect of the sale/lease price and/or marketability of a property;
 - the common types of selling/leasing agencies used in the context of the South Australian market;
 - understanding the costings and procedures for all methods of sale; and
 - understanding that one method may be more suitable for a particular property than another method.

The Review Panel therefore further concludes that legal practitioners, or those entitled to be admitted as legal practitioners, are not sufficiently skilled to perform the activities of a land agent as defined by the Act by virtue of their legal qualifications alone.

However, if legal practitioners can demonstrate adequate and appropriate skills in the two identified areas, the Review Panel sees no reason why legal qualifications in combination with such skills should not be sufficient to allow an applicant to satisfying the qualifications entitlement criterion under section 8(1) of the *Land Agents Act 1994*.

It must be noted that in reaching this conclusion the Review Panel is in no way advocating the adoption any particular course which would provide the requisite skill.

For the Review Panel to make such recommendations would be entirely beyond the scope of this Supplementary Review. Such matters will need to be dealt with by the relevant licensing authority should the recommendation of the Review Panel be accepted by the Government.

However, the Review Panel notes that it does not consider that it is necessarily appropriate for an applicant to have undertaken a separate course in each area listed. In light of the evidence received by the Review Panel, it may be more appropriate that a short course be developed incorporating various elements which would either separately or in combination cover the various skills identified as lacking.

This is particularly so given the relatively brief treatment of the identified areas as discrete elements of a broader single subject offered as part of the Bachelor of Business (Property) by the University of South Australia.

CONCLUSION

The conclusion of the Review Panel is that the qualifications held by an admitted legal practitioner, or a person entitled to admission in South Australia, in combination with demonstrated skills in:-

1. Appraisal; and
2. Undertaking property sales by private treaty and conducting property sales by auction, limited to the discrete areas of:-
 - Listing process from first call to final signature;
 - Marketable features of residential properties which may have an effect of the sale/lease price and/or marketability of a property;
 - The common types of selling/leasing agencies used in the context of the South Australian market;
 - Understanding the costings and procedures for all methods of sale; and
 - Understanding that one method may be more suitable for a particular property than another method;

substantially equate to the skills provided by the Bachelor of Business (Property).

3.7 RECOMMENDATION OF THE REVIEW PANEL REGARDING LEGAL QUALIFICATIONS

The recommendation regarding legal qualifications as unanimously agreed by the Review Panel is set out below.

RECOMMENDATION

The Review Panel recommends that the qualifications held by an admitted legal practitioner, or a person entitled to admission in South Australia, in combination with demonstrated skills in:-

1. Appraisal; and
2. Undertaking property sales by private treaty and conducting property sales by auction, limited to the discrete areas of:-
 - Listing process from first call to final signature;
 - Marketable features of residential properties which may have an effect of the sale/lease price and/or marketability of a property;
 - The common types of selling/leasing agencies used in the context of the South Australian market;
 - Understanding the costings and procedures for all methods of sale; and
 - Understanding that one method may be more suitable for a particular property than another method;

should be accepted in satisfaction of the requirements under section 8(1)(a) of the *Land Agents Act 1994*.

PART 4: COST BENEFIT ANALYSIS

Having concluded and recommended that there are alternative qualifications which could be recognized for registration purposes, the Review Panel is required under the terms of the Competition Principles Agreement to consider the costs and benefits of that recommendation.

4.1 BENEFITS OF RECOGNISING FURTHER QUALIFICATIONS

It is widely accepted that increases in supply within a market can cause a downward pressure on prices. In terms of the real estate market, an increase in numbers of those supplying land agent services will have a predicted outcome of lowering prices for consumers of those services. It follows that if the range of qualifications recognised for the purposes of gaining registration as a land agent is broadened, and thus the range of people entitled to be granted registration is broadened, it is likely that there will be new entrants into the market, and a corresponding reduction in prices for consumers.

However, reductions in prices are not the only beneficial outcomes of increases in supply. Indeed, there are instances in which prices will not fall greatly on the entrance of new competitors to the market. In such situations an increase in competition will provide other benefits to consumers. Chief amongst these is the increased pressure placed on incumbents to explore innovative means of service provision. Such innovations, while not necessarily leading to lower prices for consumers, will nonetheless allow them to reap the benefits of different and perhaps more efficient methods of service delivery, which would not have arisen under the status quo.

These positive effects of competition are not limited to the situation where new competitors actually enter the market, but extend also to the situation where there is a real or perceived threat of new competitors. Indeed, it has been noted that the mere threat of competition can be as effective as competition itself in delivering benefits to the community as a whole, with market incumbents altering their price/service/quality mix in response to the threat presented by potential entrants to the market.²² Therefore, broadening the range of appropriate qualifications will also have the effect of increasing the level of contestability in this market.

²² This theory is known as "contestability".

The Review Panel notes that there is also a benefit to be derived through allowing those with a "different" source of qualification to enter the market. While in no way criticising the current entry qualifications, the point must be made that those entering the market with a different perspective bring with them the potential to deal with market situations in a fashion which may not have been considered by market incumbents.

This is not to say that current means of performing land agent work are not appropriate, but rather to note that "there is more than one way to skin a cat". As discussed above, innovations in service delivery and business structures can deliver efficiencies to consumers which will in the long run benefit the community as a whole.

It is efficiencies in the market that must be the focus of this debate. As has been noted by the Productivity Commission:-

*"There is a widespread misconception that the NCP reforms are solely about reducing prices to consumers. While this will often be the case and is an important outcome, NCP reforms are aimed at more efficient pricing. In some situations, this can involve increases in user and consumer prices."*²³

Thus when noting the benefits of allowing a broader range of qualifications to be recognised, the Review Panel is not simply looking at reducing prices by increasing supply, but is rather concentrating on potential increases in market efficiency overall.

4.2 COSTS OF THE RECOGNISING FURTHER QUALIFICATIONS

Competition is by its very nature a bitterly rivalrous process, with competitors vying with each other for market share.²⁴ In a competitive market there will necessarily be those who obtain a significant market share through their activities and there will also be those who are not able to maintain a viable market share. Those who are unable to maintain a viable market share will ultimately be forced to exit the market. Increasing competition in this market may therefore in theory result in some market exit.

²³ Impact of Competition Policy Reforms on Rural and Regional Australia, chapter 10: Summary of Impacts of NCP Reform, Productivity Commission, Productivity Commissioner website, <http://www.pc.gov.au/inquiry/compol/finalreport/index.html>

²⁴ *Queensland Wire Industries Pty Ltd v. Broken Hill Pty Co Ltd* (1987) 75 ALR 331

This potential for market exit was considered by the Review Panel in the course of its deliberations, and it notes that there are a number of matters which must be taken into account in this regard.

Firstly, while it is accepted that there may be costs to individual competitors through market exit, such exits are of themselves merely private costs. National Competition Policy is concerned with deriving maximum community benefit from Australian resources, including legislation, for the whole community. Therefore, while there may be some private costs, and even wider community costs, arising as a result of increased competition, if the community benefit derived from that increase outweighs those costs then there is strong justification for it.

In this case, the Review Panel considers that the identified benefits to the wider community more than offset the potential for some market exits by incumbents.

This is particularly so when consideration is given to statistics relating to the real estate services market. Recent Australian Bureau of Statistics data shows that in the South Australian market average income for real estate services per business was \$358,100 in the reporting period 1998 to 1999.²⁵ By way of contrast, the market average income for real estate services per business in the reporting period 1995 to 1996 was \$283,500.²⁶ This is an average rise in income of \$74,600 in a 3 year period.

These figures are particularly pertinent when one considers the numbers of new entrants to the market over the relevant periods and also the numbers of land agents registered from year to year.²⁷

Year	New Entrants	Total Number of Land Agents
95/96	158	2,521
96/97	101	2,407
97/98	121	2,435
98/99	122	2,261

What can be seen from these figures is that while there is a relatively high entrance rate to the market presently, there is also a relatively high exit rate such that the numbers of market incumbents at any one time has been in a slight

²⁵ Australian Bureau of Statistics, *Real Estate Services Industry 1998-99*, 8663.0, May 2000

²⁶ Australian Bureau of Statistics, *Real Estate Services Industry 1995-96*, 8663.0, September 1997

²⁷ Source: Office of Consumer and Business Affairs registration statistics and the Commissioner for Consumer Affairs' Annual Report series 1995-95 to 1998-99.

decline over the relevant period. This has two impacts in terms of the current discussion.

Firstly, it demonstrates that there is already a relatively high exit rate in this market. It is significant, in the Review Panel's opinion, that there is absolutely no evidence to suggest that this exit rate is imposing high levels of cost on the wider community, or even high levels of private cost within the community. This tends to suggest that even if there were an increase in competition, and some exits from the market, there would not be a great level of community cost incurred.

Secondly, the rise in income levels over the period 1995-96 to 1998-99 when considered in combination with the decline in actual numbers of land agents shows that there has been an increase in profit taking within the market. As a result, the market will clearly be able to easily absorb an increase in competition without fundamental structural change.

Therefore, the Review Panel does not consider that market exits carry a great weight in terms of costs arising from increasing the range of qualifications acceptable for registration purposes.

4.2.1 Conflict of Interest - the potential for costs

A more real concern in the opinion of the Review Panel is the potential for conflicts of interest to arise, and thus for costs to be incurred by consumers if legal practitioners who gained registration as land agents were able to act as agent in relation to a sale and were also able to perform conveyancing in relation to that sale.

Further, in competition terms, there would be a significant level of discrimination if certain registered land agents, namely those who also practise as legal practitioners, were able to gather excess profits from conveying land they had arranged to be sold, while others land agents were not able to earn such profits. The Review Panel considers that this would be an unacceptable outcome and, if permitted, would militate against the adoption of its recommendation.

However, section 28 of the *Land and Business (Sale and Conveyancing) Act 1994* provides that:-

Preparation of conveyancing instrument by agent or related person

28. If a conveyancing instrument (other than one to give effect to a transaction in which the agent participates as a purchaser or mortgagee of land) is prepared by an agent, or a person who stands in a prescribed relationship to an agent, the agent and the person by whom the instrument is prepared are each guilty of an offence.

Maximum penalty: \$2 500

This section prohibits any person registered as a land agent from preparing conveyancing instruments, and applies whether or not the preparation is gratuitous or for fee or reward.

The prohibition applies to every person registered as a land agent, no matter what other occupation they may practise. Even if a person held registrations as both a conveyancer and a land agent, section 28 precludes them from ever preparing a conveyancing instrument. Similarly, even though a person may be admitted as a legal practitioner, and prima facie entitled to prepare conveyancing instruments, if he or she were also registered as a land agent section 28 would preclude their preparing any conveyancing instruments.

It is perhaps convenient to note at this point that despite recent media and other speculation, legal practitioners are as of right permitted to convey property. Indeed, this is a core legal function which has, in this State, been opened to competition from laypersons for a significant length of time. Conveyancers, formerly known as land brokers, thus practise in a sub-set of legal practise which is specifically allowed under *Legal Practitioners Act 1981*. It is incorrect therefore to assert that there have been recent changes "permitting" legal practitioners to perform conveyancing.

The scope of the section 28 prohibition is not limited simply to those who might be registered as a land agent as well as being a legal practitioner. The prohibition is extended to all of those who are in a prescribed relationship to the land agent.

Section 26 sets out the definition of prescribed relationships as follows:-

Interpretation of Part 5

26. (1) For the purposes of this Part, a person stands in a prescribed relationship to an agent if the person-

(a) is an employee of the agent; or

(b) is a partner of the agent; or

(c) is an employee of, or is remunerated by, a body corporate and-

(i) the agent is in a position to control the conduct of the affairs of the body corporate; or

(ii) the agent is a director of, or a shareholder in, the body corporate and the body corporate is not a public company as defined in the Corporations Law ; or

(iii) the agent is also an employee of, or is also remunerated by, the body corporate.

If a legal practitioner registered as a land agent were in partnership with another practitioner, the prohibition would extend to precluding the partner from preparing any conveyancing instruments so long as the legal practitioner remained registered as a land agent.

The Review Panel considers that this strong prohibition negates the possibility of costs arising for consumers from conflicts of interest, as legal practitioners holding registration as land agents will not be able to perform any conveyancing work while registered. This is so notwithstanding the declaratory provisions of section 27 of the *Land and Business (Sale and Conveyancing) Act 1994*.

Any concern over cost being borne by consumers through abuse of conflict of interest situations is thus unwarranted, as the present regulatory scheme under the *Land and Business (Sale and Conveyancing) Act 1994* absolutely prohibits such behaviour.

Therefore, there is no potential for "one stop shops" or "cradle to grave" land agent and conveyancing services to be provided by legal practitioners who also hold registration as a land agent.

Further, the existence of the prohibition and its extended operation removes the potential for discrimination between competitors within the market which would otherwise be an unjustifiable restriction on competition.

The Review Panel wishes to emphasise strongly that this is a clear, unequivocal and crucial prohibition which is fundamental to the reasoning underpinning the recommendation of the Review Panel. If that recommendation is to be implemented, then the Review Panel would suggest that the existence and scope of the prohibition should be carefully explained to all interested parties.

The Review Panel also notes that the maximum penalty which may be imposed for a breach of section 28 is relatively small, \$2,500.00. Given the significance of this prohibition not only to the recommendation of the Review Panel, but also in the general sense within the market, the Review Panel suggests that consideration be given to increasing the level of this penalty.

4.2.1.1 Conclusion - Conflict of Interest Costs

The conclusion of the Review Panel is that section 28 of the *Land and Business (Sale and Conveyancing) Act 1994* prevents all land agents from performing any conveyancing work whether or not for fee or reward and irrespective of any other occupation the land agent may pursue.

The section 28 prohibition provides fundamental protection to consumers by preventing conflicts of interest in dealings in land, as well as removing what would otherwise be an unjustifiable discrimination between competitors within the market.

The Review Panel would suggest that consideration be given to increasing the level of penalty which may be imposed for a breach of this section.

4.3 COST BENEFIT ANALYSIS

On the basis of the foregoing reasoning, the Review Panel considers that while there is the potential for costs to arise if the range of qualifications acceptable for registration purposes is expanded, these costs are in the main of a private nature.

However, the key non-private cost identified by the Review Panel which could arise from implementation of the "legal qualifications" recommendation is potential for discrimination within the market by allowing those registered as both legal practitioners and land agents to prepare conveyancing instruments, while all other land agents are prohibited from carrying out this work. In such a situation there would be a sector of the market which was given extra ability to earn profits without any justification. This would be an inefficient system of regulation and could not be justified under Competition Policy Principles.

In this regard the Review Panel has noted and analysed the prohibition contained in section 28 of the *Land and Business (Sale and Conveyancing) Act 1994*. This prohibition prevents all land agents, and those in prescribed relationships to

land agents, from preparing conveyancing instruments, irrespective of whether that preparation is for fee or reward.

Under the terms of this prohibition, it does not matter that the land agent may also carry on another occupation, for example as a conveyancer or legal practitioner; once they fall within the definition of "land agent" under the *Land Agents Act 1994*, then the prohibition applies. Further, it does not even matter if the person is not registered as a land agent under the Act, so long as they fall within the ambit of the definition of "land agent" then prohibition will capture them.

Therefore, as the prohibition avoids the discriminatory and conflict of interest costs inherent in allowing land agents who are also legal practitioners to perform conveyancing, the Review Panel concludes that this cost is not relevant to its considerations. However, in the absence of such a prohibition, this cost would be given a significant weighting in this analysis.

In light of the substantial potential benefits which could accrue to the wider community through a broadening the range of qualifications leading to registration as a land agent, the Review Panel has concluded that these benefits outweigh any costs.