

Discussion paper

National Competition Policy Review of the Security and Investigation Agents Act 1995 - Final Report

Issued June 2003

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Government
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Office of
Consumer and
Business Affairs

NATIONAL COMPETITION POLICY REVIEW
OF THE
SECURITY AND INVESTIGATION AGENTS ACT 1995

FINAL REPORT

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National Competition Policy Review
Security and Investigation Agents Act 1995

Executive Summary

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

It is important to emphasise that this particular review is restricted to a review of the Act in terms of its effect on competition. The review is not a general review of the effectiveness of the legislation and issues related to this question have not been canvassed in the review or in this Report.

Security and investigation agents provide a range of services to both public and private consumers in South Australia. The range of services is outlined in section 4 of the Act. The market for the provision of these services and the market for the training of service providers, are the relevant markets for the purposes of this Review.

The Review Panel has concluded that the Act has the objectives of promoting the safety of the public and promoting the proper maintenance of appropriate standards by those engaged in the provision of security and investigation functions. The Act seeks to achieve these objectives by ensuring that only appropriate persons are able to hold licenses issued under the Act, and that persons licensed under the Act are adequately and appropriately trained.

The Review Panel concludes that there is justification for the continued regulation of security and investigation agents, due to the high risk of criminal activity and invasion of privacy associated with security and investigation services.

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

During the course of the Review it became apparent to the Review Panel that the current licensing structure, (contractor, employee, employee under supervision), is no longer appropriate in an industry where a large number of service providers are engaged as subcontractors rather than employees.

Accordingly, the Review Panel has proposed that the licensing structure be altered to provide for the separate licensing of contractors and workers. A person holding a contractor licence will be able to contract for the performance of the work, while a person holding a worker licence will be able to actually perform the work.

The Act contains a number of restrictions, in the form of barriers to entry and conduct restrictions. The definition of the scope of work is a barrier to entry, as it reserves a body of work to a particular class of person (that is, those who meet the requirements of the Act). Nonetheless, the Review Panel has concluded that the current scope of work can be justified, but for the specific function of “hiring out or otherwise supplying dogs or other animals for the purpose of protecting or guarding a person or property”, which should be deleted.

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

The Review Panel concluded that the legislation should no longer refer to “qualifications” but should instead refer to competencies. This reflects the fact that the licensing system is directed at ensuring the competence of industry participants, and not at increasing the “professionalism” of the industry by requiring the completion of “qualifications

Ensuring the fitness and propriety of an agent is perhaps the prime objective of the Act. The Review Panel is firmly of the view that the probity requirement must remain as a public protection measure (and not as a further penalty on a convicted person), and that the current list of prescribed offences is appropriate given the nature of the work to be undertaken by licensees. However, the Review Panel recommends that the reference to “indictable offences” in Schedule 1 of the Regulations be amended to recognise the difference between major and minor indictable offences. The Review Panel considers that a permanent disqualification should only apply where the applicant has been convicted of a major indictable offence, but that the exclusionary period for a person convicted of a minor indictable offence should be limited to ten years.

The Act currently requires a person who wishes to hold a contractor licence, to have sufficient financial resources for the carrying on of the business. The Review Panel is of the view that this requirement is justified in those circumstances where contractor failure poses a risk to consumers.

It is important to note that business competencies are only relevant to the ability to hold a contractor licence, while technical competencies are only relevant to the holding of a worker licence. The Review Panel therefore proposes a two-tier licence structure. This involves the separate licensing of contractors (those who contract for the work) and workers (those who personally perform the work). Licensing contractors and workers separately would allow for the development of distinct licensing entitlement criteria for each type of licensee. In short contractors would no longer be required to satisfy criteria relevant only to workers, and vice versa.

The Act provides for disciplinary measures to be taken against an agent under a range of circumstances. Disciplinary measures may result in a reduction in the number of persons who can provide services within the market, and may therefore

be seen as a mechanism by which competition within the marketplace can be restricted. However, normal competitive behaviour within the marketplace is unaffected by the operation of the Act, and the disciplinary procedures only operate to remove from the market those who engage in conduct which is against the interests of consumers generally. For these reasons, the Review Panel sees any restriction which may arise from the operation of the disciplinary provisions to be justified as being in the public interest.

The Act also contains a number of exemptions. In general terms the Review Panel has recommended the retention of the exemptions, but only to the extent that the competence and probity of agents is assured without licensing.

In summary, the Review Panel concludes that there is a clear public benefit in the retention of regulatory control of the market for security and investigation services, and that the current legislation (subject to any changes recommended within the Final Report) is the least restrictive and most effective means of achieving the twin objectives of ensuring public safety and promoting the maintenance of appropriate standards by those engaged in providing those services.

PART 1 : INTRODUCTION

1.1 WHY IS THE ACT BEING 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 forms the basis for this review. In this context it must be borne in mind that legislative reviews, such as this review of the *Security and Investigation Agents Act 1995* and the regulations under it, 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.

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
- 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.

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

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 must be removed, even if they are 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 set out in the Competition Principles Agreement, including rural issues, have been considered by the Review Panel.

It is important to acknowledge at the outset that some laws may restrict competition. In many such cases restrictions may be essential in order to achieve a significant community benefit. However, National Competition Policy requires that all laws restricting competition should be identified, so that those community benefits and the necessity for the restriction can be reviewed in an objective fashion.

1.2 WHAT IS BEING REVIEWED?

The Agreement requires that all existing legislation (including Acts, enactments, ordinances or regulations) be reviewed.

Accordingly, this Review applies to:-

- *Security and Investigations Act 1995* (“the Act”); and
- *Security and Investigations Regulations 1996* (“the regulations”)

References have been made to other legislation where appropriate. However, the scope of this review is limited to the *Security and Investigation Agents Act 1995* and the regulations. Issues relating to competitive restrictions in other legislation are beyond the scope of this review and are not considered in this Final Report.

It is important to emphasise that this particular review is restricted to a review of the Act in terms of its effect on competition. The review is not a general review of the effectiveness of the legislation and issues related to this question have not been canvassed in the review or in this Report.

1.3 THE REVIEW PANEL

The review was conducted by a Review Panel consisting of officers of the Policy and Legal Unit of the Office of Consumer and Business Affairs and officers of the South Australian Police Force.

1.4 CLASSIFICATIONS OF RESTRICTIONS ON COMPETITION

Restrictions on competition identified in the Act will not be of uniform effect, with varying degrees of impact on competition inherent in each particular restriction. Therefore, the Review Panel has adopted the process of categorising potential restrictions on competition as **trivial**, **intermediate** or **serious** in order to assist in deciding on the depth of analysis to be given in each case.

The categorisations attributed by the Review Panel to the various restrictions are derived following a consideration of various factors including the height of barriers to entry and the impediments to rivalry in all dimensions of the price-product-service packages offered to consumers by market participants given the nature of the market.

1.5 THE REVIEW PROCESS

The purpose of the Final Report is to present to the Minister for Consumer Affairs the conclusions and recommendations of the Review Panel in relation to each of the legislative restrictions on competition identified within the *Security and Investigations Act 1995* and the *Security and Investigations Regulations 1996* in accordance with the requirements of the Competition Principles Agreement. A summary of the conclusions and recommendations of the Review Panel can be found at Appendix 1.

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

An Issues Paper was released for public consultation on 15 March 1999. Eight submissions were received by the Review Panel. Based on submissions received, a Draft Report was then prepared by the Review Panel and released for further public consultation. The Review Panel received 12 submissions in response to the Draft Report. A schedule detailing the distribution of the Draft Report can be found at Appendix 3. The terms of reference for the review are set out at Appendix 2.

This Final Report was prepared taking into account submissions to the Draft Report and further research conducted by the Review Panel.

PART 2 : THE MARKET

2.1 WHAT IS THE RELEVANT MARKET?

In general terms, a market is a collection of buyers and sellers that interact, resulting in the possibility of exchange². Buyers include consumers who purchase goods and services, and sellers include firms and individuals who sell their goods and services.

A recently published report indicated that the security industry in Australia has undergone a rapid period of growth during the 1980's and 1990's.³ It has been estimated that Australians spend in excess of \$2 billion dollars per annum on private security.⁴

A feature of the market in recent years has been the domination of larger firms in the security industry in particular. In a recent paper, Prenzler and Sarre indicated that "only 1 percent of security enterprises was responsible for 66 percent of employment and 60 percent of turnover" based on ABS statistics, and that "a trend towards oligopoly accelerated in the 1990's with Tempo purchasing Group 4, and acquisitions involving Chubb, Wormald, Mayne Nicklass and MSS".⁵ Chubb, in particular, has a large presence within the South Australian market.

2.1.1 Sellers

In the context of the *Security and Investigation Agents Act 1995*, sellers include those persons who provide or carry on the business of providing, the following security and investigation services in South Australia⁶ :-

- protecting or guarding a person or property or keeping a person or property under surveillance;
- hiring out or otherwise supplying dogs or other animals for the purpose of protecting or guarding a person or property;
- preventing, detecting or investigating the commission of an offence in relation to a person or property;
- controlling crowds;

² Pindyck R.S. and Rubinfeld D.L., Microeconomics (Second Edition), MacMillan, USA, 1992, p.11

³ Prenzler T and Sarre R, Regulating Private Security in Australia, Trends and Issues in Crime and Criminal Justice Series (No 98), Australian Institute of Criminology, Canberra, November 1998, p. 1

⁴ The Age, Good Weekend Magazine, July 18 1998, p.15

⁵ Prenzler T and Sarre R, Regulating Private Security in Australia, Trends and Issues in Crime and Criminal Justice Series (No 98), Australian Institute of Criminology, Canberra, November 1998

⁶ These services are more fully described in section 4 of the Act.

- providing advice on security alarm or surveillance systems;
- hiring out or otherwise supplying security alarm or surveillance systems;
- installing or maintaining security alarm or surveillance systems;
- ascertaining the whereabouts of or repossessing goods that are subject to a security interest;
- collecting or requesting the payment of debts;
- executing legal process for the enforcement of a judgement or order of a court;
- executing distress for the recovery of rates, taxes or money;
- obtaining or providing (without the written consent of a person) information as to the personal character or actions of the person or as to the business or occupation of the person;
- searching for missing persons;
- obtaining evidence for the purpose of legal proceedings (whether the proceedings have been commenced or are prospective).

These services are offered by a large range of suppliers, both public and private. At 30 June 2002 the following number of *private* persons were licensed to provide security and investigation services in South Australia⁷ :-

Companies	Individuals	Total
250	6,806	7,056

There is no reliable estimate of the number of persons in the public sector providing security and investigation services, but these persons should also be considered as part of the market, as their skills are substitutable for those within the private sector.

2.1.2 Consumers

Under the Act, there are two distinct classes of consumers who need to be considered:-

- the consumer who pays for the service provided by the agent; and
- the person who is the subject of the agent's work.

⁷ Annual Report 2001-2002, Commissioner for Consumer Affairs. Note that many licensees hold endorsements for both investigation and security work.

The former consumer is the person who wants property secured, court orders activated or debts collected. The legislation aims to protect the interests of these people by ensuring that the agent is a fit and proper person and thus is someone who is likely to perform the required functions with due attention and honesty.

The second consumer is the person in the licensed premises who is subject to supervision by a crowd controller, or who is a debtor, or who is under investigation. The legislation aims to protect these consumers by imposing conduct rules on agents.

2.1.3 Mutual Recognition

It should also be recognised that under mutual recognition legislation, trades and professions regulated in one jurisdiction have the ability to obtain registration in another jurisdiction by means of administrative process. Currently, all States and Territories have some form of regulation of the security industry.

One of the effects of the mutual recognition legislation is that licensing decisions taken in South Australia may also be the main licensing decision for the whole of Australia and New Zealand⁸.

It is therefore appropriate to consider that the market for these services extends beyond the boundaries of South Australia. Correspondingly, licensed persons from interstate and New Zealand can also provide security and investigation services within South Australia, provided they have made application under the mutual recognition process.

2.1.4 Market for Training Courses - A Secondary Market

A secondary market to be considered is the market for security and investigation industry training courses, since the Act requires prospective security or investigation agents to complete a course of training approved by the Commissioner.

Currently, some 15 training providers have courses approved for licensing purposes by the Commissioner for Consumer Affairs. These providers offer in excess of 48 approved training courses across a range of licensing functions.

While the structure and governance of these training courses is largely within the province of the *Vocational Education, Employment and Training Act 1994* (which is also currently subject to review), the market for training courses is largely generated by the existence of the Act. It is therefore appropriate to consider the market for security industry training courses as part of this Review.

⁸ By virtue of the Trans-Tasman Mutual Recognition Agreement (“the TTMRA”).

CONCLUSION 1.

The conclusion of the Review Panel is that the markets affected by the operation of the Act are:-

- the South Australian market for the provision of security and investigation services, and
- the South Australian market for security and investigation industry training courses.

PART 3: THE NEED FOR REGULATION

Any review of legislation in line with competition policy principles must commence from a basis that no regulation is required. The case must then be made for regulation, and that regulation should be in the least restrictive form to meet the identified objectives.

It is therefore necessary to identify whether there is a need for any regulation within this market.

3.1 COMPETITION: WHAT IS IT? WHY THE NEED?⁹

3.1.1 What is it?

Competition expresses itself as rivalry within a market, and can take a number of forms:-

- rivalry on price;
- rivalry on service;
- rivalry on technology;
- rivalry on quality; or
- rivalry on consistency of product.

Effective competition requires both that prices should be flexible (reflecting the forces of demand and supply), and that there should be independent rivalry in all dimensions of the price-product-service packages offered to consumers.

3.1.2 Why do we need competition?

Many economists argue that competitive market forces deliver greater choice and benefits to consumers. If a service provider is able to exercise significant power within its market, a misallocation of resources may result. The provider has no incentive to offer new products to consumers, and consumers may pay more for the service than it is worth. Vigorous competition between service providers encourages them to attract consumers to the business with targeted service provision and/or reduced prices.

⁹Drawn from *re Queensland Co-op Milling Association Ltd & Defiance Holdings Ltd* [1976] ATPR ¶40-012 at 17,246; Commonwealth of Australia, Department of Industry, Science and Tourism, *Codes of Conduct Policy Framework* (Canberra 1998) p9.

Competition therefore functions as an incentive to business to improve performance through service innovation and adaptation to changing market environments. It provides a benefit to the community as a whole by allowing for greater consumer choice, increased efficiencies and economic growth, which may in turn lead to increased employment opportunity.

It is important to note that:-

“Competition policy does not require that all firms compete on an equal footing; indeed, differences in size, assets, skills, experience and culture underpin each firm’s unique set of competitive advantages and disadvantages. Differences of these kinds are the hallmark of a competitive market economy.”¹⁰

This Review is not primarily concerned with competitive conduct between suppliers within the market, unless such conduct results in inefficiencies and costs to the community at large. Rather, the Review is concerned with provisions in the legislation which may restrict entry into the market by new competitors, or provisions (of general application) which distort competition within the market as a whole.

3.1.3 Why do we regulate competition?

Competition in markets is usually regarded as the most efficient method of allocating resources. However, unrestricted competition may not provide the best or most appropriate economic or social outcome. It has been observed that:-

“government intervention in a competitive market is not always a bad thing. Government - and the society it represents - might have other objectives besides economic efficiency. In addition, there are situations in which government intervention can improve economic efficiency. This includes externalities and cases of market failure.”¹¹

It is therefore argued that where the potential for market failure exists, a basis for government intervention can be established.

3.1.3.1 Market Failure¹²

Competition assumes a market that is perfect, ie:-

- where maximum satisfaction and profit are sought;

¹⁰ National Competition Policy, Report by the Independent Committee of Inquiry, August 1993, p. 293

¹¹ Pindyck R.S. and Rubinfeld D.L., Microeconomics (Second Edition), MacMillan, USA, 1992, p.320

¹² Partly drawn from Commonwealth of Australia, Trade Practices Commission, *Regulation of professional markets in Australia: issues for review* (Canberra 1990) pp22-25; Victoria, Competition Policy Task Force, *National Competition Policy: Guidelines for the review of legislative restrictions on competition* (Melbourne 1996) pp70-72.

- where there are no hidden transaction costs;
- where all parties are completely informed; and
- where there are no costs to other parties.

From the consumer's viewpoint, inefficient market outcomes may result where there are high transaction costs, information asymmetry or externalities. Such situations indicate market failure and may justify regulatory intervention. Market failure will be discussed in greater detail at Part 4.7 of this Final Report.

3.1.3.2 Provider Failure

Conventional forms of market failure do not, however, account for the failure of the service provider to honour their obligations, for example, through the intervention of dishonesty, insolvency or the systematic performance of substandard work.

In theory, consumers and service providers contract for a pre-defined quality of service in exchange for a price that the provider can demand without losing business. The provision of service quality less than that bargained for may be compensated for by regulatory intervention such as the setting of point-of-entry standards, the imposition of ongoing requirements or the provision of a 'safety net' for consumers.

Analyses of occupational regulation schemes in Australia have produced a list of potential risks to consumers that are generally not related to market failure.¹³ The main types of benefit provided to the public through regulation consist of protection against a risk of:-

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

The existence of these situations may also provide justification for regulatory intervention, and will be explained in further detail at Part 4.8 of this Final Report.

3.2 THE EFFECT OF OCCUPATIONAL REGULATION ON COMPETITION¹⁴

¹³ See Victoria, Law Reform Commission & Regulation Review Unit, *Principles for Occupational Regulation* (Melbourne 1988).

¹⁴Partly drawn from Moore & Tarr, "General Principles and Issues of Occupational Regulation" in (1989) 1 *Bond LR* 119 at 122-123.

The intended effect of occupational regulation is to address concerns with market and/or provider failure. **Any regulation imposed should therefore be appropriate to addressing these concerns.** However, most occupational regulation legislation was designed without any explicit consideration of its impact on competition.

Restrictions on competition imposed by occupational regulation form two broad groupings:-

- barriers to market entry; and
- restrictions on competitive conduct.

These are briefly discussed below.

3.2.1 Barriers to Entry

Regulatory barriers to market entry have the most direct influence over competitive conditions within an industry.

Numerous point of entry controls can exist:-

- barriers creating a monopoly;
- restrictions that operate by reference to the number of producers or product;
- barriers operating against interstate goods or service providers;
- barriers operating against foreign goods or service providers;
- restrictions that operate by reference to standards or qualifications.

It is this final barrier which is of most relevance to this Review.

3.2.2 Restrictions on Competitive Conduct

Many sectors of the economy operate under regulatory regimes which restrict certain forms of competitive behaviour. Restrictions on conduct may range from price controls to mandatory codes of practice.

If these controls were maintained by private agreement between competitors many would be caught by the competitive conduct provisions of the *Trade Practices Act*. However, as these controls are imposed by government, they are immune from the *Trade Practices Act* provisions.

As discussed previously, competition expresses itself as rivalry within a market. This rivalry may be in terms of price, service, technology or quality. Effective competition requires both that prices should be flexible (reflecting the forces of demand and

supply), and that there should be independent rivalry in all dimensions of the price-product-service packages offered to consumers. Restrictions on competitive conduct can prevent this competitive rivalry from being maximised.

Clearly, justification exists for government intervention in circumstances of market or provider failure in the marketplace. Intervention in an occupational services market, which may take the form of conduct or entry restrictions, must necessarily be subject to close scrutiny to ensure that any anti-competitive effects of this regulation can be justified as being in the best interests of the public.

PART 4: ANALYSIS - THRESHOLD TEST

4.1 IS THERE A NEED FOR ONGOING REGULATION?

As a threshold question, consideration must be given to whether there is an ongoing need for regulation of this market as a whole. To answer this question it is necessary to consider both the objectives of the legislation to identify the market or provider failure which the Act seeks to address and the contemporary market to identify possible areas of provider or market failure.

4.2 HISTORY OF REGULATION IN SOUTH AUSTRALIA

South Australia has had licensing of some form in relation to aspects of the security industry for more than 50 years.

The *Bailiffs & Inquiry Agents Licensing Act 1945* licensed persons enforcing court orders and processes, as well as those gathering evidence for court proceedings involving matrimonial or family law cases.

In March 1972, the *Commercial and Private Agents Act 1972* was introduced into the South Australian Parliament. This Act covered a broader range of security-related occupations, including:-

- commercial agents and sub-agents; and
- inquiry agents; and
- loss assessors; and
- process servers; and
- security agents; and
- security guards.

and was extended in 1978 to include :

- store security officers.

In April 1983 the Minister for Consumer Affairs established a working party to review the *Commercial and Private Agents Act 1972*. The Working Party reported to the Minister in January 1984, and provided some 24 recommendations. As a result of those recommendations, the 1972 Act was repealed and replaced by the *Commercial and Private Agents Act 1986*.

The *Commercial and Private Agents Act 1986* provided consumer protection by regulating the activities of individuals and businesses engaged as commercial agents,

private inquiry agents, process servers, crowd controllers and security providers in South Australia.

It was not until 1994 that the *Commercial and Private Agents Act 1986*, was itself reviewed. Almost 10 years had elapsed since the introduction of the 1986 Act, and in the interim there had been significant growth in the security market. Practices within the industry had altered and there had been a number of technological advances which the previous Act did not adequately deal with. Further, new legislation had an impact on the operational practices used in the industry.¹⁵ Significant consultation with the police, industry and public was undertaken at the time of the review.

As a result of the recommendations of the review, the Minister for Consumer Affairs introduced the *Security and Investigation Agents Bill 1995* to the Parliament. The Bill was passed, and received assent on 7 December 1995. The Act became operational on 31 March 1996.¹⁶

Section 48 of the Act provides that the Governor may make such regulations as are contemplated by, or necessary or expedient for the purposes of the Act. The *Security and Investigation Agents Regulations 1996*¹⁷ were gazetted on 28 March 1996, and came into operation on 31 March 1996.¹⁸

4.3 OBJECTIVES OF THE CURRENT ACT

The long title of the Act merely states that it is :-

“An act to regulate security and investigation agents ; to repeal the Commercial and Private Agents Act 1986, and for other purposes.”

Throughout the Act there is a prominent and recurring theme of consumer protection. The Act prevents persons from entering the industry if they pose a risk to consumers, and regulates the conduct of persons operating within the industry so as to thwart their opportunity to cause harm to consumers.

More specifically the Act stipulates that in order to be licensed, agents must be appropriately trained. This benefits consumers by reducing the likelihood of agents providing them with incompetent service.

The Act also requires that an agent be of sound character. This requirement acts a filter by identifying persons with a criminal propensity and preventing them from entering the industry. The effect of this is that it reduces the prevalence of agents who are likely to abuse their position of trust to the detriment of consumers.

The Liquor and Gaming Commissioner supported the view that the Act aims is to protect consumers and commented this was achieved by ensuring that¹⁹ :-

¹⁵ For example the *Privacy Act 1990* (Commonwealth)

¹⁶ *Gazette*, 28 March 1996, p. 1797

¹⁷ No 48 of 1996

¹⁸ Except Part 4, which came into operation on 30 April 1996

¹⁹ Submission S1, Liquor and Gaming Commissioner

“only fit and proper persons should be able to hold a licence issued under the Security and Investigation Agents Act 1995, persons licensed under the Act should be adequately and appropriately trained, and regular checks should be made to ensure compliance.”

The existence of disciplinary provisions allows for agents whose conduct does not reach the prescribed standard, and is therefore more likely to cause loss to consumers, to be dealt with appropriately.

The Act further requires that certain classes of agent must meet financial resource requirements. This helps to ensure that agents operating a security or investigations business have sufficient resources to successfully sustain that business. This reduces the risk of the business collapsing, and consequently reduces the risk of consumers suffering loss as the result of business failure.

CONCLUSION 2.

The conclusion of the Review Panel is that the Act has the following objectives : -

- 1. to minimise the potential for consumer loss resulting from consumers being serviced by incompetent agents.**
- 2. to minimise the potential for consumer loss arising from agents engaging in criminal activity.**
- 3. to minimise the potential for consumer loss arising from the collapse of businesses in the security and investigations market.**

4.4 THE ONGOING RELEVANCE OF THE OBJECTIVES

The question must be asked whether these objectives continue to be relevant. An examination of the available complaint statistics in relation to security and investigation agents demonstrates that a relatively small amount of complaints are received by the Office of Consumer and Business Affairs.

Year	Complaints
1996	16
1997	6
1998	14
1999	3
2000	2
2001	11
Total	52

** note that these statistics cover complaints arising in relation to all security services.*

The Review Panel notes that the level of complaints received by the Office of Consumer Affairs is not necessarily indicative of the fact that regulation of the industry is unnecessary. These statistics may reflect the fact that the current system of regulation is achieving its aim of consumer protection, and is reducing the prevalence of activities which give rise to consumer complaints.

4.5 CURRENT OPERATION OF THE ACT.

4.5.1 Licensing

The Act prevents a person from carrying on business or otherwise acting as a security agent or investigation agent unless authorised by licence. A person is also prevented from advertising himself or herself as being entitled to carry on business or to otherwise act as a security agent or investigation agent, unless authorised by licence.²⁰ The terms “security agent” & “investigation agent” are defined by the Act.²¹

4.5.1.2 Licence Types

The Act caters for three types of licence, a security agents licence, an investigation agents licence, and a restricted licence (that being a restricted security agents licence or a restricted investigation agents licence).

The restricted licence is subject to a condition or conditions of the following kinds:-

<i>restricted functions condition</i>	a condition limiting the functions that may be performed under the authority of the licence
<i>employee condition</i>	a condition preventing the holder of the licence from carrying on business as an agent
<i>employee (supervision) condition</i>	a condition requiring the holder of the licence to perform functions as an agent only under the supervision of a natural person who holds a licence authorising the person to perform those functions personally without supervision
<i>partnership condition</i>	a condition preventing the holder from carrying on business as an agent except in partnership with a person specified in the licence or some other person approved by the Commissioner
<i>partnership (business only) condition</i>	a condition preventing the holder of the licence from personally performing functions as an agent

²⁰ Section 6

²¹ Section 3

The Act also provides for the negative licensing of process servers. Although process servers are not required to be licensed or registered, the Act states that a person must not carry on business or otherwise act as a process server unless they are qualified in accordance with the regulations, and they have not been convicted of a prescribed offence.

4.5.1.3 Entitlement to be Licensed - A natural person

A natural person is entitled to be licensed if that person²²:-

- possesses the qualifications and experience, specified in the regulations or considered appropriate by the Commissioner for Consumer Affairs; and
- has not be convicted of an offence listed in the regulations; and
- is not suspended 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.

Furthermore, for licences other than those subject to an employee condition, the person will not be entitled to be licensed unless the person:-

- is not an undischarged bankrupt, or subject to a composition or deed or scheme of arrangement with or for the benefit of creditors; and
- has not during the period of five years preceding the application for the licence, been a director of a body corporate that has been wound up for the benefit of creditors - either at the time when the body was wound up or within the period of six months preceding the commencement of winding up; and
- has sufficient business knowledge and experience and financial resources for the purpose of carrying on business under the licence.

4.5.1.4 Entitlement to be Licensed - A Body Corporate

A body corporate will be entitled to be licensed²³ :

if the body corporate :-

- is not suspended 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

²² Section 9(1)

²³ Section 9(2)

- is not being wound up and is not under official management or in receivership; and
- has sufficient financial resources for the purposes of properly carrying on business under the licence;

and no director of the body corporate :-

- has been convicted of an offence specified in the regulations in relation to the functions authorised by the licence; or
- is 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; or
- has during the period of five years preceding the application for the licence, been a director of a body corporate that has been wound up for the benefit of creditors - either at the time when the body was wound up or within the period of six months preceding the commencement of winding up

and each director of the body corporate :-

- is a fit and proper person to be the director of a body corporate that is the holder of a licence.

and the directors of the body corporate :-

- together have sufficient business knowledge and experience for the purposes of properly directing the business carried on under the licence.

4.5.2 Regulation of Activities

A person must not employ another as an agent, unless that other person holds a licence authorising them to perform the functions of an agent²⁴, nor must a person assist another to pretend to be an agent.²⁵

A licensed agent that is a body corporate must ensure the agents business is properly managed and supervised by a person holding a relevant licence²⁶, and that the functions performed in the course of the business are performed by licensed natural persons²⁷.

²⁴ Section 12A

²⁵ Section 16

²⁶ Section 13(1)

²⁷ Section 13(2)

A person carrying on business as an agent, must not conduct business under a name other than the name appearing in the licence, or a business name registered under the *Business Names Act 1996*.²⁸ Nor must the person publish any advertisement relating to the business, unless it specifies the name under which the business is being conducted.²⁹

A natural person who is a licensed agent must at all times when performing functions under the license, carry his or her licence and produce it forthwith if requested to do so by the police, the Commissioner for Consumer Affairs, a person dealing with the agent or other authorised person.³⁰

An agent must not make false, misleading, or deceptive representations, or conceal material facts, to induce a person to enter into an agreement in connection with the function of an agent.³¹ An agent must not settle claims relating motor vehicles.³² Furthermore if an agent repossess a motor vehicle, the agent must inform the police.³³

4.5.3 Disciplinary Provisions

In certain circumstances, disciplinary action may be commenced in the District Court against :-

- former agents;
- persons licensed as an agent whether or not carrying on business or otherwise acting as an agent, and
- persons formerly licensed as an agent.

The disciplinary power provides remedies over and above those available through other Acts or the common law and also provides a mechanism whereby those who are seen as posing a risk to consumers may be removed or excluded from the industry.

Disciplinary action is commenced by way of lodging a complaint with the District Court.³⁴ It is important to note that it is not only the Commissioner for Consumer Affairs who may lodge a complaint; the Act allows that any person may lay a complaint.³⁵ On hearing a complaint, the Court may, at the discretion of the Judge of

²⁸ Section 18

²⁹ Section 19

³⁰ Section 20

³¹ Section 17

³² Section 21

³³ Section 22

³⁴ Section 27

³⁵ Section 26

the Court, sit with assessors, who are representatives from industry and consumer organisations.³⁶

The grounds on which proper cause for disciplinary action may be made out are wide ranging ³⁷, as are the penalties available to the Court in the event that proper cause is made out. ³⁸

4.5.4 Miscellaneous Provisions

The Commissioner for Consumer Affairs may, with the approval of the Minister for Consumer Affairs, enter into agreements with an organisation representing the interests of agents or a particular class of agents under which the organisation undertakes a specified role in the administration or enforcement of this Act.³⁹

The Commissioner may also delegate his power to specified persons⁴⁰, be joined as a party to any proceedings of the Court under this Act,⁴¹ request the Commissioner of Police to investigate and report on any matter under this Act⁴², and must keep a register of persons licensed under this Act.⁴³

The Minister for Consumer Affairs may, on application by a person, exempt the person from compliance with a specified provision of the Act.⁴⁴

4.6 COSTS OF REGULATING THE MARKET FOR SECURITY AND INVESTIGATION AGENTS

Regulatory intervention into an industry will inevitably give rise to some costs. These costs may occur in the government, industry or consumer sectors. The sources of costs identified are:-

- the actual and opportunity costs of complying with a regulatory regime;
- the actual and opportunity costs of administering a regulatory regime; and
- the costs arising from a reduction in competition and contestability in the relevant market.

³⁶ Section 28

³⁷ Section 25

³⁸ Section 29

³⁹ Section 32

⁴⁰ Prenzler T and Sarre R, *Regulating Private Security in Australia, Trends and Issues in Crime and Criminal Justice Series* (No 98), Australian Institute of Criminology, Canberra, November 1998; Section 31

⁴¹ Section 35

⁴² Section 39

⁴³ Section 34

⁴⁴ Section 33

Costs arise through ongoing compliance with the regulatory scheme by service providers. In the absence of regulation, a service provider would be free to structure their business behaviour in the manner most efficient for their business requirements. A regulatory system imposes a framework within which a service provider must operate, and will not necessarily allow the service provider to achieve maximum efficiency. This loss of efficiency is considered a source of cost to the wider community.

An example of the present Act imposing an operational framework which reduces efficiency, arises from the requirement that collection agents adhere to strict trust accounting procedures. Regulating the manner in which such agents deal with money, restricts them from obtaining the most competitive rate of return upon that money.

Regulation of markets also imposes costs on government, and thus the wider community, through administration and compliance requirements. This involves not only the immediate costs of funding, but also the opportunity costs of that funding. Again, the nature of the particular regulatory scheme will direct the extent of costs incurred.

In the case of the Act under consideration, significant governmental costs arise. The Commissioner for Consumer Affairs is the licensing authority for the purposes of the Act. This requires that staff be employed to :-

- process, assess and grant licence applications;
- advise current and prospective licensees on matters relating to the Act;
- undertake compliance work;
- undertake disciplinary actions and/or prosecutions;
- educate the public about the operation of the Act.

Obviously, these administrative and compliance costs will be significant given the number of security and investigation agents presently licensed. It may be argued that the costs of administration are met by the licence fees collected, and since it is the licensees who pay the fees, any costs incurred in administering the system are ultimately private rather than public costs. However, this does not take account of the fact that these costs will be transferred to the public through licensees' cost structures. Therefore, it can be appreciated that once again the wider community bears the costs of administration and compliance work.

The theory of contestability would suggest that the mere threat of entry by new competitors into the market can act as a spur to incumbents to improve efficiency. Regulation of the market which restricts entry to new competitors is a key contributor to a reduction in the level of contestability in that market. With little threat of new competition, those presently in the market have a greater incentive to maintain the status quo than to explore new or different service delivery options. In

these circumstances costs, both tangible and intangible, will be imposed on the wider community.

In addition to decreased contestability, regulation may have other detrimental effects on competition within the present market. Regulation which determines not only those who may enter the market, but also the manner in which service may be delivered, is of prima facie anti-competitive effect. It is argued that since competition is the force which drives down prices, a reduction in levels of competition will cause a resultant increase in the costs of acquiring the relevant services.

Reduced levels of competition and contestability may also give rise to a situation of technological lethargy, where suppliers have lower or no incentive to develop or implement new and potentially more efficient methods of service delivery. There will be costs imposed on the community as a whole through foregone efficiency gains in such circumstances. If a supplier is limited to supplying only a particular type of service, then there is no incentive for that supplier to explore other avenues of service delivery. Whilst there may be other methods of service delivery which would result in a more efficient use of resources, both by the consumer and supplier, these will not be pursued in the regulated environment. Again, this may be considered to impose both actual and opportunity costs on the wider community.

The Review Panel therefore concludes that regulation in an industry may result in increased costs to the community as a whole through:-

- the requirements of administration and enforcement of the regulation;
- decreasing the level of contestability in the market;
- decreasing the level of overall competitiveness in the market; and
- allowing the potential for technological lethargy to arise.

Having identified that regulation of the market potentially imposes costs on the wider community, it is necessary to analyse the potential for market and provider failure in this market to see what benefits may arise through regulation.

4.7 MARKET FAILURE

As discussed, market failure may occur due to the existence of:-

- transaction costs;
- information asymmetry; or
- externalities.

If regulation is able to overcome any or all of these causes of market failure, then this may be seen as providing benefits which may be weighed against the costs of regulation.

4.7.1 Transaction Costs

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

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

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

This is particularly true in the security and investigations market, where many consumers only participate in the market on a limited number of occasions. For example the expensive and durable nature of security alarms means that such goods are only purchased once or twice in a lifetime. Furthermore it is not uncommon for security agents to be employed for one off functions and gatherings.

Licensing of Security and Investigation Agents helps to provide basic information about suppliers in the market. The fact that a person has been granted a licence is an indication to the consumer (although not a guarantee) that the service will be provided by an appropriately trained and competent person. This can decrease the cost to consumers of individually measuring the competence of service providers. Economies of scale dictate that Government is in a better position than an individual consumer to undertake such an assessment on consumers' behalf.

Regulation of the security and investigations market therefore provides a public benefit so far as it reduces the potential incidence of transaction costs.

4.7.2 Information Asymmetry

Information asymmetry occurs when there is a disparity between information at the disposal of the consumer on the one hand, and the service provider on the other. Consumers may be at a disadvantage in:

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

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

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

The greatest potential for information asymmetry in the security industry, arises in the area of alarm sales and installation. It is fair to say that most consumers will participate in this area of the market on a limited number of occasions. They are usually not in a position to assess for themselves the quality or appropriateness of the goods or services prior to consumption, when it is often too late. Thus they are at a significant disadvantage in terms of the information possessed in comparison with the security agent.

The evolving nature of the goods in this market also contributes to information difficulties for consumers. Alarms have, over time, become increasingly complex technologically. The average consumer simply does not have the technical expertise to adequately assess the alarms, nor the installation techniques they are considering purchasing.

Requiring agents to be licensed, and to comply with all accompanying requirements, is one way of addressing this information asymmetry. Consumers can be assured that a person providing the goods and services to them is suitable to do so, without having to undertake extensive searches to discover the relevant information. This reduces the need for consumers to obtain further independent assurance that the dealer is competent; the Government has performed that task for consumers.

4.7.3 Externalities

Externalities are costs to parties not directly involved in the transaction - they are sometimes referred to as 'spillovers'. In some occupations, the risk of externalities is so significant for the community that a high degree of assurance of competence upon entry is required. Subsequent remedial action is often too late and ill-directed.

The Review panel concludes that there is serious potential for negative externalities in this market. The incorrect installation of security systems can lead to false alarms, and a consequent waste of police resources in responding to the false alarms. A wastage of police resources is clearly a cost to the community as a whole, and may correctly be identified as an externality.

Furthermore, the decision of hotels and other establishments to engage crowd controllers, can have serious effects on those not party to the decision. If crowd controllers fail to perform their job competently, hotel patrons are likely to be at risk of physical injury.

Regulation therefore provides significant public benefits by prescribing minimum standards of training, which reduce the potential for negative externalities within the market.

4.8 PROVIDER FAILURE

As discussed earlier, a set of potential risks to consumers have been identified which are not generally referable to market failure, but rather to the failure of a provider to honour obligations. Occupational regulation schemes can provide protection to the public against the risk:-

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

4.8.1 Financial Risk

The financial risks thought worthy of protecting against may be conveniently described as personal risk and business risk.

4.8.1.1 Personal risk

Personal risks are risks attaching to the individuals behind the supplier. Regulating to reduce the risk of dishonesty is normally reflected in the requirement that an applicant be a fit and proper person to hold a licence. This requirement is commonly tested by reference to the applicant's criminal record regarding offences of fraud or dishonesty.

Protection against this risk is also facilitated by imposing controls on licensees, (such as trust accounting requirements), which are directed to securing financial probity in those occupations in which large amounts of money are handled by a licensee on behalf of a third party. Such regulation provides a filter to exclude from the occupation those who have a known predisposition to fraud or dishonesty.

It is often the case that collection agents hold significant amounts of money on behalf of their clients. The Review Panel considers that the risk of an agent behaving dishonestly in relation to this money needs to be minimised to the greatest extent possible and that regulation is required to provide the necessary protection.

4.8.1.2 Business risk

Business risk is related to the financial stability of the business. It is common for occupational regulation schemes to create some sort of financial threshold for an intending licensee to minimise the possibility of them becoming insolvent while liable to the consumer. This requirement is commonly expressed in the requirement that an applicant have sufficient financial resources to enable the successful carrying on of the occupation authorised by the licence. It is often supported by constraints on persons who are bankrupts or directors of companies recently wound up from being licensed.

It should be recognised that the risk of financial loss is small in the markets for security and investigation services. With perhaps two exceptions, the majority of consumers will be required to pay for the service only after the service has been rendered. There is therefore little opportunity for the consumer to be at risk of financial failure from the operator.

One exception is the supply, installation and maintenance of security alarm and surveillance systems. Consumers may pay substantial deposits in advance of these systems being supplied and installed. Consumers also have an interest in ensuring that the supplier of these systems remains in existence to meet any warranty or maintenance requirements. A further exception is the collection agent who at any point in time may hold significant funds on behalf of clients. Again, consumer risk is high.

4.8.2 Substandard work

In many areas, standards of technical competency are mandated to reduce the risk of substandard work being systematically performed. This risk is reduced by the requirement that an applicant for a licence or registration has completed a prescribed course of training or holds prescribed qualifications. Consumers are thus given some confidence that services provided by practitioners will conform to a basic level of skill.

The risk of substandard work arises in the market for security and investigation services, the best example being the installation of security alarms. The installation of such alarms is a complex task, and incompetence not only impacts upon the consumer but can also lead to false alarms and wasted police resources. The Review Panel concludes that the risk of substandard work needs to be minimised and that regulation can help achieve this.

4.8.3 Public Health and Safety

Where public health and safety are potentially at risk, there is a greater argument in favour of regulation.

If the performance of a particular type of work, or the carrying on of a particular occupation has the potential to negatively impact on public health and safety, then there are arguably grounds for government regulatory intervention. Intervention in such circumstances must be designed to eliminate or minimise the potential for harm

to the general public. There are many legislative examples of regulation aimed at achieving these outcomes. For example, the regulation of medical practitioners and dentists aims to minimise public health and safety risks by ensuring that only those who are demonstrably competent are permitted to carry out the relevant activities.

As set out earlier, there is a very real risk of externalities in this market. Of concern to this Review is the potential for serious negative externalities. The likelihood of an incompetent crowd controller injuring members of the public, demonstrates the potential risk to public health and safety which is present in this market.

4.8.4 Criminal activity

Many of the functions performed by security and investigation agents require the agents to enter peoples homes, and have access to private and confidential information. The agent is placed in a position of trust, creating a situation where there is a real and significant potential for the agent to engage in criminal activity. For example persons installing security alarms gain knowledge of the consumers property, as well as knowledge of how to circumvent the security system.

The Review Panel therefore considers that there is a real risk of criminal activity within the security and investigations market. Licensing conditions which exclude persons of bad character from entering the market, perform the important function of helping to reduce this risk.

4.9 CONCLUSIONS - CONTINUING REGULATION

On the basis of the foregoing analysis, the Review Panel has come to the conclusion that justification is made out for the continuing control of the market for security and investigation agents, as the potential benefits to the wider community through the addressing of market and provider failure outweigh the identified costs of regulation.

CONCLUSION 3.

The conclusion of the Review Panel is that the continued regulation of the market for security and investigation agents is justified as the potential benefits to the wider community outweigh the costs.

PART 5 : ALTERNATIVES

5.1 ALTERNATIVES TO THE CURRENT REGULATORY SCHEME

Having established a need for regulation in this market, Clause 5 of the Agreement requires that the Review Panel consider less regulatory alternatives to the current system of regulation.

5.2 RELIANCE UPON MARKET FORCES

The government could remove the existing legislation and simply rely on market forces to control conduct within the industry. This presupposes that the market will operate to remove incompetent or uncompetitive operators, and relies on consumers exercising their legal rights where operators fail to deliver to contracted standards.

The Institute of Criminology has noted that the notion of industry deregulation and market forces as being a method of improving quality by way of market pressures has been described by the NSW Independent Commission Against Corruption ("ICAC") as "*naïve in the extreme*".⁴⁵

The cost of exercising legal rights (considered to be transaction costs) is significant, particularly for the average consumer. Consumers could potentially suffer some financial loss; for example in the case of the "mum and dad" type consumer, the purchase of a security alarm is a relatively expensive transaction. Placing these consumers at risk of financial loss is undesirable both from a social and from an economic perspective.

There is also a risk that incompetent and possibly dishonest practitioners could enter the industry in the absence of any controls. Further, market forces only operate reactively, i.e. once damage has been caused.

However, the Review Panel believes that there is room for market forces to play a greater role in addressing matters such as information asymmetry.

This is based on the assumption that licensing exists in part to provide consumers with an indication that a person possesses a basic level of competence. It has been asserted that:-

*"Occupational regulation in the form of licensing is premised on an assessment that it is better at the outset to exclude from the market incompetent or dishonest practitioners rather than deal with the consequences of their actions later."*⁴⁶

⁴⁵ Prenzler T and Sarre R, *Regulating Private Security in Australia, Trends and Issues in Crime and Criminal Justice Series* (No 98), Australian Institute of Criminology, Canberra, November 1998

⁴⁶ *Guidelines for the Review of Legislative Restrictions on Competition*, Victorian Department of Premier and Cabinet, p.71

Licensing operates as a control over entry into a market, and in one sense is therefore only concerned with setting minimum standards of competence and conduct, below which the government will not allow a person to participate in the market.

Further, licensing does not provide for recognition of specialist skill or expertise. Market forces may be able to deliver such guarantees, and also give recognition to those who have achieved a degree of skill and expertise beyond the basic level of competence measured by licensing.

CONCLUSION 4.

The conclusion of the Review Panel is that sole reliance on market forces is an inappropriate mechanism for the overall regulation of the security and investigations market.

5.3 RELIANCE UPON EXISTING LAWS OF GENERAL APPLICATION

Consumers of goods and services have a range of laws that they may call on during a dispute.

Providers of services may be liable to their customers for any damage caused by their negligence in circumstances where a duty of care to the customer exists and is breached, resulting in loss or damage that can be attributed to that breach.

There are also a number of laws dealing with the advertising of goods and services. At common law, misrepresentations regarding the price or quality of services may give a consumer legal rights to void the contract or, in certain circumstances, claim damages.

The Review Panel notes at the outset that although consumer protection laws tend to operate reactively (i.e. they are only available to the consumer once loss has been suffered), they still offer some protection to consumers. In addition, they have some deterrent effect, because dealers know that they may face legal action.

5.3.1 Fair Trading Act 1987 (SA)

The *Fair Trading Act 1987 (SA)* prohibits misleading and deceptive advertising and other conduct. In particular, the following sections are of relevance:-

- section 56 Misleading or deceptive conduct
- section 57 Unconscionable conduct
- section 58 False or misleading representations

- section 63 Misleading conduct in relation to goods
- section 64 Misleading conduct in relation to services
- section 69 Harassment and coercion.

Persons providing security and investigation services are subject to these laws because the definition of services in section 46 of the *Fair Trading Act 1987* is very wide; it includes any rights (including rights in relation to, and interests in, real or personal property), benefits, privileges or facilities that are, or are to be, provided, granted or conferred in trade or commerce, including rights, benefits, privileges or facilities that are or are to be provided, granted or conferred under a contract for or in relation to the performance of work, including work of a professional nature.

Products such as security alarms are also subject to these laws given that they fall inside the definition of goods, as outlined in section 46.

5.3.2 Trade Practices Act 1974 (Cth)

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

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

Warranties in relation to the supply of services

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

(2) Where a corporation supplies services (other than services of a professional nature provided by a qualified architect or engineer) to a consumer in the course of a business and the consumer, expressly or by implication, makes known to the corporation any particular purpose for which the services are required or the result that he desires the services to achieve, there is an implied warranty that the services supplied under the contract for the supply of the services and any materials supplied in connexion with those services will be reasonably fit for that purpose or are of such a nature and quality that they might reasonably be expected to achieve that result, except where the circumstances show that the consumer does not rely, or that it is unreasonable for him to rely, on the corporation's skill or judgment.⁴⁷

⁴⁷ Emphasis added.

The section only implies these terms into contracts for the supply of services struck between a corporation and a consumer. Due to constitutional limitations, the *Trade Practices Act 1974* does not in general extend to govern transactions between unincorporated traders and consumers.

A corporation may be liable if services are not rendered with due care and skill, or if the services do not fulfil the requested purpose. It is also the case that the conduct of the directors, servants or agents of the corporation acting within the scope of their actual or apparent authority may be taken into account to ascertain whether a breach of the implied term has been committed.⁴⁸

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

5.3.3 Consumer Transactions Act 1972 (SA)

South Australian law has a similar set of terms that are implied into contracts for the performance of services under the *Consumer Transactions Act 1972*, and these are not limited to corporations.⁴⁹ However, that Act only applies to a limited range of goods and services, which are defined within the Act and regulations. Although security alarms are likely to fall within the definition of goods, the Act does not extend to security and investigation services.

5.3.4 Occupational Health, Safety and Welfare Act 1986 (SA)

In addition, there are laws protecting persons from unsafe or unhealthy work practices by way of the *Occupational Health, Safety and Welfare Act 1986* (SA). In a 1998 case,⁵⁰ a company was convicted of failing to ensure that a plant which they installed was safe, in breach of section 24(2) of the Act.⁵¹ Of relevance, section 22 imposes on an employer or self-employed person a duty to take reasonable care to avoid adversely affecting the health or safety of any other person through an act or omission at work (employees are under a similar duty per section 21). Again, these laws are reactive, but should have a deterrent effect against providers.

5.3.5 Sale of Goods Act 1895 (SA)

⁴⁸ *Trade Practices Act 1974* (Cth), section 84(2).

⁴⁹ *Consumer Transactions Act 1972* (SA), section 7(1), (2).

⁵⁰ Carter v Ad-Box (Australia) Pty Limited and Anor, Industrial Relations Court of South Australia (Judgement 97-24401), 18 December 1998.

⁵¹ Carter v Ad-Box (Australia) Pty Limited and Anor, Industrial Relations Court of South Australia (Judgement 97-24401), 18 December 1998.

The *Sale of Goods Act 1895(SA)* is a general Act governing contracts relating to the sale of goods. "Goods" are defined to include all personal chattels, other than things in action and money.⁵² Any goods presently owned or possessed by the seller, described under the Act as "existing goods", may properly be the subject of a contract of sale. Since a security alarm clearly falls within the definition of a "good" it may properly be the subject of a contract of sale and the contract for the sale will be governed the *Sale of Goods Act 1895(SA)*.

The Act deals with all aspects of a contract for the sale of goods: the formation of the contract, the effects of the contract, the performance of the contract, rights of an unpaid seller against the goods and actions for breach of the contract.

When a seller breaches a condition of the contract for the sale of goods, that breach does not always have to be treated as a breach of a condition per se. The consumer has an option to either waive the condition or treat the condition as a breach of warranty if they choose.⁵³ This right of election affects the relief that the consumer may obtain. In general terms, a breach of a condition gives the consumer the right to repudiate the contract. Alternatively, a breach of a warranty gives the consumer a right to seek damages against the seller.

The Act also provides for the transfer of title upon sale by contract. If a person sells goods that they do not own, and they do not have the authority or consent of the owner to sell, then the buyer does not acquire title unless the owner has done something which would preclude them from denying of the seller's right to sell.⁵⁴

Further, even where there are competing interests in the good purchased by a buyer, a buyer will still obtain good title if:-

- the seller has a voidable title to the goods but the title has not been avoided at the time of sale then the buyer acquires good title if bought in good faith and without knowledge of the seller's defect of title;⁵⁵
- the seller sells goods to a buyer but keeps possession of the goods or documentation of title to the goods and then sells and delivers them, or the title documentation, to a second buyer the second buyer obtains good title if bought in good faith and without knowledge of the first sale;⁵⁶
- the first buyer purchases goods from a seller and receives those goods, or title documentation relating to the goods, and then sells the goods and delivers them, or the title documents, to a second buyer who will then obtain good title if bought in good faith and without knowledge of any rights which the original seller may have held in relation to the goods. It must be noted that this will not operate to defeat a registered interest under the *Goods Securities Act 1986*.⁵⁷

⁵² *Sale of Goods Act 1895* section 60(1)

⁵³ supra n24 - s11(1)

⁵⁴ supra n24 - s21(1)

⁵⁵ supra n24 - s23

⁵⁶ supra n24 - s25(1)

⁵⁷ supra n24 - n ss 25(2) & 25(4)

The Review Panel notes however that this Act presents a severe disadvantage insofar as all the consumer protection provisions discussed above may be excluded by the contract between the parties. This is significant where there is an information imbalance, as is the case in this market.

5.3.6 Conclusion

Although South Australia undoubtedly has in place a strong scheme of consumer protection under the laws discussed above, there nonetheless is a difficulty in relying on either common law remedies or generalist consumer protection laws to the exclusion of other protection. While they can be effective in some instances, in others they may offer little protection to consumers. If, for example, the dealer is insolvent, or if the loss incurred as a result of the conduct of the agent is large, then while the consumer may be able to establish a claim, recovering any form of compensation will be difficult if not impossible. Thus any victory will be a moral one only, and will still leave the consumer out of pocket.

Further, the costs of pursuing such remedies may deter some consumers from taking any action. Finally, if litigation increased as a result of a lowering of standards in the industry, there would be significant public costs which would follow through the increased costs to the courts, longer case lists and the many other costs involved in litigation.

CONCLUSION 5.

The conclusion of the Review Panel is that reliance on existing general laws to alleviate the risks existent in the market for security and investigation services is inappropriate. Rather, the Review Panel considers that these general laws provide an effective framework for regulation of this market only in combination with a licensing system.

5.4 INDUSTRY SELF-REGULATION

There are a number of examples of professions or occupations who self-regulate, and who do so successfully. The accounting profession has never been subject to a licensing system, but has developed a system of internal regulation. Industry bodies require members to adhere to strict codes of conduct and ethics, and membership cannot be obtained without the requisite training and qualifications.

A significant quantity of analysis of self- and co-regulatory systems has been undertaken over the years.⁵⁸ In 1996, the Office of Consumer and Business Affairs

⁵⁸ South Australia, Office of Consumer and Business Affairs, *Industry Regulation: The way forward* (Adelaide 1996); Commonwealth of Australia, Department of Industry, Science and

released an Issues Paper entitled “*Industry Regulation - The Way Forward*”, which specified criteria that an industry would need to be able to demonstrate in order that co- or self-regulation would be considered:-

- the legal basis upon which the industry group operates;
- evidence that the industry as a whole is supportive of the proposed role (as opposed to industry association support);
- evidence that the industry group has sufficient coverage of the industry concerned;
- evidence of public and consumer consultation in the development of the proposal;
- proposals for reporting to the Commissioner for Consumer Affairs, methods for identifying and reporting on individual industry members and systemic industry problems, and consultative mechanisms;
- evidence that the formal industry agreement and the delegated powers will be applied in a consistent and fair fashion and will not be applied to the detriment of a particular industry sector or non-member in an anti-competitive manner;
- proposals for independent evaluation of the undertaking of the delegated authorities;
- proper funding proposals; and
- evidence of capacity to handle delegations.⁵⁹

The paper further noted:-

“A mature industry is prepared to take responsibility, does not shield members who deserve censure, assists in the resolution of disputes, and has the motivation to keep

Tourism, *Codes of Conduct Policy Framework* (Canberra 1998) p9; Commonwealth of Australia, Trade Practices Commission, *Self-regulation in Australian industry and the professions* (Canberra 1988); Commonwealth Department of Industry, Science and Tourism, *Benchmarks for Industry-based Customer Dispute Resolution Schemes* (Canberra 1997); Commonwealth of Australia, Australian Competition and Consumer Commission, *Benchmarks for dispute avoidance and resolution - a guide* (AGPS, Canberra 1997); Commonwealth of Australia, *Fair Trading Codes of Conduct - why have them, how to prepare them* (AGPS, Canberra 1996); Commonwealth of Australia, Ombudsman’s Office, *A Good Practice Guide for Effective Complaint Handling* (Canberra 1997); New Zealand, Ministry of Consumer Affairs, *Market Self-regulation and Codes of Practice* (Wellington 1997)

⁵⁹*Industry Regulation: The Way Forward*, Office of Consumer and Business Affairs (South Australia), 1996, p. 9

*industry standards at a high level. A mature industry views external participation not as a threat to "cosy" relationships but as a welcome part of adjudicatory procedures."*⁶⁰

The current Act provides that the Commissioner for Consumer Affairs (with the permission of the Minister for Consumer Affairs) can enter into agreements with professional organisations.⁶¹ The Review Panel believes this is a useful tool for reducing regulation in sectors of the market, as an when regulation becomes unnecessary.

There are a number of industry bodies within South Australia, but at this time none exhibit the necessary characteristics that would justify the Commissioner for Consumer Affairs entering into an agreement allowing for co- or self-regulation in this State. In particular none of the bodies have demonstrated a long standing adherence to a defined set of rules and codes, which in many ways mirror the competence and character requirements of licensing.

The Review Panel also notes the finding of the Commonwealth Taskforce on Industry Self-Regulation that "*self-regulation is likely to be most effective where there are clearly defined problems but no high risk of serious or widespread harm to consumers*".⁶² . As previously discussed, this market is characterised by high levels of consumer vulnerability. Security agents are responsible not just for the protection of personal property, but are also charged with the protection of people. Incompetent performance of crowd controller functions for example, can lead to consumers suffering serious physical injury. The review panel therefore concludes that the security and investigations market is not a suitable market for the imposition of an industry self-regulatory scheme.

CONCLUSION 6.

The conclusion of the Review Panel is that the option of greater co- or self-regulation by industry bodies is not feasible at this time, although the option does exist within the current legislation for this to occur should the industry exhibit the level of maturity sought by Government to justify entering into appropriate agreements.

5.5 NEGATIVE LICENSING

"Negative licensing" is a system of market regulation in which legislation simply prescribes who may or may not operate within a specified market. There is usually no requirement to be registered with a government agency. The Office of Consumer and Business Affairs administers negative licence schemes in relation to process

⁶⁰*Industry Regulation: The Way Forward*, Office of Consumer and Business Affairs (South Australia), 1996, p. 9

⁶¹ Section 32

⁶² Draft Report of the Taskforce on Industry Self-Regulation, June 200, page 40, Department of Treasury, Commonwealth Government.

servers (under the *Security and Investigation Agents Act 1995*), land valuers (under the *Land Valuers Act 1994*) and sales representatives (under the *Land Agents Act 1994*).

5.5.1 Security and Investigation Agents

The experience of the Office of Consumer and Business Affairs is that negative licensing schemes impose a cost on government in terms of administering and enforcing the legislation, with no offsetting revenue from licensing. By way of comparison, a positive licensing scheme involving the payment of initial and periodic fees is a revenue neutral system. The fees collected simply offset the costs of administering the system. Negative licensing therefore imposes a cost on the wider community that must be funded from general revenues.

It is also of note that a negative licensing scheme has no “fit and proper” person test to preclude from the industry those considered an inappropriate risk to consumers. Contrastingly, a positive licensing scheme is based ultimately on an assessment by the Government that a person is “fit and proper” to carry on the business of, in this case, a security or investigations agent.

Under a positive licensing scheme, licensing conditions act as a form of ongoing regulation which restricts the conduct of licensees. In contrast a negative licensing scheme does not impose any controls on a persons behaviour once they have satisfied the initial criteria for entering a market. In fact it is difficult to ascertain exactly who is participating in the market. The absence of such regulation, particularly in a market identified as having high potential for incidence of provider failure, could result in persons providing security and investigation services in such a manner as to give rise to consumer loss.

5.5.2 Process Servers

Unlike other persons regulated under the *Security and Investigation Agents Act 1995*, process servers are subject to a negative (rather than positive) licensing system. The Act states that a person must not carry on a business, or otherwise act, as a process server unless the person is⁶³ :-

- Qualified in accordance with the regulations, and
- has not been convicted of an offence of a class specified by regulation in relation to a process server.

The maximum penalty for non-compliance being \$20,000.

Process servers, despite their “unlicensed” status, are subject to the disciplinary provisions contained within the Act because of their inclusion in the definition of “agent” in section 3 of the Act. Since the introduction of the Act in 1995, the

⁶³ Section 23(1)

Commissioner for Consumer Affairs has had no cause to take any such action, indicating that the activities of process servers are not the cause of many complaints.

By relying on a system of negative licensing, the Act avoids placing licensing costs on process servers and thereby prevents these costs being passed on to consumers.

The costs of a negative licensing system associated with security and investigation agents are not really applicable to process servers. The cost of regulating what is a relatively complaint-free sector of the market is low and does not require off-setting licence fees. In addition the fit and proper requirements of a positive licensing system seem unnecessary in light of the market's trouble free status.

5.5.3 Conclusion:- Negative licensing

In light of the foregoing, the Review Panel does not consider at this stage that a negative licensing scheme is appropriate for security and investigation agents, except in the context of process servers. The potential for provider failure highlights the need for conduct regulation and suggests that the cost on government in terms of administering and enforcing the legislation will be relatively high. As such the greater level of regulation and administrative cost neutrality of a positive licensing system are well suited to the market for security and investigation agents.

Process servers on the other hand are not the cause of many complaints. The cost of regulating such persons is therefore low and does not require off-setting licence fees. In addition the fit and proper requirements of a positive licensing system are better suited to problematic sectors of the industry.

CONCLUSION 7.

The conclusion of the Review Panel is that the potential for provider failure makes negative licensing inappropriate for security and investigation agents.

The Review Panel further concludes process servers are the cause of very few complaints and as such are well suited to a negative licensing system.

5.6 FURTHER ANALYSIS OF THE ACT

The Hilmer Report noted there will often be significant opposition to regulatory review:-

“beneficiaries of the restrictions usually have powerful incentives to resist reform, with those advocating change bearing the burden of establishing that existing restrictions are not justified”⁶⁴

and further,

“regulation that confers benefits on particular groups soon builds a constituency with an interest in resisting change and avoiding rigorous and independent re-evaluation of whether the restriction remains justified in the public interest.”⁶⁵

As discussed, justification for government intervention into a market may be provided by the occurrence of market or provider failure. Having established that regulation of the relevant markets is necessary, and that there are no appropriate less regulatory alternatives, it is necessary for the Review Panel to examine the competitive restrictions in the current form of legislation and assess whether they can be justified in the public’s best interests.

Inappropriate regulation can reduce the competitiveness of a market in numerous ways. Both managerial and financial costs may be imposed which may in turn lead to the diversion of resources and time from more productive activities. Barriers to innovation, in terms of product and service delivery, may also result from inappropriate regulatory methods.

As discussed earlier in this Final Report, restrictions on competition imposed by occupational regulation fall within two broad groupings:-

- barriers to market entry; and
- restrictions on competitive conduct.

As will be seen in the following analysis, the Act in its current form contains both barriers to entry and restricts the conduct of service providers in this market. While the Review Panel has formed the conclusion that alternatives to the current overall scheme of regulation are not appropriate in this industry at this stage, nonetheless it is necessary to examine each restriction on competition in the legislation to determine whether there are less restrictive alternatives for achieving the desired objectives.

⁶⁴ National Competition Policy - Report by the Independent Committee of Inquiry, August 1993 at page 189 (“the Hilmer Report”)

⁶⁵ Hilmer Report at page 191.

PART 6: BARRIERS TO ENTRY

6.1 INTRODUCTION

Regulatory barriers to market entry have the most direct influence over competitive conditions within an industry, and may take the form of :-

- barriers creating a monopoly;
- restrictions that operate by reference to the number of producers or products;
- barriers operating against interstate goods or service providers;
- barriers operating against foreign goods or service providers; or
- restrictions that operate by reference to standards or qualifications.

It is this final barrier which is of most relevance to this Review.

The Hilmer Report noted that some *“regulatory regimes may be more restrictive than necessary to protect the public interest objectives for which they were imposed”*, and even if the imposed standards are objectively reasonable, *“there may be concerns over whether they are administered or enforced in a way that unduly favours incumbents.”*⁶⁶

The theory of “contestability” suggests that the mere threat of potential competition can have efficiency effects similar to actual head-to-head competition. Removing or reducing entry barriers can therefore have a positive impact on performance, even if few or no competitors actually enter the market.

The imposition of point-of-entry controls for these purposes may preserve the status quo in the industry but, given a stable demand for the services, restriction on their supply may lead to price increases. Further, such regulation may affect the relative prices of labour and material inputs, thereby causing service providers to use inefficient mixes.

Another consequence of the imposition of point-of-entry controls may be ‘technological lethargy’ where suppliers have no incentive to innovate. Given that many innovations may result in cost reductions to consumers, regulation that inhibits innovation is imposing a hidden cost.

Point-of-entry regulation may also result in functional separation of an industry, restricting market competition and raising the cost of services. Functional separation may limit the functions that can be performed by other occupations and less-skilled workers. Without functional separation due to regulatory intervention, market forces would determine the most efficient forms of organisation and specialisation. If

⁶⁶ Hilmer, at p.197

there are no substantial economies to be made in specialisation, persuasive public interest reasons would need to be advanced for enforcing industry segmentation.

6.2 SCOPE OF WORK FOR WHICH A LICENCE IS REQUIRED

The terms “security agent” and “investigation agent” are defined in the Act, by reference to the work performed.⁶⁷

A security agent is a person who, for fee or reward, performs one or more of the following functions:-

- protecting or guarding a person or property or keeping a person or property under surveillance;
- hiring out or otherwise supplying dogs or other animals for the purpose of protecting or guarding a person or property;
- preventing, detecting or investigating the commission of an offence in relation to a person or property;
- controlling crowds;
- providing advice on security alarm or surveillance systems; or
- installing or maintaining security alarm or surveillance systems.

An investigation agent is a person who, for fee or reward, performs one or more of the following functions:-

- ascertaining the whereabouts of or repossessing goods that are subject to a security interest;
- collecting or requesting the payment of debts;
- executing legal process for the enforcement of a judgement or order of a court;
- executing distress for the recovery of rates, taxes or money;
- obtaining or providing (without the written consent of a person) information as to the personal character or actions of the person or as to the business or occupation of the person;
- searching for missing persons; or
- obtaining evidence for the purpose of legal proceedings (whether the proceedings have been commenced or are prospective).

⁶⁷ Section 3

This definition represent a barrier to entry as it reserves a body of work to a specific person or class of persons.

6.2.1 What are the objectives of the restriction?

The objective of this restriction is to “ring-fence” certain transactions from the general sector of the economy. As discussed earlier in this Final Report, there are strong public interest reasons supporting regulation of such transactions.

6.2.2 Impact of the scope of work on competition

The current scope of work may be restrictive of competition if it is too broad and therefore encompasses the provision of services that could appropriately be performed by anyone without risk to the consumer. The Review Panel has identified this as a **serious restriction on competition**.

6.2.3 Costs of the scope of work

Whenever a class of activity is regulated, costs will be incurred. The reservation of the business of providing security and investigation services has the potential to reduce competition in the market. Economic theory would dictate that the number of persons carrying on this activity is less than would be the case if the work were not reserved. Consequently, there is likely to be a reduction in the supply of services, with corresponding higher prices for consumers, in a regulated market.

6.2.4 Benefits of the scope of work

As previously identified, the nature of the security and investigations industry is such that consumers place a great deal of trust in the hands of agents operating within the industry. Consumers entrust agents with money, confidential information and the responsibility for their physical safety and the safety of their property. Consumers are therefore vulnerable to the misdeeds of agents.

The current scope of work is beneficial in that it encompasses (and helps to regulate) those aspects of the security and investigations industry which involve an identifiable risk of market or provider failure.

6.2.5 Assessing the costs and benefits of the scope of work

It is the conclusion of the Review Panel that the scope of work for which a licence is required is appropriate.

The benefit provided by the current scope of work in reducing the incidence of market and provider failure is of significance given the nature of the market as discussed in this Final Report. Although there is a cost borne by the community as a

whole, due to fewer persons providing security and investigation services than would be the case without regulation, this cost is more than offset by the benefits provided.

6.2.6 Alternatives

The Review Panel identified three functions where concern has arisen over the scope of work reserved under the Act. These are the functions of canine handling, crowd controlling and security guarding.

Canines

With respect to canine handling, it is clear from the definition in section 3 that the only persons covered by the definition are those supplying or hiring out canines or other animals. It would appear that those people who have been licensed to handle canines (as opposed to supplying them) have been licensed erroneously.

It is understood that the objective in including those supplying canines or other animals was to regulate in some way persons who would deliver animals to a client's address, leave them unsupervised overnight, and collect them the next day. However it appears that this practice does not continue to such a degree as to demand regulation. No submissions to the draft report indicated that this practice continues to be a problem and there are currently no persons issued with the sole endorsement for this type of work.

The Review Panel therefore recommends that the definition of security agent in section 3 be amended to remove the work function of "hiring out or otherwise supplying dogs or other animals for the purpose of protecting or guarding a person or property".

Security Guard & Crowd Controller

The second area of concern arises from anecdotal evidence that there is an artificial distinction between the functions of "security guard" and "crowd controller". It is suggested that many crowd controllers perform security functions (eg escorting cash and valuables), while many security guards perform crowd control functions (in other than licensed premises). This would tend to suggest that some licensees are operating outside the scope of their licence.

Given that each type of licensee is likely to perform the functions of the other, the Review Panel recommends that training should prepare licensees to perform both the functions of a security guard and a crowd controller. Any additional training will be limited, as National Competency Standards for the two functions are identical but for a crowd controller being required to possess two extra competencies.

The Review Panel concludes that the two functions should remain separately listed in the section 3 definition of a "security agent", but should be licensed as a single function.

6.2.7 Conclusion:- Scope of work

CONCLUSION 8.

The Review Panel recommends that the definition of security agent be amended so as to exclude the function of “hiring out or otherwise supplying dogs or other animals for the purpose of protecting or guarding a person or property”.

The Review Panel further recommends that the functions of security guarding and crowd controlling be licensed as a single function, so as to reflect the similarity in the scope of the functions.

6.3 THE REQUIREMENT TO BE LICENSED

The Act prohibits a person from carrying on business, or otherwise acting as a security agent or investigation agent unless they hold a licence granted under the Act.⁶⁸ Therefore, if a person falls prima facie within the definition of an agent they must obtain a licence.

6.3.1 What are the objectives of the restriction?

The requirement to be licensed can be seen as the enforcement of the scope of work. The restriction seeks to ensure that only those who obtain a licence may perform the work reserved under the Act.

6.3.2 Impact of licensing on competition

The impact of the restriction on competition cannot be considered in isolation from the scope of work reserved under the Act. As with the scope of work, the requirement to be licensed reduces the number of entrants to the market by raising a barrier to entry.

The presence of a barrier to entry results in levels of suppliers in the market being below that which would exist without regulation. A reduction in suppliers without a corresponding reduction in demand will result in higher unit prices for consumers. The market will therefore be less efficient than would otherwise be the case.

The Review Panel’s assessment of this requirement is that it is a **serious restriction on competition**.

⁶⁸ Section 6

6.3.3 *The costs of the requirement to be licensed*

The requirement to obtain a licence before commencing business as a security or investigation agent results in fewer dealers in the market than would otherwise be the case. Further the requirement may dissuade potential dealers from entering the market. With fewer agents participating in the market, competition is limited and consumers are likely to be subject to inflated prices.

Licensing imposes a cost on the Government in administering a licensing system. The Commissioner for Consumer Affairs is the licensing authority for the purposes of the Act. This requires that staff be employed to: -

- process, assess and grant licence applications;
- advise current and prospective licensees on matters relating to the Act;
- undertake compliance work;
- undertake disciplinary actions and/or prosecutions; and
- educate the public about the operation of the Act.

Obviously, these administrative costs will be significant. The licence fees collected meet the costs of administering the system, and, since it is dealers who pay licence fees, it may be argued that the costs incurred are private costs and not public costs. However, this does not take account of the fact that these costs will be transferred to the public through dealers' cost structures. Therefore it is the wider community which ultimately bears the costs of government administration.

6.3.4 *The benefits of the requirement to be licensed*

Licensing excludes from the industry, those persons most likely to cause consumer loss through substandard work or criminal behaviour.

Furthermore licensing reduces the transaction costs of consumers. Consumers do not have to undertake extensive and potentially expensive searches to determine relevant information about the person with whom they wish to transact. In granting a licence the Government has performed these tasks for them. The economies of scale resulting from this process provide benefit through the reduction in overall costs incurred by the community in this market.

6.3.5 *Assessing the costs and benefits*

As discussed at Part 5 generally, this market is considered best regulated by a system of positive licensing. The Review Panel acknowledges that there may be significant costs faced by the wider community through a reduction in competition in the market as a result of the restriction. However, given the conclusion of the Review Panel that there is significant enough risk inherent in consumer-dealer transactions

to justify regulation, then the costs of a licensing system will have to be relatively great to offset benefits provided.

CONCLUSION 9.

The conclusion of the Review Panel is that the requirement to be licensed is a justified restriction on competition.

6.4. QUALIFICATIONS

Before a person is entitled to be licensed, the person must : -

- complete a course of training prescribed by the regulations⁶⁹; or
- have qualifications and experience acceptable to the Commissioner, having regard to the functions authorised by the licence.⁷⁰

6.4.1. What are the objectives of the restriction ?

Apart from requiring licensees to be appropriately qualified, the Act stipulates that they must have relevant business knowledge and financial resources. These additional requirements are clearly designed to focus on the business skills of the agent, leaving qualification requirements with the role of assessing the technical competence of service providers.

Qualification requirements therefore ensure that agents have the skills and knowledge needed to perform the tasks for which they are licensed.

6.4.2 Impact of the restriction on competition

The requirement that agents have appropriate qualifications has the potential to restrict competition , as it erects a further barrier to entering the market.

However in considering long-term impacts, it is important to note that the requirement will increase the quality of service provided by agents generally. This inturn gives consumers confidence to deal in the market, which may increase market participation and competition. The Review Panel assesses this to be **a serious restriction on competition.**

⁶⁹ Section 9(1)(a)

⁷⁰ Section 9(1)(b)

6.4.3 Benefits of the requirements

By imposing technical competency requirements upon licensees, the Act helps to prevent incompetent persons from operating within the industry and thereby reduces the risk of consumers being provided with sub-standard work.

In relation to crowd controllers the Liquor and Gaming Commissioner noted in his submission that:-

“Recent information suggests that the incidence of assaults by crowd controllers in particular is declining - this is most likely as a result of the need for crowd controllers to be regulated, improving the quality of personnel.”

The Review Panel considers it likely that the imposition of training requirements has been beneficial in reducing the incidences of assault.

With regards to alarm installation and maintenance, appropriate training helps to reduce false alarms, which are largely attributed to poor installation techniques or inadequate instruction to premises owners.

Lastly, the Office of Consumer and Business Affairs is aware of anecdotal evidence of poor behaviour in the industry, such as high pressure sales tactics being used by agents engaged in alarm supply and advice (particularly when dealing with vulnerable persons such as the elderly). Requiring licensees to undertake training has the benefit of reducing the incidence of such tactics.

6.4.4 Costs of the Requirements

By excluding persons who do not meet the requirements, there is a reduction in competition. This lower level of competition has its own costs, including higher prices for consumers. The more onerous and difficult it is to obtain qualifications, the greater the number of persons excluded from the industry and the greater the subsequent decline in competition.

One difficulty in obtaining qualifications is the price of training. There is also an opportunity cost associated with the time spent training. The majority of courses run for a minimum of 100 hours, which when considered in terms of time away from employment (and lost wages), is a significant burden.

The frequency of courses offered further raises the barrier to entry. Some courses run to fixed academic schedules, while the majority are offered only as demand dictates. This means that a person wishing to obtain a licence may be required to wait until a suitable approved course is available for them to undertake. This may prevent them from obtaining work, or may delay their entry into work, until such time as they can meet the qualification requirements.

6.4.5 Assessing the Costs and Benefits of the Requirements

The Review Panel agrees that imposing training requirements upon agents helps reduce the incidence of consumers being serviced by incompetent agents. This not only reduces the likelihood of consumer loss, but also raises the quality of service, market confidence and ultimately market participation and competition.

Whilst training courses are costly and time consuming the Review Panel believes that such costs are more than offset by the benefits outlined above. This conclusion may further be enhanced by the alternative (cost reducing) approaches to regulation outlined below.

6.4.6 Alternatives

6.4.6.1 Specifying competencies not qualifications

The Review Panel has concluded that the current practice of specifying qualifications rather than competencies may lead to a person becoming “overqualified” to perform the work they are licensed to undertake. The legislation should no longer refer to “qualifications” but should instead refer to competencies. This reflects the fact that the licensing system is directed at ensuring the competence of industry participants, and not at increasing the “professionalism” of the industry by requiring the completion of “qualifications”. It also reflects the fact that the vocational training system is now competency based.

Independently of this Review, the Office of Consumer and Business Affairs continues to analyse national competency standards to identify those competencies which are seen as necessary for licensing purposes. As a result of that process, the Commissioner for Consumer Affairs has approved the competency based criteria outlined below, as meeting the (technical) qualification and experience requirements required by Section 9(1) of the Act.

UNIT NUMBER	UNIT OF COMPETENCY	
PRSG28A	INTERPRET AND COMPLY WITH LEGAL AND PROCEDURAL REQUIREMENTS	(CC) & (SG)
PRSG01A	MAINTAIN THE SECURITY OF PREMISES AND PROPERTY	(SG)
PRSG02A	CONTROL ACCESS TO AND EXIT FROM PREMISES	-
PRSG03A	MAINTAIN SAFETY OF PREMISES AND PERSONNEL	-
PRSG05A	MANAGE CONFLICT	-
PRSG13A	CONTROL CROWDS	(CC)
PRSG25A	PROVIDE EMERGENCY FIRST AID	-
THHBTHSO4A	MANAGE INTOXICATED PERSONS	(CC)

**(Individuals seeking a licence at the Agent (Contractor) level must also demonstrate competency through completion of an approved business course).*

- (CC) Denotes Unit of Competency required for a person licensed or entitled to be licensed as a Security Guard seeking a Crowd Controlling endorsement.
- (SG) Denotes Unit of Competency required for a person licensed or entitled to be licensed as a Crowd Controller seeking a Security Guarding endorsement.

6.4.6.2 Licence Structure

As discussed at part 4.5.1 of this report, the Act caters for three types of licence, a security agent's licence, an investigation agent's licence, and a restricted licence.

Persons wishing operate a security or investigations business will need to obtain a security or investigation agents licence. This entitles the licensee to perform both the functions of a contractor and an employee. The licensee is therefore required to satisfy entitlement criteria relevant to employees and contractors.

Licensing contractors and workers separately, would allow for the development of distinct licensing entitlement criteria for each type of licensee. For example, business competency requirements could be targeted at contractors, whilst technical competency criteria could be targeted at workers. In short contractors would no longer be required to satisfy criteria relevant only to workers, and vice versa. Obtaining a licence would be easier, and barriers to entering the industry would be reduced.

The Review Panel therefore proposes a two-tier licence structure along similar lines to the building, plumbing, gas fitting and electrical industries. This involves the separate licensing of contractors (those who contract for the work) and workers (those who personally perform the work). Licences would be divided into the following categories:-

1. security agent (contractor)
2. security agent (worker)
3. investigation agent (contractor)
4. investigation agent (worker)

6.4.6.3 Trainee Licence

A proposal put forward in the draft report was that a training licence be established.

Such a proposal was aimed at overcoming the problem of persons being deterred from entering the industry, because they are unable to be employed in the industry whilst receiving training.

Important considerations in determining whether a training licence would be beneficial, are the problems which arise in the practical application of such a licensing system.

The Northern Territory Attorney-Generals Department noted about training licences that

“there used to be such a possibility in the Northern Territory for real estate agents. It was eventually eliminated because of the practical problems that occur at the end of the period when persons have not completed the training requirements.”

Another problem raised by Websters Investigations (SA) P/L was that

“a trainee will command a lower wage than a fully qualified practitioner. This will entice companies to engage trainees at the expense of a fully qualified practitioner where practicable to lower the onsite running costs (wages). This may also encourage a churning effect in the industry where unscrupulous employers terminate trainees when they are upgraded to a workers licence and replace them with another trainee.”

Also of significance is that in many areas of the industry agents work alone, and it would be inefficient and unprofitable to employ both a trainee and a licensed agent. In areas requiring only one person, either trainees would not be employed, or there would be a significant increase in the cost of providing services to the consumer.

The Review Panel concludes that the costs associated with implementing a training licence outweigh the potential benefits, and therefore the licence should not be implemented.

6.4.6.4 Eliminating training for Central Station Monitoring

Licensed security agent's known as central station monitors, undertake the monitoring of security alarm and surveillance systems. At this point in time, there are no courses available which specifically train people to provide central station monitoring services. As a consequence, persons wishing to perform these services are currently required to complete one of the approved “security guarding” training courses. However, these courses have been designed, in the main, for static and mobile guards, and touch only in a minor way upon alarm and surveillance systems.

The larger monitoring firms have for some time argued that it was unnecessary to require their central station operators to undertake training which was by and large irrelevant to their occupation. On the other hand, elements within the security industry have argued that a central station operator must have an understanding and appreciation of the work of a security guard (who they will be in contact with as a part of fulfilling their duties) if they are to perform effectively.

Discussions have previously been held with a training provider to discuss the development of a training course, but the reality of a small market in South Australia, coupled with divergent technologies employed by the various operators, do not make the development of a course of training specific to the needs of the central station operator a viable proposition.

The RAA submitted that *“in some cases, there appears to be a mismatch between the security occupation and training required.”* The RAA specifically raises the issue of control room operators, who are required to undertake training as security guards. The RAA submitted that *“aspects of security guard training are too onerous for control room operators and are not appropriate to their job specification.”*

CASA noted that “appropriate training and job classification for central station monitors would benefit both the industry and consumers by removing unnecessary training costs.”

The Liquor, Hospitality and Miscellaneous Workers Union argued that persons should only have to meet the probity requirements, and that training should be left up to employers.

The Review Panel is in no doubt that persons performing central station operations must continue to remain licensed, and must be required to meet the probity requirements for being issued with a licence. Central station operators become privy to restricted information about the security and surveillance systems installed in property, and about the movements of persons residing or working within those properties. The risk of criminal activity in this industry is assessed as high.

The Review Panel therefore proposes that persons wishing to provide services in central station facilities should continue to be licensed as security agents, and must meet all other requirements under the legislation. However, with respect to the qualification requirement under section 9(1)(a), the Review Panel recommends that no qualification requirement be set by the Commissioner for Consumer Affairs. Instead, the Review Panel proposes that the responsibility for appropriate training be placed upon the employer of the operator.

6.4.6.5 *Electricians installing alarms*

With respect to qualifications for security alarm installation, there have been suggestions that electrical workers (licensed under the *Plumbers, Gas Fitters and Electricians Act 1995*) should be recognised as competent to undertake alarm installation work, without the requirement to undertake a specific alarm installation course. However, a number of training providers have indicated that the competencies required for alarm installation and maintenance are quite distinct from those required for general electrical work.

The Review Panel is of the view that electricians should not automatically be exempt from training requirements. However the Panel notes that the specification of competencies which must be possessed by persons wishing to undertake such work will make it a significantly easier task for a qualified electrician (or any person for that matter) to have their competency certified by a Registered Training Organisation or workplace assessor.

CONCLUSION 10.

The Review Panel concludes that the benefits of qualification prerequisites outweigh the associated costs, except with respect to those licensed to perform central station monitoring. The Review Panel recommends that whilst central station monitors should be required to be licensed, they should not be subject to training requirements.

The Review panel further concludes that the costs of training could be reduced by:

- specifying competencies not qualifications; and
- Introducing a two tier licensing structure which distinguishes between contractors and employees.

6.5 BUSINESS KNOWLEDGE AND FINANCIAL RESOURCE OBLIGATIONS

For licences other than those subject to an employee condition, a **person** will not be entitled to be licensed unless the person has sufficient business knowledge and experience and financial resources for the purpose of carrying on business under the licence.

A *body corporate* will not be entitled to be licensed unless ⁷¹ the **body corporate** has sufficient financial resources for the purposes of properly carrying on business under the licence and the **directors** of the body corporate together have sufficient business knowledge and experience for the purposes of properly directing the business carried on under the licence

6.5.1 What are the objectives of the requirements

Business knowledge helps an agent to manage a business, whilst financial resources are needed to establish and maintain the business. The focus is on ensuring businesses are properly managed and appropriately resourced so as to minimise the chance of business failure and consequential consumer loss.

6.5.2 Impact of the requirements on competition

Business knowledge and financial resource requirements exclude persons from the industry, thereby reducing competition.

However there is also a potential positive impact upon competition. Given that businesses will be better resourced and managed, they are less likely to fail. The more businesses succeed and survive the greater the number of service providers and the greater the level of competition. The Review Panel has assessed this as an **intermediate restriction on competition**.

6.5.3 Benefits of the requirements

⁷¹ Section 9(2)

It is well-known that the failure rates for small businesses are high, with some studies estimating that of small businesses which fail, approximately 70% fail within the first five years of operation.⁷² Researchers are in consensus that the major cause of small business failure is lack of management knowledge and experience, with estimates that this is the case in 60% to 90% of businesses. Other major causes of business failure are listed as including lack of financial resources.

By addressing the causes of business failure the Act reduces the likelihood of businesses failing, which in turn helps consumers avoid losses caused by business failure.

6.5.4 Costs of the requirements

Business failure does not always leave consumers out of pocket, meaning that business competency and resource requirements may not be needed to protect consumers.

In the security and investigations industry, consumers are only at risk of financial loss via :-

- loss of pre-paid money;
- loss of the ability to have warranties honoured; and
- loss of money held on behalf of consumers

The first two risks really only arise in the area of security alarms. The third risk arises with collection agents who collect money on behalf of clients. If business knowledge and financial requirements extend beyond these functions, cost will be imposed without any offsetting benefits.

There will clearly be costs to an applicant for a licence, in terms of both time and money, through compliance with the requirements. Firstly, there is a cost in the form of the price of training, as well as the opportunity cost associated with the time spent training. Also, there is the opportunity cost of having resources tied up in meeting financial resource requirements.

Finally, by excluding persons who do not meet the requirements, there is a reduction in competition. This lower level of competition has its own costs, including less choice and higher prices for consumers.

6.5.5 Assessing the costs and benefits

Business competency and financial resource requirements help to reduce the risk of business failure. The Review Panel concludes that this provides a net benefit to

⁷² See for example McMahon et al (1993), Small Enterprise Financial Management Theory and Practice, Harcourt Bruce, Sydney, p132-143

consumers in circumstances where business failure is likely to cause consumers to lose pre-paid money or the ability to have their warranty honoured.

CONCLUSION 11.

The Review Panel concludes that consumers are only at risk of suffering loss in consequence of business failure, where they pay for goods or services in advance, or when they purchase goods or services which are subject to a warranty.

The Review Panel recommends that the business knowledge and financial resources requirements only apply to contractors that are licensed for the following functions (i.e. functions where consumers commonly pay in advance, and purchase goods that come with warranties): -

- **security agent – security alarm and surveillance systems (supply and advice).**
- **security agent – security alarm and surveillance systems (installation and maintenance)**
- **investigation agent – collection**

6.6 FINANCIAL REPUTATION

The requirement that a person be of good financial reputation may pose a further barrier to entry.

For persons (other than those subject to an employee condition) to be licensed they must not: -

- be an undischarged bankrupt or subject to a composition or deed or scheme of arrangement with or for the benefit of creditors⁷³; or
- within the previous five years, have been a director of a body corporate wound up for the benefit of creditors.⁷⁴

For bodies corporate to be licensed: -

- its directors must meet the second of the above two requirements;⁷⁵ and
- the body itself must not be being wound up, under official management or be in receivership.⁷⁶

⁷³ Section 9(1)(e)(i)

⁷⁴ Section 9(1)(e)(ii)

⁷⁵ section 9(2)(b)(iii)

⁷⁶ Section 9(1)(a)(ii)

6.6.1 Objectives of the restriction

Financial reputation requirements are aimed at reducing the incidence business failure, in circumstances where such failure is likely to result in consumer loss.

6.6.2 Impact of the requirements on competition

Again the requirement restricts entry into the occupation. However importantly it does not necessarily follow that there has been a lessening of competition. Whilst excluding people from the industry does reduce competition, this is offset by the increase in consumer confidence generated by the restriction. Decreasing the risk of consumer loss promotes consumer confidence and spending in the industry, thereby encouraging entrants into the market.

The Review Panel has assessed this requirement as **serious restrictions on competition**.

6.6.3 Benefits of the Requirement

The provisions focusing on a persons financial reputation prevent traders who may have deliberately wound up a business to avoid warranty costs, from obtaining a contractor licence and setting up a new business (so-called “phoenix” companies).

Another benefit which may not have been intended is the protection of other creditors (particularly trade creditors) who may also be affected by the collapse of a contracting business.

6.6.4 Costs of the Requirement

Preventing persons from entering the security and investigations industry, has the effect of reducing the number of competitors operating within the industry. This reduced level of competition in turn exposes consumers to higher prices and or lower quality service than would be available in a more competitive environment.

However, as noted in 6.6.2 above, the reduction in competition is largely off-set by increased confidence and spending in the industry generated by the restriction.

6.6.5 Assessing the Costs and Benefits

Reputation prerequisites preclude from the industry those persons most likely to operate in a manner causing consumer loss. Whilst the level of competition within the industry is reduced, the alternative of allowing persons of poor business reputation to conduct business and cause harm to consumers would be far more

costly. The Review Panel concludes that there is a net benefit to be gained from protecting consumers against persons of poor reputation.

CONCLUSION 12.

Financial reputation requirements provide protection for consumers and trade creditors by reducing the risk of contractors suffering financial collapse. At the same time, the requirements do not overly restrict competition within the market.

Therefore the panel recommends the financial reputation requirements be retained.

6.7 GENERAL REPUTATION

The Act imposes a restriction by requiring a person to be of good general reputation.

For persons to be licensed (other than under a licence subject to an employee condition), they must: -

- be a fit and proper person to hold a licence⁷⁷ ; and
- not have been suspended or disqualified from practising or carrying on an occupation or trade or business under a law of this state, the commonwealth, another state or territory of the commonwealth⁷⁸; and
- not have been convicted of an offence of a class specified by regulation in relation to the functions to be authorised by the licence;⁷⁹

For bodies corporate to be licensed ,

- their directors must satisfy the above three requirements⁸⁰; and
- the body itself must not have been suspended or disqualified from practising or carrying on an occupation or trade or business under a law of this state, the commonwealth, another state or territory of the commonwealth.⁸¹

Fit and Proper person :

⁷⁷ Section 9(1)(d)

⁷⁸ Section 9(1)(c)

⁷⁹ Section 9(1)(b)

⁸⁰ and Section 9(2)(b)(ii) ,Section 9(2)(b)(i), and Section 9(2)(e)

⁸¹ Section 9(2)(a)(i)

The courts have been reluctant to definitively catalogue what constitutes a “fit and proper person”. The concept of “fit and proper” (in respect of the repealed *Commercial and Private Agents Act 1972*) was considered by Perry J in Pav v Commercial and Private Agents Board⁸²:

“The considerations which it will be proper to take into account in determining whether a person is a fit and proper person to hold a particular licence will vary according to the nature of the licence and the nature of the work done pursuant to the licence. It would be wrong to attempt any exhaustive catalogue of relevant considerations. It is obvious though that they will bear largely upon the character of the person concerned and in particular whether or not his character and reputation is such that members of the public with whom the person is dealing can deal with a reasonable degree of confidence that he will act honestly and carry out his duties in a trustworthy way and with a due and proper sense of responsibility.”

In the case of a rejection on fitness and propriety grounds, the Commissioner must, if so required by the applicant, state in writing the reasons for the Commissioner’s decision.⁸³

The fitness and propriety of an applicant is a decision against which there lies an appeal to the District Court.⁸⁴

An appeal must be instituted within one month of the making of the decision appealed against, or, where the applicant requests a written statement of reasons from the Commissioner, one month from the time the applicant receives that statement.⁸⁵

Convicted of an offence of a specified class :

This is currently assessed by reference to a National Police Clearance Certificate (“NPCC”). Regulation 5 provides that the following offences (contained in Schedule 1 to the regulations) are prescribed offences for the purposes of the Act:-

- (a) an indictable offence;
- (b) if the conviction was within the previous 5 years, of a schedule 3 offence within the meaning of the *Summary Procedure Act 1921* (an offence of dishonesty), other than a first offence of simple larceny;
- (c) common assault or any offence of violence, other than a first offence of common assault;
- (d) an offence against the *Controlled Substances Act 1984* involving a prohibited substance or a drug of dependence, other than:-

⁸² (1988) 143 LSJS 1

⁸³ s11(3)

⁸⁴ s11

⁸⁵ s11(4)

- (i) a first offence against section 31 of that Act arising out of the possession, smoking, consumption or administration of a prohibited substance or the possession of equipment for use in connection with a prohibited substance or the preparation of a prohibited substance for smoking, consumption or administration; or
- (ii) a simple cannabis offence within the meaning of section 45A of that Act;
- (e) an offence against the *Police Act 1952*;
- (f) an offence against the *Listening Devices Act 1972*;
- (g) an offence against the *Telecommunications (Interception) Act 1979* of the Commonwealth;
- (h) an offence against the Act or these regulations or the repealed *Commercial and Private Agents Act 1986* or regulations made under that Act;
- (i) an offence substantially similar to any of the above offences against the law of another place.

Paragraphs (f) and (g) do not apply in relation to a licence subject to a condition limiting the functions that may be performed under the authority of the licence to controlling crowds.

Conviction for any of the above offences will prevent a person from obtaining a licence.

The Full Court of the South Australian Supreme Court has held⁸⁶ that the Commissioner for Consumer Affairs has no discretion to grant a licence to a person convicted of a prescribed offence.

6.7.1 Impact of the requirements on competition

While the fit and proper person requirement restricts entry into the occupation, it clearly exists to protect consumers from the risk of criminal activity. As discussed earlier in this Final Report, consumers face potentially significant risks when dealing with security and investigation agents. Consumers are vulnerable having placed their money, security and confidential information in the hands of agents.

The Review Panel has assessed these requirements as **serious restrictions on competition**.

6.7.2 Benefits of the Requirement

⁸⁶ Commissioner for Consumer Affairs v Standley, Full Court of the SA Supreme Court, Judgement Number S6579, 20 March 1998 (unreported)

It has been noted that: -

“security personnel necessarily obtain inside knowledge about a client’s assets and vulnerabilities, as well as possessing technical expertise which allows them to circumvent many protective devices.”⁸⁷

This view is reinforced by the RAA in its submission, which stated that: -

“consumers of security services are vulnerable to the industry given the nature and sensitivity of information they must share with operators in order to obtain appropriate security measures. Hence the industry is endowed with a high position of trust. It is obvious that unscrupulous operators could take advantage of this consumer vulnerability. Therefore measures need to be put in place to provide appropriate consumer protection.”

By excluding persons of questionable character, the Act helps to reduce the risk of service providers exploiting the vulnerability of consumers within the security and investigations market.

Also, the Office of Consumer and Business Affairs has indicated that the discretionary nature of the provision can be useful in precluding persons who do not fall within a mandatory exclusion provision, but who nonetheless are considered unsuitable to hold a licence. In this way those who are assessed as presenting a risk to the public, in terms of provider failure, may be excluded from the market.

6.7.3 Costs of the Requirement

By preventing persons from entering the security and investigations industry, reputation requirements have the effect of reducing the number of competitors operating within the industry. This reduced level of competition in turn exposes consumers to higher prices and or lower quality service than would be available in a more competitive environment.

Some criticism has also been made of the fact that the Act excludes persons convicted of a prescribed offence for life, rather than for a specific period of time (for example, 10 years).⁸⁸

CASA submitted that *“a life prohibition ceases to be beneficial on a consumer protection basis after a reasonable period of rehabilitation has passed. It then becomes an unnecessary restriction to competition therefore this life ban ought to be reviewed.”*

The Review Panel agrees that life prohibitions linked to prescribed offences, may in some instances have implications extending beyond those necessary for consumer

⁸⁷ Prenzler T and Sarre R, *Regulating Private Security in Australia, Trends and Issues in Crime and Criminal Justice Series* (No 98), Australian Institute of Criminology, Canberra, November 1998, p.3

⁸⁸ see for example, Prenzler, Hayes and Wortley, *An Evaluation of the Queensland Security Providers Act - Implications for National Regulation*, Report to the Criminology Research Council, April 1998, p.21

protection. The Review Panel proposes to target the restriction with even greater precision so that only those who have committed the offences most relevant to the identified risks are permanently prevented from participation in the industry.

6.7.4 *Assessing the Costs and Benefits*

Reputation prerequisites preclude from the industry those persons most likely to operate in a manner causing consumer loss. Whilst the level of competition within the industry is reduced, the alternative of allowing persons of poor reputation to conduct business and cause harm to consumers would be far more costly. The Review Panel concludes that there is a net benefit to be gained from protecting consumers against persons of poor reputation.

CONCLUSION 13.

The Review Panel considers the specified prerequisites relating to general reputation, are appropriate given the nature of work to be undertaken.

However, the Review Panel recommends that the reference to “indictable offences” in Schedule 1 should be amended to recognise the difference between major and minor indictable offences.

- **a person convicted of a major indictable offence should be permanently disqualified from obtaining a licence**
- **a person convicted of a minor indictable offence should be disqualified from obtaining a licence for ten years.**

PART 7: CONDUCT RESTRICTIONS

7.1 RESTRICTIONS ON EMPLOYMENT AGENTS

The Act prohibits a person (whether licensed under the Act or not) from employing another as an agent under a contract of service to perform functions of a particular kind unless that other person holds a licence authorising him or her to personally perform functions of that kind.⁸⁹

7.1.1 Objectives of the restriction

Licensing helps to reduce the risk of consumers suffering loss by excluding from the industry those service providers who are most likely to cause such loss. Regulating the hiring practices of employment agents reinforces this objective by making it more difficult for inappropriate persons to operate within the industry.

7.1.2 Impact on competition of the requirement

As identified in part 6.3, security or investigation work must not be performed by unlicensed persons. Whilst this clearly restricts the conduct of employees, the employment restriction regulates the conduct of employers.

It is arguable that the provision does not reduce the number of persons who can operate within the industry because persons are already prohibited from performing work without a license. The Review Panel has assessed this restriction as a **trivial restriction on competition**.

7.1.3 Costs of the requirement

This requirement in many ways adds nothing new. Persons performing work in the security and investigations industry are already required to be licensed. This section simply places responsibility on bodies corporate to check that persons are complying with this requirement.

The practical effect of the restriction is to make it necessary for employers to check whether or not employees are licensed. Checking licences is a simple matter and unlikely to involve significant time and cost.

7.1.4 Benefits of the requirement

Consumers benefit because the provision helps to prevent unlicensed, unqualified persons, from being employed in the industry, which inturn reduces the risk of consumers suffering loss at the hands of such agents.

⁸⁹ Section 12A

Furthermore the provision impliedly contemplates that “a person whether licensed under the Act or not” can employ agents. This clarifies that a hotel (or any other establishment) can employ security agents to perform security work on their behalf, without having to become licensed themselves. Since establishments are not required to be licensed, they are not passing licensing costs on to consumers.

7.1.5 Assessing the costs and benefits

The Review Panel considers that the cost of checking licenses is outweighed by the benefit of a reduced incidence of consumer loss suffered at the hands of unqualified, unlicensed operators.

7.1.6 Alternatives

The restriction prohibits a person from “employing” an unlicensed agent “under a contract of service”. However there is anecdotal evidence that the majority of persons working in the industry are not employed under contracts of service, but instead operate as sub-contractors. This has been used by some to try and operate outside the legislation.

It is the recommendation of the Review Panel that the section be amended to ensure that a person must not “engage” another as an agent if that other is unlicensed. It may be necessary to prescribe a statutory meaning to “engage” to ensure that all types of employment relationships are covered.

CONCLUSION 14.

The Review Panel concludes that the prohibition on employing unlicensed agents should be retained. However the Review Panel recommends that the provision should be amended so as to apply to both employment relationships and the scenario where persons hire sub-contractors.

7.2 RESTRICTIONS ON BODIES CORPORATE

7.2.1 PROPER MANAGEMENT AND SUPERVISION

A licensed agent that is a body corporate must ensure that the agent's business is (with respect to the functions authorised by the licence) properly managed and supervised by a natural person who holds a licence authorising the person to perform those functions personally without supervision.⁹⁰

⁹⁰ Section 13(1)

7.2.1.1 Objectives of the requirement

Requiring supervision is aimed at ensuring that work is performed in a competent manner. Not only is the person performing the work appropriately trained and qualified, there is the additional assurance of a person supervising the work.

7.2.1.1 Impact on competition of the requirement

Requiring businesses to implement supervision increases their operating costs. Increased operating costs are partly absorbed by businesses, meaning less profitable businesses may be squeezed out of the industry and the level of competition would be reduced. In addition part of the increased cost will be passed on to consumers. Consumers will demand less services, which decreases the number of suppliers who can remain in the industry. In this way competition will be further reduced.

The Review Panel has assessed this restriction as a **intermediate restriction on competition**

7.2.1.2 Costs of the requirements

In practice there must be a supervisor and the supervisor must have the same licence as the person performing the work. The question may be asked whether the supervisor is really contributing anything at all, given the worker possess the same skills as the supervisor. It may be argued that the supervisor adds nothing, while the corporation is put the expense of providing supervision.

7.2.1.3 Benefits of the requirements

The restriction has the benefit of ensuring there is a nominated supervisor who would be subject to disciplinary action under the Act should the body corporate fail to discharge its duties. The threat of action against the supervisor encourages an appropriate standard of supervision. The ultimate beneficiary is the consumer, who is less likely to be provided with substandard work.

7.2.1.1 Alternatives

What functions of the business need supervision.

It is arguable that supervision extends only to the technical functions authorised by the licence, and not the actual business or commercial operations of the body corporate.

This view can be supported on the basis that section 13(1) refers to “the functions authorised by the licence”, a clear reference to the functions of a security or

investigation agent as defined in section 3. In addition the framework of the legislation is one where directors are responsible for the conduct of the business in a commercial and financial sense, suggesting a nominated supervisor is to be responsible for other activities undertaken by the body corporate.

The Review Panel recommends that the provision be amended to more clearly define the functions over which supervision must extend.

Does supervision need to be performed by a single person.

It is unclear whether the supervisory role must be performed by a single natural person. If the role is required to be performed by a single person, a number of problems arise.

1. A large body corporate, which may in fact be a “full-service” company, would be unlikely to find a natural person who held appropriate qualifications across all work functions.
2. Consumers would be denied the benefits of having a specialist “manager” in charge of the particular service they were purchasing from the body corporate.

As understood by the Review Panel, it is the intention of the provision to ensure that a natural person is held responsible for the activities of the body corporate, in addition to the body corporate itself. This aim can be realised, irrespective of whether or not the same person supervises all functions of the body. The important issue is ensuring all relevant functions are supervised and clearly identifying which persons are responsible for the supervision of each function. This can be achieved administratively by way of a notification on the application form and the annual return. The Review Panel recommends that the Provision be amended to clearly indicate that supervision can be performed by more than one person.

CONCLUSION 15.

The Review Panel concludes that supervision requirements help to maintain an appropriate standard and quality of service within the security and investigations industry and that this benefit outweighs any costs of the requirement.

The Review Panel recommends that :

- **section 13(1) be clarified to ensure that the proper supervision of a body corporate relates to the technical supervision of the functions authorised by the licence, and not the contractual aspects which are the responsibility of the directors;**

- section 13(1) be clarified to ensure that the supervision function can be performed by more than one natural person, provided each function is supervised by a natural person who holds an agent (worker) licence in respect of that function;
- Persons responsible for supervision be clearly identified by way of notification on the licence application form and the annual return.

7.2.2 ENSURING WORK IS CARRIED OUT BY LICENSED PERSONS

A licensed agent authorised to carry on business, must ensure that functions performed in the course of the business are performed by natural persons who hold licences authorising them to perform those functions personally⁹¹.

7.2.2.1 Objectives of the requirement

The requirement aims to ensure consumers are serviced by persons who possess the requisite skill to perform security and investigations work in a competent manner.

7.2.2.2 Impact on competition of the requirement

The requirement does not reduce the number of persons who can operate within the industry because persons are already prohibited from performing work without a license.

However the requirement imposes an obligation on agents (authorised to carry on business) to take positive steps to ensure their activities are being performed by licensed persons. Imposing obligations on businesses increases their operating costs. The more efficiently a body deals with statutory obligations, the less operating costs will increase, the business will be more profitable and more likely to survive. The result is that increased costs squeeze some operators out of the industry. What's more those more likely to survive in the industry are those who deal with statutory requirements more efficiently and not those who provide security and investigation services more efficiently. There is a reduction in competition and a misallocation of resources.

The Review Panel has assessed this restriction as a **intermediate restriction on competition**.

⁹¹ Section 13(2)

7.2.2.3 Costs of the requirement

Whilst a person may be licensed to perform the work for which they are employed, this is not enough. The persons who actually then perform the work must be licensed to do the work. This has the effect of making it necessary for businesses to monitor who is performing each of its activities. Only then is there an assurance that persons are not assisting in activities for which they were not employed and for which they are not licensed.

7.2.2.4 Benefits of the requirement

The provision assists in ensuring that each function of a business is performed by a person who is licensed to perform that function. This reduces the risk of consumers suffering losses at the hands of unlicensed operators.

7.2.2.5 Assessing the costs and benefits

The requirement provides considerable benefits to consumers by making it more difficult for unlicensed, unqualified persons, to work in the industry . These benefits offset costs associated with the need to monitor who is performing the functions of a body corporate.

CONCLUSION 16.

The Review Panel concludes that requiring businesses to ensure consumers are serviced by licensed agents, reduces the likelihood of consumers suffering losses at the hands of unqualified service provider. This positive outcome outweighs the associated costs, and justifies the retention of the provision.

7.3 LIMITATIONS ON SETTLING CLAIMS RELATING TO MOTOR VEHICLES

A person required to be licensed as an agent must not, when acting on behalf of another, settle or compromise or attempt to settle or compromise a claim in respect of loss or injury arising out of the use of a motor vehicle after proceedings have been instituted in a court in respect of that loss or injury.⁹²

7.3.1 Objectives of the Restriction

This restriction aims to prevent consumers entering settlement agreements which are not in their best interests.

⁹² Section 21

7.3.2 Impacts upon competition.

The restriction reduces the functions which can be performed by an agent. On the other hand persons engaged in other occupations (for example lawyers) can still perform these functions. Overall the total number of persons able to provide consumers with this service is reduced, thereby reducing competition and increasing prices. The Review Panel has assessed this restriction as an **intermediate restriction on competition**.

7.3.3 Benefits of the Restriction

In the absence of this restriction, the IMA submitted that undue influence was placed upon consumers to allow agents to settle claims.

Restricting agents from settling or compromising or attempting to settle or compromise a claim in respect of loss or injury arising out of the use of a motor vehicle, ensures consumers are more able to pursue their rights under law. This decreases the risk of a settlement being arranged by an agent where a better outcome is available to the consumer.

7.3.4 Costs associated with the Restriction

While generally accepting that the consumer would benefit from such protection, the IMA did note that consumers may be disadvantaged in circumstances where an agent is prevented from negotiating a settlement which may be in the interests of the consumer. The IMA submitted that *“the insurance industry commonly settles claims by reducing the claim in consideration for a lump sum payment.”* The Review Panel agrees that consumers may be disadvantaged if their agents cannot enter a settlement agreement which is in the best interests of the consumer. However it should be remembered that the restriction only applies once legal proceedings have been instituted, and that solicitors can still settle a claim on behalf of the client.

7.3.5 Assessing the costs and benefits

The restriction provides a clear benefit by eliminating practices where pressure is placed on consumers to accept settlement offers, which are not in their best interest. Whilst some consumers miss the opportunity to settle on terms better than would be available by not settling, instances of this are less common than scenarios where consumers face pressure to settle. The Review Panel therefore concludes that the restriction on settlements should be retained.

CONCLUSION 17.

The Review Panel has come to the conclusion that restricting agents from settling a claim, in respect of loss or injury arising out of the use of a motor vehicle, benefits

consumers by ensuring they are not pressured into accepting offers which are not in their best interests. The Review Panel therefore concludes that the restriction should be retained.

PART 8 : EXEMPTIONS

There are a number of exemptions which have not been dealt with elsewhere in this Final Report, that may have some competitive impact or create a distortion in the market for security and investigation services.

These exemptions are discussed below.

8.1. CROWN EXEMPTIONS

Section 4 of the Act therefore specifically states that the *Security and Investigation Agents Act 1995* does not apply to:-

- Members of the police force
- Officers or employees of the Crown or instrumentalities of the Crown while performing official functions;
- Officers or employees of a council while performing official functions;
- Sheriff and Court officers while performing official functions.

8.1.1 OFFICERS & EMPLOYEES OF THE CROWN & CROWN INSTRUMENTALITIES

An instrumentality of the Crown may be found to exist where a body is legally empowered to perform, and does perform, any function or purpose whatsoever for the Crown.⁹³

In applying this proposition to a specific body, it is immaterial whether it's function or purpose is one which is a traditional function of government. So long as the body is performing the function for the Crown, or the function being performed is one in which the Crown has a close interest, then this may be sufficient to characterise the body as an instrumentality of the Crown.

8.1.1.1 Objectives of the exemption

The exemption narrows the scope of work regulated under the Act. Officers and employees of Government agencies conduct a range of activities that would come within the definitions of investigation agent, security agent or process server for the purposes of the Act, in particular, investigation of compliance with legislation, controlling crowds, guarding persons and property and serving summons and other legal process. The Act was not intended to regulate such persons as they were not considered to present a risk to consumers. Employees of the Crown are governed by the employee conduct standards and rules, as well as subject to disciplinary action, under the *Public Sector Management Act 1995* on grounds including negligent or improper conduct in the course of carrying out their duties. Regulation of such

⁹³ Electricity Trust of South Australia v Linterns [1950] SASR 133; Corporation of City of Unley v The State of South Australia (1997) 68 SASR 511

persons in the performance of their official duties was considered to be an unnecessary duplication of regulation.

8.1.1.2 Impact of the exemption on competition

The functions of Crown bodies and instrumentalities are wide ranging and can be carried out in direct competition with private enterprise. Allowing employees and officers of the Crown to operate without licensing restrictions potentially enables the Crown to operate at a lower cost than its competitors. Whilst private enterprise may be more efficient in providing security and investigation services, they may be unable to offer lower prices to consumers because their prices reflect additional costs imposed by licensing regulations.

The Draft Report also made the point that a blank exemption for Crown employees may result in security work being carried out by persons not trained to perform such work. The incompetent provisions of services is likely to give rise to consumer loss and has the potential to result in negative externalities such as crowd controllers or security guards physically injuring the public.

The Review Panel assesses this to be an **intermediate** restriction on competition.

8.1.1.3 Alternatives

The Draft Report suggested that consideration be given to narrowing the Crown exemption to where officers or employees of the Crown are engaged in activities which can be characterised as enforcement or prosecution activities.

The Review Panel supports this approach for two reasons. Firstly private enterprise and the crown are not in competition when it comes to enforcement and prosecution activities. Any exemption for these activities will therefore not create a competitive advantage in favour of Crown Instrumentalities. Secondly, as mentioned in the Draft Report, Officers or employees of the Crown engaged in such work are under special duties in respect of their conduct. These duties, like the provisions of the Security and Investigation Agents Act, lessen the risk of negative externalities and injury to the public.

It is noted that both Western Australia and the Northern Territory have retained exemptions of Crown officers and employees performing official duties from their equivalent legislation and that the National Competition Council has assessed these jurisdictions as complying with their obligations under the Competition Principles Agreement with respect to review of that legislation.

Overall, the Review Panel has formed the conclusion that the Crown exemption is justified in competition policy terms and should be retained, although consideration could be given to narrowing the scope of the exemption where it enables Crown instrumentalities to enjoy a competitive advantage over private sector service providers.

Police Security Services Branch (PSSB)

SAPOL submitted that it employs a higher standard for applicants for employment undergoing a criminal records check than applies under the *Security and Investigation Agents Act* and that PSSB conducts training both before commencing specific duties and on the job. These training requirements, in addition to the conduct requirements under the public sector and police legislation, would appear to ensure that the risk to consumers is minimised without the need for further regulation under the *Security and Investigation Agents Act*. An exemption for the PSSB therefore has the benefit of avoiding duplication of regulation and its associated costs.

There are also competitive neutrality aspects to this issue and it is important to note that such issues have been addressed separately, where relevant, from this report. In its submission to this review, SAPOL argued that the requirements of PSSB employees under the *Public Sector Management Act*, *S Government Services Award*, *Police (Complaints and Disciplinary Proceedings) Act* and *Police Regulations* are in fact more prescriptive than the requirements imposed on private agents under the *Security and Investigation Agents Act*. SAPOL noted that the minor net competitive advantage assessed to be enjoyed by the PSSB in 1997/98 no longer applies and that the PSSB now has a net competitive disadvantage over its private sector competitors owing to the increased additional costs of operating within Government guidelines.

An exemption for the Police Security Services Branch reduces duplication of regulation and does not create a competitive advantage. The Review Panel therefore recommends that the PSSB remain exempt from the provisions of the Act.

CONCLUSION 18.

The Review Panel has concluded that consideration should be given to narrowing the scope of the Crown exemption to: -

- **Employees engaged in enforcement and prosecution activities; and**
- **Members of the Police Security Services Branch.**

8.1.2 LOCAL GOVERNMENT

The Act does not apply to an officer or employee of a council while performing official functions.⁹⁴

8.1.2.2 Objectives of the exemption

Similar to the case with public sector employees, local government employees are subject to legislative requirements under the *Local Government Act 1999* to act honestly and with due care and diligence in exercising their official functions. Councils are also required under the legislation to prepare codes of conduct which employees must adhere to. In light of this regulation and the absence of concerns

⁹⁴ Section 4(d)

about the conduct of council employees carrying out security or investigation functions, it was considered unnecessary to regulate council employees under the Act. The aim of the exemption is therefore revealed to be a desire to avoid duplication of regulation.

8.1.2.2 Impact of the exemption on competition

The exemption allows councils to provide security and investigation services without incurring licensing costs. In areas where councils compete with private enterprise, this creates a competitive advantage in favour of the council. The Review Panel has assessed this exemption as an **intermediate** restriction on competition.

8.1.2.3 Costs of the exemption

As outlined in the *Local Government Act (SA) 1999*⁹⁵, the functions of a council are diverse and can include any activity which helps “provide for the welfare, well-being and interests of individuals and groups within the community”. Many of these activities will not be unique to councils and some will also be performed by private enterprises. By exempting Councils from licensing requirements they gain an advantage in areas where they compete with the private sector.

8.1.2.4 Benefits of the exemption

The exemption removes licensing and compliance costs for officers and employees of councils. But for the exemption, it is likely that these costs would be borne by the council and ultimately by rate-payers.

8.1.2.5 Alternatives

Whilst the exemption has a negative impact on competition, this may not be the case where officers or employees of the council are engaged in activities which could be characterised as enforcement or prosecution activities.

These activities are unique to government sector. They are generally not subject to competition from the private sector and as such an exemption from licensing requirements will not give rise to any competitive advantage. Furthermore, officers and employees of councils are well trained in the performance of these activities. The Review Panel therefore recommends retention of the exemption in so far as it applies to activities which can be characterised as enforcement or prosecution activities.

CONCLUSION 19.

The exemption for local government should only apply to activities which can be characterised as enforcement or prosecution activities.

⁹⁵ Section 8

8.1.3 POLICE

The Act does not apply to a member of the police force of this State⁹⁶.

8.1.3.1 Objectives of the exemption

CASA noted that “those in the police force currently undergo rigorous training and are regulated by their own codes. It is unnecessary then to regulate them under this Act also.” The Review Panel agrees that the exemption aims to avoid unnecessary regulation.

8.1.3.2 Impact of the exemption on competition

It is important to note that the exemption applies to police officers, whether or not they are acting in the course of their official duties. This allows a police officer to carry on any security or investigation activity, at any time, in competition with anyone, without having to be licensed. Clearly this provides police officers with an advantage over other agents. The Review Panel has assessed this exemption as an **intermediate** restriction on competition.

8.1.3.3 Cost of the exemption

There is the potential for police officers to perform work, for which they have not been trained. Also, police officers will have a competitive advantage as unlike other agents they will not be subject to licensing costs.

No submissions to the Review Panel indicated that serving police officers are undertaking security or investigation work while “off-duty”, although the issue has been raised in the past. The Review Panel understands that strict rules are in place governing private work by serving officers to prevent the emergence of any conflict of interest. In particular, it is understood that permission will not be given for a serving officer to undertake private process serving or private inquiry agent work.

8.1.3.4 Benefits of the Exemption

The exemption eliminates the burden of licensing costs.

Furthermore the exemption allows police officers to perform the functions of an officer, even whilst “off duty”. Police officers have special status at common law, and must execute their duties at all times.

This was affirmed by the Full Court of the South Australian Supreme Court⁹⁷. In traversing the relevant authorities, Duggan J noted that a police officer is required to take all steps which appear to him necessary for keeping the peace, for preventing

⁹⁶ Section 4(a)

⁹⁷ Tester v Police (1998) 71 SASR 251

crime or for protecting property from criminal injury. Concurring with the judgement of Duggan J, Bleby J also noted that a police officer said to be off-duty “nevertheless may have an obligation to exercise powers uniquely committed to police officers in an emergency whilst off-duty.”

8.1.3.5 Assessing the Costs and Benefits of the Exemption

Exempting police officers in the course of their official duties is not problematic. These duties are for the most part unique to police, meaning competition concerns are not applicable. Furthermore there are no concerns about incompetency given the fact police officers are thoroughly trained to perform official police duties.

However the exemption for police officers extends to all activities carried on by a police officer (and not just the official duties of the officer). Potentially a police officer could carry on any security or investigation activity, at any time, in competition with anyone, without having to be licensed. In practice police have developed strict rules governing private work by serving officers, which has helped to avoid the situation of police officers acting with a competitive advantage over other security and investigation agents. Furthermore, as noted above, the wide scope of the exemption recognises the fact that police officers have special status at common law, and must execute their duties at all times.

The Review Panel therefore believes that the exemption should be retained.

CONCLUSION 20.

The conclusion of the Review Panel is that the exemption for police officers should be retained.

8.1.4 SHERIFF AND COURT OFFICERS

The Act does not apply to the following persons, whilst they are performing official functions : -

- a sheriff,
- deputy sheriff,
- sheriff’s officer,
- bailiff or
- other officer of a court or tribunal,

8.1.4.1 Objectives of the exemption

The Sheriff submitted that staff of the Sheriff and persons providing contract services on behalf of the Sheriff are subject to training and/or directions in the delivery of services provided.

CASA supported this view, saying that “*Sheriff’s Officers are sufficiently trained to act appropriately in the course of their duties so that licensing under this Act is unnecessary*”.

The Review Panel agrees that the Sheriff and Court Officers are well trained and are of appropriate character, such that licensing is not needed to ensure these qualities. The exemption aims to avoid costs associated with unnecessary regulation.

8.1.4.2 Impact of the exemption on competition

For activities other than official functions, Sheriff and Court Officers are required to be licensed in the same manner as other security and investigation agents. The result being that for those activities where Sheriff and Court Officers compete against other agents, they are subject to the same regulation as those other agents. The Review Panel has assessed this to be a **trivial restriction on competition**.

8.1.4.3 Costs of the exemption

It is difficult to see any significant costs arising from the exemption. The public is not placed at risk, as Sheriff and Court officers are well trained and are of suitable character. Also, as noted above, there are no negative impacts upon competition in the market for security and investigation services.

8.1.4.4 Benefits of the exemption

The exemption removes the need for the Sheriff and Court Officers to comply with the Act, and thereby eliminates compliance costs. This not only provides cost savings to government, but removes unnecessary regulation which in turn allows for a more efficient and timely performance of functions by the Sheriff and Court Officers.

8.1.4.5 Assessing the costs and benefits of the exemption

The Sheriff and Court Officers are subject to probity checks and training, negating the need for licensing. Furthermore, the exemption is limited to the performance of official duties and has little impact upon competition in the market for security and investigation services. The Review Panel therefore supports the retention of the exemption.

CONCLUSION 21.

The conclusion of the Review Panel is that the exemption for the Sheriff and Court Officers should be retained.

8.2 PROFESSIONS

A number of professions are exempt from complying with the provisions of the Act. These include :-

Loss Adjusters

The Act currently does not apply to :-

- a person who holds prescribed qualifications in loss adjusting while practising as a loss adjuster⁹⁸; or
- a body corporate while carrying on business as a loss adjuster under the management of a natural person who is resident in the State and holds prescribed qualifications in loss adjusting⁹⁹; or
- a person employed under a contract of service by a person or body referred to above while acting in the ordinary course of that employment¹⁰⁰.

Legal Practitioners

The Act does not apply to a person who: -

- practices as a legal practitioner, while acting in that capacity in the ordinary course of the profession¹⁰¹; or
- a person employed under a contract of service by a legal practitioner while acting in the ordinary course of that employment.

Architects, Engineers, and In-House Security Advisers

Provisions of the Act which require persons to hold a security agents licence before providing advice on security alarm or surveillance systems, do not apply to ¹⁰² :-

- Registered architects; or

⁹⁸ Section 4(e)(i)

⁹⁹ Section 4(e)(ii)

¹⁰⁰ Section 4(e)(iii)

¹⁰¹ Section 4(f)(i)

¹⁰² Regulation 8(1)

- Members of the Institute of Engineers; or
- Persons employed to provide advice on security alarm or surveillance system only to their employer in relation to premises owned or occupied by the employer.

Land Agents

The Act does not apply to a person: -

- registered as an agent under the *Land Agents Act 1994* while acting in that capacity in the ordinary course of the business¹⁰³ ; or
- employed under a contract of service by a registered land agent while acting in the ordinary course of that employment.

Accountants

The Act does not apply to a person who: -

- holds prescribed qualifications in accountancy and practices as an accountant while acting in that capacity in the ordinary course of the profession¹⁰⁴ ; or
- is employed under a contract of service by an accountant while acting in the ordinary course of that employment.

8.2.1 Objectives of the exemptions

Persons engaged in the abovementioned professions are occasionally required to perform security or investigation activities.

The exemptions remove the need for these people to be licensed, when conducting security or investigation services in the ordinary course of their business or the ordinary course of their employment. The underlying objective being to make it easier for professionals to carry on their day to day activities of accounting, legal services etc, where smaller security or investigations issues are involved.

8.2.2 Impact of the exemptions on competition

The exemptions only apply to the extent that a person is practising in their profession. For example, a loss adjuster is only exempt from the requirement to be licensed as an agent while practising loss adjusting. The exemption gives them no right to engage in crowd controlling or other security or investigation activities, which do not relate to loss adjusting.

¹⁰³ Section 4(f)(iii)

¹⁰⁴ Section 4(f)(ii)

For the most part professionals will be subject to licensing requirements, meaning the effect on competition is minimal. The Review Panel has assessed these exemptions as a **trivial restriction on competition**.

8.2.3 Costs of the exemptions

The exempt professions have developed long-standing professional bodies with strict codes of practice and ethics. Membership of the professional body itself is an indicator of good character and technical competence. Exemption from licensing therefore does not lead to incompetent, criminally inclined persons causing consumer loss.

8.2.4 Benefits of the exemptions

As already mentioned the exemptions remove licensing requirements and compliance costs. This reduces the cost of providing professional services, which in turn leads to lower prices for consumers.

8.2.5 Assessing the costs and benefits of the exemption

The exemptions have a limited impact because they only apply to professionals and their employees conducting security or investigation work in the ordinary course of their business. In addition, persons engaged in professional sectors of the economy are subject to the rules and codes of professional bodies, which in many ways mirror the competence and character requirements of licensing. The exemption avoids duplication of these requirements and eliminates compliance costs associated with regulation. This ultimately benefits consumers in the form of lower prices for professional services. The Review Panel concludes that the benefits derived from the exemptions outweigh the limited negative consequences, and it recommends that the exemptions be retained.

8.2.6 Alternatives

Loss Adjusters

Inappropriate behaviour within the industry :

A 1984 review noted the fact that prior to their inclusion in the Act, the conduct of loss adjusters was the subject of a report by Sir William Forster, then Master of the Supreme Court. The Forster Report noted that:

“[A]lthough relatively few loss assessors behaved improperly, there had been ‘complaints of loss assessors seeking and sometimes obtaining by trickery, interviews with critically ill people in hospital or with people who, while not critically ill, are not in a fit state to be interviewed’. The Report emphasised a second undesirable practice which concerned its author - namely, instances where loss assessors claiming to act on

behalf of injured parties were in fact acting for the insurance company involved in the case."¹⁰⁵

It can only be presumed that the activities of loss adjusters which concerned Sir William Forster were no longer prevalent when the Act was revisited in 1995. There have been no submissions raising concerns about the activities of loss adjusters, and as such the Review Panel concludes that the exemption should be continued.

The relevant professional body :

For the purposes of the exemption, the prescribed qualification in loss adjusting is membership of the Chartered Institute of Loss Adjusters (Australasian Division) or the Institute of Loss Adjusters of Australia Limited¹⁰⁶.

However, the professional bodies referred to no longer exist as separate entities. On 1 January 1997 the Australian Institute of Loss Adjusters Limited, the Chartered Institute of Loss Adjusters (Australasian Division) and the Institute of Loss Adjusters New Zealand merged to form the Australasian Institute of Chartered Loss Adjusters Limited. The Review Panel recommends that the Regulations be amended to reflect this change.

Architects, Engineers, and In-House Security Advisers

The RAA submitted that this exemption operates to allow professionals (such as engineering firms) to provide security systems advice, and that this created the potential *"for consumers to be exposed to operators who may not provide the basic standard of service, because they do not meet the licensing requirements."*

However the exemption is limited to professionals providing advice to their employer. There is clearly no consumer detriment where an employee provides advice only to their employer.

The RAA also submitted that the exemption gave rise to the issue of competitive neutrality.

The RAA submission with regards to architects and engineers misunderstands the nature of competitive neutrality. Competitive neutrality applies only in the context of government business activities. It is important to note that:-

*"Competition policy does not require that all firms compete on an equal footing; indeed, differences in size, assets, skills, experience and culture underpin each firm's unique set of competitive advantages and disadvantages. Differences of these kinds are the hallmark of a competitive market economy."*¹⁰⁷

¹⁰⁵ Report of the Working Party Reviewing the Commercial and Private Agents Act 1972-1978, page 17

¹⁰⁶ Regulation 7(1)

¹⁰⁷ National Competition Policy - Report by the Independent Committee of Inquiry, August 1993, p.293

The Review Panel concludes that the exemption is neither detrimental to consumers nor in breach of the principles of competitive neutrality. That as such, the exemption should be retained.

Accountants

The relevant professional body :

A prescribed qualification in accountancy is a current practising certificate issued by either the Institute of Chartered Accountants in Australia or the Australian Society of Accountants¹⁰⁸.

The basis for the exemption is not only technical competence but also the fact that membership of a professional body carries with it ethical and professional duties and responsibilities.

It is open to organisations to demonstrate that membership of their organisation is a suitable qualification for the purposes of coming within the exemption. They must, however, be able to show that membership of their organisation signifies both technical competence and probity.

In its submission to the draft report the National Institute of Accountants (NIA) outlined how its members are subject to a code of ethics, code of conduct, and accounting & auditing standards. The Review Panel further notes the NIA's earlier submission focusing on the training of its members, and concludes that membership of the NIA signifies both technical competence and probity, such that an exemption for its members is justified.

CONCLUSION 22.

The Review Panel concludes that the following professionals should remain exempt from the provisions of the Act.

- **Loss Adjusters**
- **Accountants**
- **Architects, Engineers, and In-House Security Advisers**
- **Accountants**
- **Legal Practitioners**
- **Land Agents**

The exempt professions have developed long-standing professional bodies with strict codes of practice and ethics. Membership of the professional body itself is an indicator of good character and technical competence, and largely replaces the role of licensing.

¹⁰⁸ Regulation 7(2)

CONCLUSION 23.

The Review Panel recommends amendment of the regulations to replace references to the Chartered Institute of Loss Adjusters and the Institute of Loss Adjusters Australia Ltd, with a reference to the Australasian Institute of Chartered Loss Adjusters Ltd.

With respect to the exemption for accountants, the Review Panel further concludes that the prescribed qualification in accountancy should be extended to include the National Institute of Accountants.

8.3 TRUSTEE COMPANIES & CREDIT PROVIDERS

A number of bodies providing financial services, are exempt from complying with the provisions of the Act.

Trustee Companies

The Act does not apply to :-

- a company authorised by special Act of Parliament to act as a trustee while acting in that capacity in the ordinary course of the business; or
- a person employed under a contract of service by such a company while acting in the ordinary course of that employment¹⁰⁹.

Credit Union or Building Society

The Act does not apply to:-

- a credit union or building society registered under the *Financial Institutions (South Australia) Code* while acting in that capacity in the ordinary course of the business; or
- a person employed under a contract of service by such a credit union or building society while acting in the ordinary course of that employment¹¹⁰.

Co-operatives

The Act does not apply to :-

¹⁰⁹ Section 4(f)(iv)

¹¹⁰ Section 4(f)(v)

- a society registered under the *Co-operatives Act 1997* or the *Starr-Bowkett Societies Act 1975* while acting in that capacity in the ordinary course of the business; or
- a person employed under a contract of service by such a society while acting in the ordinary course of that employment¹¹¹.

Friendly Societies

The Act does not apply to: -

- a society within the meaning of the *Friendly Societies Act 1919* while acting in that capacity in the ordinary course of the business ; or
- a person employed under a contract of service by such a society while acting in the ordinary course of that employment¹¹².

The *Friendly Societies Act 1919* was repealed in 1997, and was replaced with the *Friendly Societies (South Australia) Act 1997*.¹¹³ This forms part of the Friendly Societies Scheme. The legislation establishing the Scheme provides for uniform prudential supervision and legislation across jurisdictions. In South Australia, the prudential supervisor is the Office of Financial Supervision.

Credit Providers

The Act does not apply to

- a person lawfully carrying on business as a credit provider within the meaning of the *Consumer Credit Act 1972* while acting in that capacity in the ordinary course of the business.¹¹⁴
- a person employed under a contract of service by such a credit provider while acting in the ordinary course of that employment.

The 1972 Act was repealed in 1995 and replaced with *the Consumer Credit (South Australia) Act 1995*¹¹⁵, which became operational on 1 November 1996.¹¹⁶ This Act put in place the Uniform Credit Code arrangements agreed between all jurisdictions.

Banks and Insurance Companies

The Act does not apply to

¹¹¹ Section 4(f)(vi)

¹¹² Section 4(f)(vii)

¹¹³ *Friendly Societies (South Australia) Act 1997*, Schedule, cl. 1

¹¹⁴ Section 4(f)(viii)

¹¹⁵ No 39 of 1995

¹¹⁶ *Gazette*, 26 September 1996, p. 1209

- a person who lawfully carries on the business of banking or insurance or the business of an insurance intermediary (within the meaning of the Commonwealth *Insurance (Agents and Brokers) Act 1984*), while acting in that capacity in the ordinary course of the business.¹¹⁷
- a person employed under a contract of service by such a business while acting in the ordinary course of that employment.

8.3.1 Objectives of the exemptions

The financial services organisations specified above are regulated by specific legislation. As such, they are usually under a degree of scrutiny by other government regulators as to the conduct of their operations. For this reason, licensing is not needed to ensure the character and competence of these companies and their employees. The exemptions aim to avoid duplication of regulation thereby reducing the cost of regulation and ultimately the costs passed on to consumers.

8.3.2 Impact of the exemptions on competition

The exemptions apply equally to all trustee companies and credit providers so no one body of this type gains an advantage over another.

However these bodies gain an advantage over other providers of security and investigation services who remain subject to licensing regulations and fees.

However each exemption listed above is limited in scope, applying only to activities conducted in the ordinary course of the business of credit providers and trustee companies. This minimises any negative impacts on competition because it is only one segment of the overall security and investigations market. For all other activities trustee companies will not be exempt from the Act and will be subject to the same level of regulation as other agents.

The Review Panel has assessed this exemption as a **intermediate** restriction on competition.

8.3.3 Costs of the exemptions

Trustee companies and credit providers gain an advantage over other security and investigation agents, by operating without the burden of licensing costs. This has the potential to reduce competition by making it more difficult for other agents to compete and survive in a market where trustee companies and credit providers have an advantage.

¹¹⁷ Section 4(f)(ix)

8.3.4 Benefits of the exemptions

Consumers benefit from this because it eliminates licensing fees which would normally be passed on to consumers through an increase in the price of goods and services.

8.3.5 Assessing the costs and benefits of the exemption

The costs arising from the exemption are minimal. The reasons for this are

1. the exemption is limited in scope, applying only to persons employed by or conducting business as a trustee or credit provider, while acting in the ordinary course of business, and
2. trustee companies and credit providers are regulated under other legislation, which performs the role which licensing otherwise would have.

The exemption provides benefits in the form of reduced regulation and licensing fees. The Review Panel therefore concludes that the exemption provides a net benefit and should be retained.

8.3.6 Alternatives

Changes to the process of prudential supervision in Australia provide an opportunity to streamline a number of these exemptions into a single exemption.

In 1996 the Federal Government embarked on a process of reform, under which: -

- The Australian Securities and Investments Commission (ASIC) assumed responsibility for market integrity and consumer protection across the financial system, including for investment, insurance and superannuation products; and
- The Australian Prudential Regulation Authority (APRA) assumed responsibility for prudential regulation of superannuation, insurance and deposit-taking institutions.

Legislation introduced into the South Australian Parliament transferred the prudential and corporate regulatory responsibilities for building societies, credit unions and friendly societies from the Office of Financial Supervision to the combined APRA/ASIC regime. Rather than a series of individual exemptions, it may be more appropriate to create an exemption of general application, applying to all persons subject to regulation under the new APRA/ASIC scheme.

CONCLUSION 24.

The Review Panel concludes that trustee companies and credit providers should continue to be exempt from the provisions of the Act.

However, the form of the current exemptions should be reviewed, giving consideration to an exemption of general application covering all persons subject to regulation under the APRA/ASIC scheme.

8.4 MISCELLANEOUS EXEMPTIONS

In addition to exemptions for the Crown, professionals and financial institutions, there are a variety of other exemptions. These exemptions are discussed below.

The Review Panel notes that a number of the exemptions appear to apply where a person performs one specific function of an agent, and only that one function. For example the Act does not apply to a person employed under a contract of service who acts as an agent *only* as an incidental part of the duties of that employment; and the Act does not apply to a person who is employed under a contract of service by a licensed investigation agent who acts as an agent *only* by requesting the payment of debts by telephone calls made from the agent's place of business while under the supervision of the agent.¹¹⁸

If a person were to act as an agent incidentally and also act as an agent by requesting the payment of debts by telephone, then it appears that neither of the exemptions outlined above would apply. In contrast, if a person performs one of these activities but not the other, then it appears that the relevant exemption will apply.

Whilst it is recognised that there would be a point at which a person performs sufficient of these exempted activities so that they cease to be characterised as incidental activities (and begin to take on the character of the ordinary work of a security or investigation agent) the Review Panel recommends the consideration should be given to allowing more than one exemption to apply.

8.4.1 INCIDENTAL DUTIES

The Act does not apply to a person employed under a contract of service who acts as an agent only as an incidental part of the duties of that employment.¹¹⁹

8.4.1.1 Objectives of the exemption

The day to day operations of many South Australian businesses involve incidental security and investigation issues. For example, requesting the payment of debts. The exemption aims to allow employees to perform these incidental activities without the need to be licensed.

¹¹⁸ Section 4(j)

¹¹⁹ Section 4(h)

8.4.1.2 *Impact of the exemption on competition*

Employees engaging in incidental security or investigation services will not be subject to licensing costs and will therefore have an advantage over licensed agents. Given the minor or secondary nature of incidental activities, the Review Panel has assessed this restriction as a **trivial restriction on competition**.

8.4.1.3 *Costs of the exemption*

The exemption is limited to incidental duties. These duties are performed only so far as is necessary to produce (non-security and investigation) goods or services. Convenience dictates that these duties are best performed by employees, and not outside security or investigation agents. Whether or not employees have the benefit of the exemption, it is likely that they will remain responsible for the performance of incidental security or investigation services. The exemption therefore is not responsible for the transfer of business away from licensed security and investigation specialists.

8.4.1.4 *Benefits of the exemption*

Allowing employees to undertake incidental security or investigation activities without having to be licensed has the obvious benefit of eliminating licensing costs. In addition there is also the benefit of increased efficiency. Time and resources are not wasted on ensuring employees are licensed. It allows businesses to reduce the impact of incidental activities, which contribute little to the profitability of the business. It thereby promotes the efficient completion of an entity's core business.

8.4.1.5 *Assessing the costs and benefits of the exemption*

The exemption differentiates between persons whose primary employment function is the performance of security or investigation activities, and persons who only perform security or investigation services as an incidental part of their employment. Exempting the latter but not the former category of persons does not in practice distort competition. The main reason for this is that exempt employees primarily operate in markets other than the market for security and investigation services. They are not in direct competition with licensed agents. In conjunction with the elimination of licensing costs, the Review Panel concludes that the exemption should be retained.

8.4.1.6 *Alternatives*

There is some anecdotal evidence to suggest that the inclusion of the examples within the Act has led to some degree of confusion, in particular the use of the caretaker example.

A new development which has occurred since the introduction of the Act is the emergence of facilities management companies which provide whole-of-building

services support. These services include cleaning, maintenance and security. The Office of Consumer and Business Affairs is aware of at least one instance where such a company tried to claim that its staff were actually caretakers, and that the security being undertaken was “incidental” to their main position as caretaker.

Consider a situation in which a maintenance worker, while undertaking his or her normal duties discovers an unauthorised person on the premises and seeks to remove them. This action would clearly bring them within the definition of “security agent” yet it is an unusual and incidental part of their duties “to care for the property”. It would be unjustified to require this person to be licensed as a security agent, when they may never be called upon to exercise such functions as part of their normal duties. This is very different from the situation where a person acts as both a maintenance worker and a person who engages in security duties in a systematic and routine fashion.

In light of this confusion, the Review Panel believes that the care taker example should be removed from the Act. The phrase “incidental duties” is widely used and has an accepted meaning, making the example unnecessary and potentially misleading.

CONCLUSION 25.

The conclusion of the Review Panel is that the exemption for incidental duties should be retained, but to avoid confusion the caretaker example should be removed.

8.4.2 SECRETARIAL FUNCTIONS

The Act does not apply to a person who performs only clerical or secretarial functions on behalf of an agent.¹²⁰

8.4.2.1 Objectives of the exemption

The exemption aims to allow people to perform clerical or secretarial functions on behalf of an agent, without the need to be licensed as a security or investigation agent.

8.4.2.2 Impact of the exemption on competition

The exemption applies equally to everyone conducting secretarial functions. The Review Panel therefore concludes that there is no distortion of competition and that the exemption is best categorised as a **trivial restriction on competition**.

¹²⁰ Section 4(i)

8.4.2.3 *Costs of the exemption*

Clerical and secretarial functions involve activities such as writing letters and making phone calls on behalf of agents. It is difficult to see any real problems for consumers arising out of these activities. This is particularly true when one considers that such functions are performed on behalf of an agent, and are most likely subject to the directions and instructions of the agent.

8.4.2.4 *Benefits of the exemption*

The exemption has the benefit of ensuring secretaries and clerks are not subject to the burden of licensing fees, nor the financial burden associated with having to spend time and resources fulfilling licensing entitlement criteria.

8.4.2.5 *Assessing the costs and benefits of the exemption*

Whether or not the secretarial functions are subject to regulation, it would appear that consumers face very few risks. The result is that whilst regulation imposes costs, there are no off-setting benefits in the form of additional consumer protection. The review panel agrees that the exemption reflects a common sense approach, and helps to avoid costs associated with unnecessary regulation.

8.4.2.6 *Alternatives*

The Review Panel agrees that the exemption reflects common sense, but notes that an exemption already exists in section 4(h) for a “person employed under a contract of service who acts as an agent only as an incidental part of the duties of that employment”. It would seem that a person performing secretarial or clerical functions may well fall within this more general exemption. Relying on the general exemption would also prevent unnecessary definitional problems in relation to “secretarial duties”.

The Review Panel concludes that this provision represents an unnecessary duplication which, while not restrictive, cannot be justified.

CONCLUSION 26.

The Review Panel concludes that the exemption for clerical or secretarial functions represents an unnecessary duplication and should be removed from the Act.

8.4.3 DEBT COLLECTION BY TELEPHONE

The Act does not apply to a person who is employed under a contract of service by a licensed investigation agent, and who acts as an agent only by requesting the payment of debts by telephone calls made from the agent's place of business while under the supervision of the agent.¹²¹

8.4.3.1 Objectives of the exemption

The exemption reflects the reality that the actions of such persons are adequately covered by the *Privacy Act 1990* (Commonwealth) and the *Fair Trading Act 1987* (SA).¹²² The provisions aim to remove duplication of regulation.

8.4.3.2 Impact of the exemption on competition

This exemption and the exemption covering incidental duties, by and large cover all persons requesting debts by telephone. No one person gains an advantage over others. The Review Panel assesses this as a **trivial restriction on competition**.

8.4.3.3 Costs of the exemption

Removing licensing requirements removes checks upon the competence and character of persons performing the functions of an agent. However, in the case of the exemption in question, this is unlikely to be detrimental to consumers. The reason for this is that if persons employed by licensed investigation agents engage in unfair, improper or illegal activities, the agent would be subject to disciplinary action under the Act.¹²³ The Review Panel feels that this places pressure upon agents to ensure that their staff are adequately trained and able to perform their work in an appropriate manner. This position is supported by the IMA who recommended the exemption be retained on the basis that debt collection by telephone is not an activity which is causing problems for the community.

8.4.3.4 Benefits of the exemption

Exemption from the operation of the Act has the benefit of eliminating licensing fees, and other costs associated with obtaining a license, including the opportunity cost of undertaking training.

8.4.3.5 Assessing the costs and benefits of the exemption

Although the exemption removes the need for persons to satisfy licensing entitlement criteria, responsibility for the conduct of the exempt persons rests with the licensed agent. This provides a real incentive for agents to supervise employees and minimise poor performance. In addition the exemption has not impacted upon

¹²¹ Section 4(j)

¹²² *Fair Trading Act 1987* (SA), section 43

¹²³ see section 25(1)(c)

service quality and has reduced regulation of the security and investigations industry giving rise to the potential for savings to be passed on to consumers.

CONCLUSION 27.

The conclusion of the Review Panel is that the exemption for debt collection by telephone should be retained.

8.4.4 CASINO EMPLOYEES

A person employed in connection with a casino licensed under the *Casino Act 1997* is exempt, while acting in the ordinary course of that employment, from the requirement to hold a licence authorising the performance of: -

- protecting or guarding a person or property or keeping a person or property under surveillance; or
- preventing, detecting or investigating the commission of an offence in relation to a person or property; or
- controlling crowds.¹²⁴

8.4.4.1 Objectives of the exemption

Casino employees are regulated by the Independent gambling authority and the Liquor and Gaming Commissioner, in accordance with the *Casino Act 1997*. The exemption aims to ensure that regulation is not duplicated under the *Security and Investigation Agents Act 1995*.

8.4.4.2 Impact of the exemption on competition

The exemption extends to actions undertaken “in the ordinary course” of a persons employment with a Casino. If a Casino security officer wished to undertake security work in addition to their employment with the Casino, they would be required to obtain a licence under the *Security and Investigation Agents Act*. The Review Panel therefore considers the exemption to be a **trivial restriction on competition**.

8.4.4.3 Costs of the exemption

The exemption does not impose significant costs. The reasons for this are twofold.

¹²⁴ Regulation 8(2)

Firstly, as stated above, the exemption is limited in scope such that if a Casino security officer wished to undertake security work in addition to their employment with the Casino, they would be required to obtain a licence under the *Security and Investigation Agents Act*. The upshot of this is that for the vast majority of security work, casino employees and non-casino employees will be in the same position. Both will be subject to licensing requirements, and neither will have a competitive advantage over the other.

Secondly, despite the exemption, casino security officers remain subject to close scrutiny. Under the *Casino Act* the Liquor and Gaming Commissioner is responsible for ensuring that all operations of the Casino are scrutinised. The Commissioner must approve persons as suitable to be casino employees.

The competence and probity of casino employees is therefore assured without regulation under *the Security or Investigation Agents Act*. The exemption does not give rise to a greater incidence of incompetent work.

8.4.4.4 Benefits of the exemption

The exemption removes licensing requirements and fees from casino security officers. Labour costs associated with the running of the casino are reduced.

8.4.4.5 Assessing the costs and benefits of the exemption

As indicated, casino employees are regulated under the *Casino Act 1997*. The exemption therefore does not leave casino security officers unregulated, and does not give rise to a greater incidence of incompetent work. Instead the exemption has the benefit of avoiding duplication of regulation. The assessment of the Review Panel is that the exemption provides a net benefit and should be retained.

CONCLUSION 28.

The Review Panel concludes that the exemption for casino employees generates a net benefit and should be retained.

8.4.5 USHERS AND GREETERS

A person is exempt from the requirement to hold a licence authorising the performance of the function of controlling crowds if the person is not employed or engaged to deal with persons who behave in a disorderly manner or create a nuisance.¹²⁵

¹²⁵ Regulation 8(3)

8.4.5.1 Objectives of the exemption

This exemption aims to allow persons such as ushers, greeters, commissionaires, doorkeepers and night auditors to operate without having to be licensed.

8.4.5.2 Impact of the exemption on competition

The exemption distinguishes between types of agent those who deal with disorderly people and those who don't.

Persons who deal with disorderly people can engage in the exempt ("usher type") activities without obtaining additional licensing. Those who don't deal with disorderly people can engage in "usher type" activities without obtaining a licence. Both types of agent can compete on equal terms. The Review Panel assesses this as a **trivial restriction on competition**.

8.4.5.3 Costs of the exemption

The exemption applies to crowd controllers, other than those who deal with disorderly persons. An usher guiding a person to his or her seat for instance would fall within the exemption. This is a relatively straightforward task which poses neither a physical nor financial risk to the public. Licensing is not needed to protect consumers.

8.4.5.4 Benefits of the exemption

Removing licensing requirements and fees clearly results in a financial saving for agents. This has the potential to benefit consumers as security service providers are able to reduce the price of their services. Enquires undertaken by the Review Panel suggest that the competitive nature of the crowd controlling industry is helping to ensure savings are in fact passed on to consumers, and not merely pocketed by the service provider.

8.4.5.5 Assessing the costs and benefits of the exemption

The exemption applies to activities which pose little risk to consumers. The Review Panel concludes that this relatively low level of risk is outweighed by the benefit of reduced licensing costs, and that the exemption should be retained.

8.4.5.6 Alternatives

It has been suggested that the definition of an agent should be amended, so as to refer only to crowd controllers who deal with disorderly people. This would eliminate the need for the exemption. However the current approach ensures that

whilst “usher type” crowd controllers are exempt from licensing, they remain subject to the disciplinary provisions of the Act, because they remain agents within the meaning of the Act. The Review Panel therefore recommends the retention of the current provisions.

Secondly, there is anecdotal evidence that this exemption causes some difficulty from a compliance perspective. In many situations persons are performing “crowd controlling” functions, but claiming that they are employed as ushers, greeters or door staff. It can be a difficult proposition to prove that this is not the case. The effect can be that persons who are not able to be licensed as crowd controllers (for example, due to previous convictions) are able to continue what is effectively same work.

There have been allegations that some hotels and nightclubs are engaging persons to perform crowd control functions, but instructing them to say they are merely “greeters” if questioned by police, authorised officers of the Office of Consumer and Business Affairs or staff from the Office of the Liquor and Gaming Commissioner.

The Review Panel has determined that this issue is beyond the scope of this Review, which is limited to a review of the Act pursuant to the Competition Principle s Agreement. However, the Commissioner for Consumer Affairs may wish to investigate and if necessary develop strategies for preventing the practice of persons acting as crowd controllers whilst claiming to be ushers or greeters.

CONCLUSION 29.

The Review Panel concludes that the exemption for ushers and greeters should be retained.

8.4.6 PROCESS SERVER (NEGATIVELY LICENSED)¹²⁶

A natural person must not carry on business, or otherwise act, as a process server, or advertise or otherwise hold himself or herself out as being entitled to carry on business, or otherwise act, as a process server, unless the person is qualified in accordance with the regulations and has not been convicted of an offence of a class specified by regulation in relation to a process server.

A process server (whether a natural person or body corporate) must not employ a person as a process server unless the person is qualified in accordance with the regulations and has not been convicted of an offence of a class specified by regulation in relation to a process server.

¹²⁶ Section 23

8.4.6.1 Objectives of the exemption

Negative licensing is aimed at being a low cost means of excluding inappropriate and incompetent persons from engaging in process serving.

8.4.6.2 Impact of the exemption on competition

Negative licensing requirements act as a barrier to entry, excluding persons who do not meet the requirements. This reduces the number of process servers operating within the industry, meaning there are less competitors and less competition. The Review Panel assess this to be an **intermediate restriction on competition**.

8.4.6.3 Costs of the exemption

The IMA submitted that “*process servers cause more complaints than investigators*” and that negative licensing causes difficulty in obtaining a licence under mutual recognition in other States. This assertion with respect to complaints is not supported by any evidence, and the Office of Consumer and Business Affairs.

It is also worth restating that process servers, despite their “unlicensed” status, are subject to the disciplinary provisions contained within the Act because of their inclusion in the definition of “agent” in section 3 of the Act. Since the introduction of the Act in 1995, the Commissioner for Consumer Affairs has had no cause to take any such action, somewhat dispelling the allegation that process servers are causing problems to such an extent that they should be licensed.

The IMA further submitted:-

“There is a high risk of cost to the community if untrained and unlicensed persons serve important legal documents incorrectly. Incorrect service of documents, especially if not discovered until very late in the course of a legal claim has very serious consequences for the parties involved.”

In discussions with the IMA, it was asserted that couriers were being used to serve legal process, and that this was causing difficulties by way of incorrect service. The Review Panel contacted numerous courier companies to ascertain how widespread this alleged practice is, and all denied that they knowingly served process (while admitting that many deliveries were made on behalf of law firms, they had no knowledge of what was contained in the packages being delivered). In any event, they were not aware of any problems arising out of their work for law firms.

The Law Society of South Australia was aware that legal practitioners use the services of couriers to deliver documents etc, but was not aware of the use of couriers to serve process. It is considered “standard practice” for practitioners to use professional process servers or their own staff to serve process where required. The Law Society pointed out that in the majority of cases couriers would not be able to swear process as they had no knowledge of what was being delivered. It was also noted that if a practitioner used a courier to effect service, and problems arose due to

incorrect service, then the client would be in a position to take action against the practitioner.

The Review Panel therefore agrees with the comments of CASA, that “Licensing them (process servers) would be an unnecessary regulation and consumer protection does not warrant it.”

8.4.6.4 Benefits of the exemption

Negative licensing provisions ensure that only competent persons of appropriate character are permitted to act as process servers. Persons must be qualified in accordance with the regulations and must not have been convicted of an offence of a class specified by regulation. Such requirements reduce the incidence of incompetent work, which in turn has the effect of minimising consumer loss.

8.4.6.5 Assessing the costs and benefits of the exemption

Negative licensing is beneficial in that it helps to prevent inappropriate persons from engaging in process serving, and does so without imposing the costs of a positive licensing system. In terms of negative effects, there is little evidence of problems arising with respect to the current practices of process servers. The Review Panel therefore concludes that the current regime of negative licensing is an appropriate system for dealing with process servers who “are privy to sensitive information”.

CONCLUSION 30.

The Review Panel concludes that the current regime of negative licensing is an appropriate system for dealing with process servers, and should continue in its current form.

Appendix 1: Summary Of Conclusions

CONCLUSION 1.

The conclusion of the Review Panel is that the markets affected by the operation of the Act are:-

- the South Australian market for the provision of security and investigation services, and
- the South Australian market for security and investigation industry training courses.

CONCLUSION 2.

The conclusion of the Review Panel is that the Act has the following objectives : -

4. to minimise the potential for consumer loss resulting from consumers being serviced by incompetent agents.
5. to minimise the potential for consumer loss arising from agents engaging in criminal activity.
6. to minimise the potential for consumer loss arising from the collapse of businesses in the security and investigations market.

CONCLUSION 3.

The conclusion of the Review Panel is that the continued regulation of the market for security and investigation agents is justified as the potential benefits to the wider community outweigh the costs.

CONCLUSION 4.

The conclusion of the Review Panel is that sole reliance on market forces is an inappropriate mechanism for the overall regulation of the security and investigations market.

CONCLUSION 5.

The conclusion of the Review Panel is that reliance on existing general laws to alleviate the risks existent in the market for security and investigation services is inappropriate. Rather, the Review Panel considers that these general laws provide an effective framework for regulation of this market only in combination with a licensing system.

CONCLUSION 6.

The conclusion of the Review Panel is that the option of greater co- or self-regulation by industry bodies is not feasible at this time, although the option does exist within the current legislation for this to occur should the industry exhibit the level of maturity sought by Government to justify entering into appropriate agreements.

CONCLUSION 7.

The conclusion of the Review Panel is that the potential for provider failure makes negative licensing inappropriate for security and investigation agents.

The Review Panel further concludes process servers are the cause of very few complaints and as such are well suited to a negative licensing system.

CONCLUSION 8.

The Review Panel recommends that the definition of security agent be amended so as to exclude the function of "hiring out or otherwise supplying dogs or other animals for the purpose of protecting or guarding a person or property".

The Review Panel further recommends that the functions of security guarding and crowd controlling be licensed as a single function, so as to reflect the similarity in the scope of the functions.

CONCLUSION 9.

The conclusion of the Review Panel is that the requirement to be licensed is a justified restriction on competition.

CONCLUSION 10.

The Review Panel concludes that the benefits of qualification prerequisites outweigh the associated costs, except with respect to those licensed to perform central station monitoring. The Review Panel recommends that whilst central station monitors should be required to be licensed, they should not be subject to training requirements.

The Review panel further concludes that the costs of training could be reduced by:

- specifying competencies not qualifications; and
- Introducing a two tier licensing structure which distinguishes between contractors and employees.

CONCLUSION 11.

The Review Panel concludes that consumers are only at risk of suffering loss in consequence of business failure, where they pay for goods or services in advance, or when they purchase goods or services which are subject to a warranty.

The Review Panel recommends that the business knowledge and financial resources requirements only apply to contractors that are licensed for the following functions (i.e. functions where consumers commonly pay in advance, and purchase goods that come with warranties): -

- security agent - security alarm and surveillance systems (supply and advice).
- security agent - security alarm and surveillance systems (installation and maintenance)
- investigation agent - collection

CONCLUSION 12.

Financial reputation requirements provide protection for consumers and trade creditors by reducing the risk of contractors suffering financial collapse. At the same time, the requirements do not overly restrict competition within the market.

Therefore the panel recommends the financial reputation requirements be retained.

CONCLUSION 13.

The Review Panel considers the specified prerequisites relating to general reputation, are appropriate given the nature of work to be undertaken.

However, the Review Panel recommends that the reference to “indictable offences” in Schedule 1 should be amended to recognise the difference between major and minor indictable offences.

- a person convicted of a major indictable offence should be permanently disqualified from obtaining a licence
- a person convicted of a minor indictable offence should be disqualified from obtaining a licence for ten years.

CONCLUSION 14.

The Review Panel concludes that the prohibition on employing unlicensed agents should be retained. However the Review Panel recommends that the provision should be amended so as to apply to both employment relationships and the scenario where persons hire sub-contractors.

CONCLUSION 15.

The Review Panel concludes that supervision requirements help to maintain an appropriate standard and quality of service within the security and investigations industry and that this benefit outweighs any costs of the requirement.

The Review Panel recommends that :

- section 13(1) be clarified to ensure that the proper supervision of a body corporate relates to the technical supervision of the functions authorised by the licence, and not the contractual aspects which are the responsibility of the directors;
- section 13(1) be clarified to ensure that the supervision function can be performed by more than one natural person, provided each function is supervised by a natural person who holds an agent (worker) licence in respect of that function;
- Persons responsible for supervision be clearly identified by way of notification on the licence application form and the annual return.

CONCLUSION 16.

The Review Panel concludes that requiring businesses to ensure consumers are serviced by licensed agents, reduces the likelihood of consumers suffering losses at the hands of unqualified service provider. This positive outcome outweighs the associated costs, and justifies the retention of the provision.

CONCLUSION 17.

The Review Panel has come to the conclusion that restricting agents from settling a claim, in respect of loss or injury arising out of the use of a motor vehicle, benefits

consumers by ensuring they are not pressured into accepting offers which are not in their best interests. The Review Panel therefore concludes that the restriction should be retained.

CONCLUSION 18.

The Review Panel has concluded that consideration should be given to narrowing the scope of the Crown exemption to: -

- Employees engaged in enforcement and prosecution activities; and
- Members of the Police Security Services Branch.

CONCLUSION 19.

The exemption for local government should only apply to activities which can be characterised as enforcement or prosecution activities.

CONCLUSION 20.

The conclusion of the Review Panel is that the exemption for police officers should be retained.

CONCLUSION 21.

The conclusion of the Review Panel is that the exemption for the Sheriff and Court Officers should be retained.

CONCLUSION 22.

The Review Panel concludes that the following professionals should remain exempt from the provisions of the Act.

- Loss Adjusters
- Accountants
- Architects, Engineers, and In-House Security Advisers
- Accountants
- Legal Practitioners
- Land Agents

The exempt professions have developed long-standing professional bodies with strict codes of practice and ethics. Membership of the professional body itself is an indicator of good character and technical competence, and largely replaces the role of licensing.

CONCLUSION 23.

The Review Panel recommends amendment of the regulations to replace references to the Chartered Institute of Loss Adjusters and the Institute of Loss Adjusters Australia Ltd, with a reference to the Australasian Institute of Chartered Loss Adjusters Ltd.

With respect to the exemption for accountants, the Review Panel further concludes that the prescribed qualification in accountancy should be extended to include the National Institute of Accountants.

CONCLUSION 24.

The Review Panel concludes that trustee companies and credit providers should continue to be exempt from the provisions of the Act.

However, the form of the current exemptions should be reviewed, giving consideration to an exemption of general application covering all persons subject to regulation under the APRA/ASIC scheme.

CONCLUSION 25.

The conclusion of the Review Panel is that the exemption for incidental duties should be retained, but to avoid confusion the caretaker example should be removed.

CONCLUSION 26.

The Review Panel concludes that the exemption for clerical or secretarial functions represents an unnecessary duplication and should be removed from the Act.

CONCLUSION 27.

The conclusion of the Review Panel is that the exemption for debt collection by telephone should be retained.

CONCLUSION 28.

The Review Panel concludes that the exemption for casino employees generates a net benefit and should be retained.

CONCLUSION 29.

The Review Panel concludes that the exemption for ushers and greeters should be retained.

CONCLUSION 30.

The Review Panel concludes that the current regime of negative licensing is an appropriate system for dealing with process servers, and should continue in its current form.

Appendix 2: Terms of Reference

1. Methodology for the Review

The review adopted the following procedures:-

- Appointment of Review Panel and finalisation of draft terms of reference
- Initial research identifying relevant resources and materials, including materials on any interstate and overseas equivalents
- Preparation of an issues paper
- Release of issues paper for public and industry comment
- Incorporation of comments into consultation draft report
- Preparation of consultation draft report and release for public and industry comment
- Preparation of Final Report to Minister for Cabinet
- Release of report

2. Consultation

The review consulted widely with industry and consumer representatives, educational institutions and relevant government agencies (see Appendix 3).

3. Review Panel

- Ms Judy Hughes, *Deputy Commissioner, Policy & Legal, Office of Consumer and Business Affairs;*
- Ms Gillian Schach, *Senior Policy Officer, Office of Consumer and Business Affairs;*
and
- Mr Brett Williams, *Policy Officer (Competition Policy), Office of Consumer and Business Affairs.*
- Chief Superintendent John Dicker, *Chair of the Police/Private Security Liaison Group.*

4. Contact Officer

The contact officer for the review is:

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Policy Officer (Competition Policy)

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Appendix 3: Consultation List

The following stakeholders were consulted during the course of the review: -

Academy of Law & Investigation	Accreditation & Registration Council	ACT Consumer Affairs Bureau
Advanced Techniques Training Pty Ltd	Alarmlogic Pty Ltd	Australian Security Industry Association Ltd
Attorney-General's Office (NT)	Australian Competition and Consumer Commission	Australian Institute of Loss Adjusters
Australian Small Business Association	Australian Society of Certified Practising Accountants	B&C Services (SA)
BEST Centre	Companies Xclusive	Consumer Affairs Division, Commonwealth Treasury
Department of Consumer Affairs (Qld)	Consumers Association of South Australia	TAFE
VEET Board	Department of Fair Trading (NSW)	Department of Human Services
Department of Justice (Vic)	Max Tatnell Detective & Security Agency	FAI Home Security
FNS (Wholesale) Pty Ltd	Housing Industry Association	Institute of Chartered Accountants
Institute of Mercantile Agents	Insurance Council of Australia	Law Society of South Australia
Local Government Association	Department of Justice (Tas)	Master Builders Association
Ministry of Fair Trading (WA)	NASTEC Solutions	National Electrical Contractors Association
National Institute of Accountants	Liquor Commissioner (NT)	Consumer Protection Agency (NSW)
Security Industry Registry (NSW)	Office of Consumer Affairs (Qld)	Office of Consumer Affairs (NT)
Office of Consumer Affairs (Tas)	Office of Fair Trading (Vic)	Liquor and Gaming Commissioner (SA)
Planning SA	Police Security Services Division	Department of Justice (Vic)
SAPOL	Port Adelaide Training and Development Centre	Precise Investigations
Queensland Police Service	Retail Traders Association	Royal Automobile Association
Small Retailers Association	South Australian Employers Chamber of Commerce and Industry	Private Agents Registry (Vic)
WA Police Service (Commercial Agents Squad)	Websters Investigations	Statewide Security SA Pty Ltd
Small Business Advocate	Sheriff for the State of South Australia	

Appendix 4: Table of Submissions

The following organisations made submissions during the course of the review: -

Consumers Association of SA
Department of Education and Vocational Training
Department of Environment, Heritage and Aboriginal Affairs
FAI Home Security
Institute of Mercantile Agents
Liquor and Gaming Commissioner
National Institute of Accountants
Northern Territory Attorney Generals Department
Office of the Sheriff of South Australia
Police Commissioner
Royal Automobile Association
Security Institute of South Australia
Websters Investigations (SA) Pty Ltd

Appendix 5 : Table Of Abbreviations

CASA	Consumer Association of South Australia
HIA	Housing Industry Association
ICA	Insurance Council of Australia
IMA	Institute of Mercantile Agents.
LHMWU	Liquor, Hospitality and Miscellaneous Workers Union
MBA	Master Builders Association
NIA	National Institute of Accountants
RAA	Royal Automobile Association
SAPOL	South Australian Police Department

