



Tasmania

Draft Report

Review of the

Auctioneers and Real Estate Agents Act 1991

November 2001

This Draft Report has been prepared for discussion purposes only. Any conclusions expressed in this Draft Report are preliminary only, and may be revised in the light of submissions received during the consultation process. Any action taken in anticipation of the outcomes of the review process is at the risk of persons taking such action.

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PART A: INTRODUCTION

1. WHY IS THE ACT BEING REVIEWED?

There has been no systematic review of the *Auctioneers and Real Estate Agents Act 1991* since its enactment 8 years ago. There have been minimal changes to the Act since its enactment, and these have all been ad hoc in response to particular issues which were current at the time. The intention of this review is to determine if the current requirements are appropriate, to discover if there are better alternatives and, if necessary, revise and update the statutory requirements regulating the industry. In this context it is appropriate to consult with the broader community to assist in developing future options.

The review is also being carried out in the context of National Competition Policy ("NCP") reforms in order to determine the appropriate level of regulation necessary to provide the widest consumer choice and the greatest net benefit to the community as a whole whilst ensuring appropriate consumer protection.

2. WHAT IS BEING REVIEWED?

This Review applies to:-

Auctioneers and Real Estate Agents Act 1991 ("the Act"); and
Auctioneers and Real Estate Agents Regulations 1992 ("the regulations").

Copies of the Act and Regulations are available on <http://www.thelaw.tas.gov.au/> or from the Printing Authority of Tasmania.

3. THE REVIEW PROCESS

An Issues Paper was released for public consultation in November 1999. Advertisements were placed in the public notices section of the Mercury, Examiner and Advocate newspapers and the Paper was placed on the Department's website.

Submissions were received from:

- Auctioneers and Real Estate Agents Council of Tasmania (AREAC)
- Real Estate Institute of Tasmania (REI)
- Office of Consumer Affairs and Fair Trading (CAFT)
- Department of Primary Industries Water and Environment (re Discussion point 19)
- Harrison Humphreys Real Estate (HH)
- Weedon Real Estate
- Tenants Union of Tasmania (TUT)
- Roberts Limited
- Australian Society of Certified Practising Accountants Tasmanian Division (CPA)
- Michael O'Halloran
- Peter Jones Real Estate Agent

- Bruce Scott

The purpose of the Draft Report is to present the **preliminary** conclusions and recommendations. Submissions are invited to address the reasoning, conclusions and recommendations put forward by the Department. However, where there is a disagreement with an aspect of the Draft Report, the Department asks that analysis supporting an alternate point of view be provided.

The period of consultation will run for four weeks from the date the Draft Report is released. **Please note that no extensions of time for submissions will be granted.**

The closing date for submissions is: 10th December 2001

Only written submissions will be accepted, and should be forwarded to:

The Secretary
Department of Justice and Industrial Relations,
Level 6 15 Murray Street
Hobart 7000.
Email: anne.horner@justice.tas.gov.au
Facsimile: (03) 6233 3920

At the conclusion of the consultation period, the Department will prepare a Final Report for presentation to the Attorney-General. This is expected to occur in early 2002.

PART B: GENERAL PRINCIPLES OF NCP REFORMS

On 11 April 1995 the Council of Australian Governments ("COAG") entered into three inter-governmental agreements to facilitate the implementation of National Competition policy. One of these agreements was the Competition Principles Agreement ("the Agreement"). As part of its obligations under the Agreement, State and Territory governments gave an undertaking to review existing legislation that restricts competition.

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

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

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

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

² Clause 5(1), Competition Principles Agreement

This principle applies to proposals for new legislation as well as reviews of existing Acts. An additional consideration is whether it will impose a significant negative impact on business.

Legislation identified as restricting competition must be systematically reviewed at least once every ten years thereafter³. The procedure for reviewing legislation is contained in clause 5(9) of the Agreement. A review should:-

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

Where there is a requirement to balance the benefits of a policy or course of action against its costs, or to assess the most effective means of achieving a policy objective, the following matters⁴ should be taken into account where relevant:

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

These matters are also relevant when developing new legislation.

The NCP reform program seeks to encourage greater competition in the marketplace, and to extend the productivity-enhancing effects of competition to virtually all sectors of the economy, providing it is assessed as being in the public benefit. It consists of a number of reforms which aim to lower business costs, improve competitiveness and provide the conditions for more sustainable economic and employment growth.

Underlying NCP 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 user's demands in terms of improved quality.

It is important to acknowledge that some laws may restrict competition. In many such cases restrictions may be essential in order to achieve a significant community benefit. However, NCP 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.

³ Clause 5(6), Competition Principles Agreement

⁴ Clause 1(3), Competition Principles Agreement

PART C: OVERVIEW AND DISCUSSION POINTS OF THE LEGISLATION

1. HISTORY

The Act replaced the *Auctioneers and Estate Agents Act 1959*, following a detailed review in the late 1980s of the repealed Act by the Department and the Auctioneers and Real Estate Agents Council (“the Council”).

The main findings of the review were:

- a) commission rates on residential properties be deregulated;
- b) the Real Estate Institute establish a recommended scale of commissions and charges;
- c) the Council be given greater powers to discipline and control licensed persons and provide safeguards for the public in their dealings with licensed persons; and
- d) written agency contracts, together with disclosure and advertisement of commission rates.

2. CURRENT OPERATION OF THE ACT

2.1 The “market” for the purposes of this Draft Report

The relevant market is the market for the provision of services relating to the sale, buying, leasing or management of land and businesses and the auctioning of goods, land and businesses in Tasmania.

These services are offered by a large range of suppliers and the whole community “consumes” these services in some manner and at the same time. There are approximately 140 auctioneers and real estate agents businesses operating in Tasmania. Over 1400 licences are renewed and granted each year in Tasmania in accordance with the Act. In 2000 this included 135 real estate agents licences, 202 real estate managers licences and 732 real estate consultants licences. There were 20 general auctioneers licences, 94 real estate auctioneers licences and 211 employed auctioneers licences granted or renewed during the same period⁵. (It should be noted that some persons hold several licences as part of their business.)

- REI summarised the market to cover:
 - a) management of property - commercial and residential;
 - b) sale and purchase of business
 - c) sale and purchase of land
 - d) transfer of interests in land
 - e) development of land
- The Tenants Union stated that the Act needs to ensure that it clearly covers the residential tenancy market as part of its overall market.
- CPA suggested that further consideration should be given to the implications of extended markets through the internet etc.

⁵ Auctioneers and Real Estate Agents’ Council Annual Report for year ended 31 December 2000

A. The preliminary conclusion is that the relevant market under the Auctioneers and Real Estate Agents Act is the market for the provision of services, other than conveyancing, relating to land and businesses and the auctioning of goods, land and businesses in Tasmania.

B. Do you agree or disagree with this conclusion? Please state your reasons.

2.2. Licensing and management of an auctioneer's or a real estate agent's business

Persons who wish to establish businesses in real estate or auctioneering, must be licensed under the Act. An application for a licence, or the renewal of a licence must be made to the Auctioneers and Estate Agents Council in the form approved by the Council and be accompanied by the prescribed fee, and required documentation. To be licensed, a person must hold the required educational and practical qualifications. A person is not qualified to hold a licence if the applicant is not of good reputation. This includes both general and financial reputation and covers matters such as bankruptcy, convictions, previous disciplinary action by the Council or a failure to undergo continuing education as specified by the Council.

The Act does not bind the Crown.

In addition, the requirement that a person hold a licence does not apply to -

- (a) a liquidator or receiver; or
- (b) the committee of the estate of a person appointed under a law relating to mental health; or
- (c) a trustee company within the meaning of the *Trustee Companies Act 1953*; or
- (d) a legal practitioner in respect of whom a practising certificate is in force - exercising rights and powers or performing duties and obligations in that capacity.

2.3 Requirements for Auctioneers

The Act provides that no person shall carry on an auctioneering business or conduct an auction unless licensed. This means that an individual cannot auction his or her own goods or property, including real estate. The Act sets out who may conduct an auction, and also places restrictions on the way auctions are held.

A person who auctions property other than real estate as a business must hold a general auctioneers licence; and a person who auctions real estate must hold both a real estate auctioneer's licence, and a real estate agent's licence

Employees who conduct auctions on behalf of their employers must also hold a relevant licence, such as an employed auctioneer's licence, a probationary auctioneer's licence or a temporary auctioneer's licence.

The holder of an employed auctioneer's licence can only conduct an auction on behalf of the employing auctioneer. A probationary auctioneer may only conduct an auction under the

supervision of the employer, or another licensed employee. A temporary auctioneer may only conduct an auction on behalf of the employer and in accordance with any conditions endorsed on the licence.

There are exemptions to this requirement, as set out in section 10(7). These include an auction authorised by an Act being conducted by a person specified in the Act; an auction under a writ or process issued by a court; an auction of property distrained for rent or arrears of rent; and an auction being conducted for a charitable purpose.

The qualifications to be an auctioneer include a requirement that the person satisfy the Council that he or she has sufficient knowledge of the business of auctioneering to be able to carry on the functions of the particular licence.

The object of the qualification requirement is to ensure that auctioneers possess basic knowledge and skills in the art of conducting an auction. Ensuring that auctioneers possess that knowledge and skill should help protect consumers from the actions of unskilled or unknowing auctioneers. The objective of the requirement is not to ensure that auctioneers possess marketing or sales skills. Such matters are for the industry to facilitate.

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

The provisions applicable to bodies corporate are similar and a body corporate cannot hold a licence if an officer has been disqualified following disciplinary action.

2.4 Requirements for real estate agents, managers and sales consultants

The Act requires that persons carrying on the business of real estate agent, and persons employed in the real estate business as a manager or a sales consultant are to be licensed.

The Act defines the functions of real estate agents, managers and sales consultants.

"Real estate agent" or "agent" means a person who carries on the business of -

- (a) selling, buying, exchanging, leasing or otherwise dealing with, or disposing of, real estate or businesses; or
- (b) negotiating the sale, purchase, exchange, lease or any other dealing with, or the disposition of, real estate or businesses; or
- (c) collecting rents for real estate or businesses; or
- (d) managing real estate let or leased -

pursuant to instructions received from other people, and includes a person who, by publishing information or reports, represents himself or herself as carrying on that business;

There are exemptions from the requirement of persons to be licensed as an agent as set out in 2.2. These exemptions are limited to a few professions. There may be other occupational groups, such as accountants, who believe themselves to be able to assist clients in the sale of their businesses. If they are doing this, and it falls within the definition of an agent, then these groups are breaching the Act.

The qualifications for a real estate agent are that the person has the prescribed qualifications and has been employed full time as a real estate sales consultant for a total period of at least two years during the preceding 5 years. A person who has previously held a real estate agents licence or a real estate managers licence in the preceding five years may apply for a licence; and a person who has been licensed under the law of another state or Territory as a real estate agent in the preceding five years may also be eligible for a licence. In the latter case, the person must have worked in that State or Territory for at least two years of the preceding five years and must satisfy the Council that he has sufficient knowledge and experience of the business to be granted a licence. A person who is currently licensed interstate would be eligible to be licensed in Tasmania under the principles of mutual recognition.

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

A "real estate manager" means a person engaged by a real estate agent to manage a place where the agent is authorised to carry on the business of a real estate agent.

The required qualifications for a real estate manager are the same as those for a real estate agent.

A real estate business must be managed by a person who holds a real estate agents licence, or a real estate managers licence or, in limited circumstances, and subject to Council approval, by a real estate consultant.

Regulation 48 sets out the rules of conduct for a licensee/manager who is engaged by a real estate agent to manage business premises:

- (a) the licensee must be responsible for the management of those premises to the exclusion of all other persons other than the real estate agent by whom the licensee was engaged;
- (b) the licensee must give substantial attendance at those premises during normal business hours;

(c) the licensee must ensure that the business and accounting records required to be kept at, or in respect of the business transacted from, those premises are kept in accordance with the Act;

(d) the licensee must not manage, or interfere with the management of, any other business premises of the real estate agent by whom the licensee was engaged;

(e) the licensee must honestly account to the real estate agent by whom the licensee was engaged for all money received at those premises in the course of business;

(f) the licensee must diligently supervise the work of any other persons engaged to work at those premises; and

(g) the licensee must ensure that any other persons engaged to work at those premises understand and comply with the provisions of the Act.

The Council may require verification of the manager's hours of attendance at the business. The requirement that the manager must be in substantial attendance at the premises during normal business hours is a restriction upon the ability of persons to work part time in the industry.

A "real estate sales consultant" means a person who, acting for a real estate agent -

(a) induces or attempts to induce, or negotiates with a view to inducing, people -

(i) to acquire, dispose of or lease real estate or businesses; or

(ii) to make an offer to acquire, dispose of or lease real estate or businesses; or

(iii) to enter into contracts for the acquisition, disposal or leasing of real estate or businesses; or

(b) collects rents for real estate or businesses; or

(c) manages real estate let or leased.

The required qualification for a real estate consultant is that the applicant must satisfy the Council that he or she has sufficient knowledge to be able to carry out the functions of the position.

The provisions applicable to bodies corporate are similar. A body corporate may hold a real estate agents licence if at least half of its directors hold either real estate agents licences, or real estate managers licences. The requirement that at least half of the directors hold licences may be a restriction on the ability of large businesses with diverse business interests to operate in the real estate industry. This in effect limits a body corporate to being run by persons with specific real estate experience.

2.5 Disqualifications

Notwithstanding the above requirements, a person is not qualified to hold a general auctioneers licence or any kind of real estate licence if that person:

- is an undischarged bankrupt or has made a composition or arrangement with creditors and the debts to which the composition or arrangement relates have not been paid in full; or the terms of the composition or arrangement have not been fulfilled; or
- is a body corporate which is in receivership or liquidation or is in the process of winding up or has a director, manager, secretary or other similar officer who is disqualified for holding a licence by virtue of section 45 (disciplinary action by Council); or
- is disqualified for holding a licence by virtue of a suspension under the Act or disciplinary action by Council; or
- has been convicted, in Tasmania or elsewhere, of an offence of a nature which, in the Council's opinion, makes it not in the public interest the person be granted a licence; or
- has held a similar licence granted under the law of another State or Territory of Australia that was suspended or revoked, or refused renewal in circumstances which, in the Council's opinion, make it not in the public interest the person be granted a licence.

A person is not qualified to be or continue to be a licensee unless, within a period specified by the Council, that person has undertaken any continuing education course specified by the Council.

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

2.6 Licences

There are eight types of licences which may be granted under the Act:

- real estate auctioneers licence;
- general auctioneers licence;
- employed auctioneers licence;
- probationary auctioneers licence;
- temporary auctioneers licence;
- real estate agents licence;
- real estate managers licence; and
- real estate consultants licence.

All licences except the probationary auctioneers licence and the temporary auctioneers licence may be renewed annually.

The licences may be granted to a natural person or a body corporate.

Each licence requires qualifications which are tested by examination or inquiry by the Council.

2.6.1 Licence Qualifications and Criteria

The Council grants licences subject to the applicants satisfying the Council that they have the required qualifications or knowledge of the relevant business. The Act provides that certain persons are disqualified from holding a licence. This covers such matters as bankruptcy, receivership, liquidation etc. The Act also provides that a person is disqualified from holding a licence if the person has been convicted of an offence of such a nature which, in the opinion of the Council, makes it not in the public interest for the person to be granted a licence.

The qualifications for the prospective licences are as follows:-

Real estate auctioneers licence

- the applicant must hold a real estate agents licence;
- the applicant must satisfy the Council that he or she has sufficient knowledge of the business of auctioneering to be able to carry on that business;
- in the case of body corporate, as well as holding a real estate agents licence, the applicant must have in charge of its auctioneering business an employee who holds an auctioneers licence and who is able to satisfy the Council that he or she has sufficient knowledge of the business of auctioneering.

General auctioneers licence

- in the case of a natural person, the applicant must satisfy the Council that he or she has sufficient knowledge of the business of auctioneering to be able to carry on the business;
- in the case of a body corporate, the applicant must have in charge of its auctioneering business an employee who holds an auctioneers licence and who is able to satisfy the Council that he or she has sufficient knowledge of the business of auctioneering.

Employed and probationary auctioneers licence

- the applicant must be engaged or employed by a principal auctioneer; and
- the applicant must satisfy the Council that he or she has sufficient knowledge of auctioneering to carry out the functions of an auctioneer or a probationary auctioneer.

Real estate agents licence

In the case of a natural person:

- the applicant must have the prescribed educational qualifications; and applicant must have been engaged full time as a real estate sales consultant for a total period of at least two years during the five years immediately preceding the application for a licence; or
- the applicant must have held a real estate agents licence or a real estate manager's licence at any time during the five years immediately preceding the application for the licence; or

- the applicant has, during the previous 5 years, been authorised under the law of another State or Territory to carry on the business of real estate agent in that place; and has worked as a real estate agent in that other place for at least 2 years during the previous 5 years; and the applicant satisfies the Council that he or she has sufficient knowledge and experience of the real estate business to be granted a licence.

A body corporate may hold a real estate agents licence if at least half of its directors hold either real estate agents licences or a real estate managers licences.

Real estate managers licence

- the applicant must have the prescribed educational qualifications; and applicant must have been engaged full-time as a real estate sales consultant for a total period of at least two years during the five years immediately preceding the application for the licence; or
- the applicant must have held a real estate agents licence or a real estate managers licence at any time during the five years immediately preceding the application for the licence; or
- the applicant has, during the previous 5 years, been authorised under the law of another State or Territory to carry on the business of real estate agent or to carry out the duties of a real estate manager in that place; and has worked as a real estate agent or manager in that other place for at least 2 years during the previous 5 years; and the applicant satisfies the Council that he or she has sufficient knowledge and experience of managing a real estate business to be granted a licence.

Real estate sales consultants licence

- the applicant must satisfy the Council that he or she has sufficient knowledge to be able to carry out the functions of a real estate sales consultant.

Where applicants are required to satisfy the Council as to the relevant knowledge, this is done by examination, as determined by the Council.

The Auctioneers and Real Estate Agents Regulations provide that the prescribed educational qualifications for a real estates agents licence or a real estate managers licence are either an Associate Diploma in Business (Real Estate) from TAFE, or such other qualification as the Council determines is of an equivalent standard to the TAFE Diploma.

In addition to the requirements to obtain a licence, the Act provides that, as a condition of renewal of a licence, the Council may require licensees to undertake additional education courses.

There is no limit placed on the number of licences which can be issued.

3. REAL ESTATE INDUSTRY

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

In this section the real estate industry, including real estate auctioneering is considered.

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

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

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

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

- risk of market failure
- risk of provider failure

Risk of market failure

Market failure may arise from:

- high transaction costs
- information asymmetry; and
- externalities.

Transaction Costs

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

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

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

The market for real estate services is one in which many consumers only participate once or twice in their lives. As a result, most consumers are unfamiliar with the market, and face significant transaction costs in seeking a service provider. Consumers will generally only search out and utilise information so long as the costs of doing so are lower than the savings they expect to make as a result. Thus consumers of real estate services are less likely to undertake such searches. Licensing⁶ seeks to provide information about real estate agents. The fact that a person has satisfied required standards is an indication to the consumer (although not a guarantee) of the quality of service that will be provided. This can decrease the cost to consumers of individually measuring the quality of services. The government or licensing body is also in a better position to undertake such assessment on behalf of consumers, at significantly lower cost than if consumers were to individually undertake such searches.

Information Asymmetry

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

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

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

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

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

Requiring all agents to be licensed, and to comply with all the requirements which accompany such licensing, is one way of addressing this information asymmetry. Consumers

⁶ In whatever form, ie licensing, registration, negative licensing.

can be assured that a person providing 'real estate agent' services to them is qualified to do so, without the consumer being required to undertake extensive searches to discover the relevant information. This reduces the need for the consumer to obtain further independent assurance that the agent is competent; the licensing body has performed that task for the consumer. It also reduces the likelihood of unqualified persons entering the market and providing an inferior service at equivalent cost, which would be a misallocation of resources, because these people are prevented from entering the industry.

Externalities

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

Provider Failure

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

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

Risk of financial loss

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

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

The Act deals with this risk in five ways.

- (1) it creates a barrier to entry for those who have previously been convicted of an offence of dishonesty or have a history of personal bankruptcy or association with wound up companies.
- (2) it creates strict rules governing trust accounts, which determine what money must be paid into trust accounts and how that money may and may not be dealt with.
- (3) it creates mechanisms to ensure compliance, including audits and the provision for the appointment of managers and administrators if there are demonstrated problems.
- (4) it provides for the discipline of agents and ultimate removal from the industry of those who have demonstrated that they are unfit to be members of the industry.
- (5) when all these measures fail to protect the consumer, the Act provides for compensation from the indemnity fund.

Risk of substandard work being performed

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

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

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

In Tasmania, unlike many other jurisdictions, real estate agents may draft the contract for the sale of land or a business. For an agent to be able to draft such a contract, however, an understanding of the principles of contract and property law is essential. Failure to take these principles into account may result in a contract that is unenforceable, unclear or one that does not reflect the intention of the parties to the contract. The potential for consumer detriment as a result of such contracts is considerable. A vendor may lose the sale if the contract proves to be unenforceable (a result which is intensified in a depressed property market). Alternatively, the vendor may suddenly discover that they have lost their entitlement to aspects of the property which they understood they were able to keep (fixtures, etc). A purchaser may discover that the property does not include aspects which the purchaser believed it included. Uncertainty may result in invalidity of the contract or may lead to lengthy and expensive litigation to determine the meaning of the terms of the contract.

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

Risks to health and safety

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

Risk of criminal activity

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

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

Do the benefits of regulation outweigh the costs?

There is a clear cost in restricting the practice of negotiating, selling etc of land and businesses to licensed real estate agents. These costs flow from the reduction of competition in the marketplace. Incumbents have less incentive to innovate, to increase efficiency and to reduce cost.

Nonetheless, it is acknowledged that there are a number of benefits which flow from restricting real estate practice to licensed agents.

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

It is considered that, in principle, these benefits outweigh the general costs of regulation.

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

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

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

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

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

Fair Trading Act 1990

The *Fair Trading Act 1990 (Tas)* prohibits misleading and deceptive advertising and other conduct. The more general sections read as follows:

Misleading or deceptive conduct

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

Misleading conduct in relation to services

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

Real estate services are subject to these laws because the definition of services in section 3 of the *Fair Trading Act* 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, and, without limiting the generality of the foregoing, includes the 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), whether with or without the supply of goods.

Therefore real estate services will fit into the category of 'services' for the purposes of the *Fair Trading Act*.

Trade Practices Act - Implied Terms

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

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

Warranties in relation to the supply of services

74. (1) In every contract for the supply by a corporation in the course of a business of services to a consumer there is an implied warranty that the services will be rendered with due care and skill and that any materials supplied in connection 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 connection 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.⁷

The section only implies these terms into contracts for the supply of services struck between a corporation and a consumer. A real estate agent carrying on business as a sole trader or in

⁷ Emphasis added.

partnership with another does not have these terms implied into their dealings with consumers.

However, the conduct of the directors, servants or agents of the corporation acting within the scope of their actual or apparent authority may be taken into account to ascertain whether a breach of the implied term has been committed.⁸ An agent working for a corporation may make it liable if their services are not rendered with due care and skill, or if the services do not fulfil their requested purpose.

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

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

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

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

Nevertheless, there is merit in filling the gap where implied contract term provisions are not available to sole traders and partnerships. Indeed it might be argued that their non-application to certain firms provides a competitive advantage over companies. The implied contract terms could be duplicated for sole traders and partnerships in the *Fair Trading Act 1990* and would contribute to a more level playing field for the operation of business generally.

The preliminary conclusion is that the ongoing regulation of the market for real estate services is justified. While individual restrictions must be analysed on a case by case basis, it is considered that regulation of the real estate industry in some form is necessary.

⁸ *Trade Practices Act 1974* (Cth), section 84(2).

What are the alternatives?

Self-regulation

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

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

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

For an industry to self-regulate, there needs to be an industry body or bodies with broad industry coverage. In the real estate industry, the Real Estate Institute is a body with fairly broad industry coverage.

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

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

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

Negative Licensing

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

Examples of the use of negative licensing are the *Second-Hand Dealers and Pawnbrokers Act 1994* and the *Crowd Controllers Act 1999*. In South Australia, sales representatives are negatively licensed under the *Land Agents Act 1994*.

Although negative licensing controls entry to the industry to some extent, it is an inadequate way of regulating industries where significant amounts of money are held on trust. In the

absence of registration or licensing requirements, it is difficult for an inspecting body to know the identity and location of all participants in the industry. Searches of publications such as the Yellow Pages may offer some assistance but will not necessarily be accurate or complete, and are time-consuming in any event.

Co-regulation

Under co-regulation, the regulatory role is shared between government and an industry body. Typically it involves an industry organisation or a representative of a large proportion of industry participants formulating a code of practice in consultation with government. The code is designed to ensure that breaches are enforceable via effective sanctions by the industry or professional organisation.

Co-regulation enables the industry to take the lead in the regulation of its members by setting industry standards and encouraging greater responsibility for the performance of its own members. Co-regulation has been used in relation to professions such as lawyers and engineers.

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

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

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

Certification

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

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

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

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

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

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

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

Restriction of title

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

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

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

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

Pre-contractual disclosure (vendor statements and cooling-off periods)

One of the alternatives to more restrictive regulatory intervention such as licensing is mandatory disclosure. Disclosure assists in reducing information asymmetry for consumers and a number of Australian jurisdictions require vendors to complete disclosure statements before selling real property. Vendor statements provide key information about land use options and about latent defects which may impact upon a decision to purchase. Typically, a vendor statement might include a copy of the relevant local government certificate which provides key information about a property.

Coupled with pre-contractual disclosure is the notion of a cooling-off period. Cooling-off periods may either facilitate the discovery of further information or they may provide a right of reflection. If vendor statements are adequate, there is a reduced argument for a cooling-off period which facilitates further information search. However, an 'overnight' right of reflection may be value in encouraging rational consumer decision making.

Ultimately, both vendor statements and or a cooling-off period may bolster consumer protection and reduce the risk of reducing regulatory intervention such as licensing.

Preliminary conclusion

The preliminary view is that the benefits of regulation in principle outweigh the costs. There are no viable alternatives. It is therefore the preliminary conclusion that some regulation of the real estate industry should be retained.

- A. The preliminary conclusion is that the benefits of regulation outweigh the costs.**
- B. The preliminary conclusion is that there are no viable alternatives to regulation.**
- C. The preliminary conclusion is that some regulation of the real estate industry should be retained.**
- D. Existing regulation may be improved by amending the Fair Trading Act to include implied contract terms for sole traders and partnership.**
- E. Existing regulation may be strengthened by requiring vendor statement and or cooling-off periods.**
- F. Do you agree or disagree with these conclusions? Please state your reasons.**

4. GENERAL AUCTIONEERS INDUSTRY

4.1 Is the continuation of regulation of the general auctioneering industry justified?

This section of the Draft Report considers the regulation of general auctioneers and employed general auctioneers. Licensing for real estate auctioneers and their employees is considered separately with the real estate licences.

In 1993 the Council of Australian Governments (COAG) agreed to the principle of mutual recognition of professions and occupations throughout Australia.

As part of the process, COAG agreed to review the licensing of those occupations which are partially regulated in Australia, that is, those occupations in respect of which not all jurisdictions require licensing. Not all States require licensing of the various occupations which come under the auctioneer and real estate industry. In its review of these partially regulated occupations, COAG adopted the policy that licensing could only be justified on public health and safety grounds. It also decided that if a particular occupation was not licensed in one jurisdiction, then there would be a presumption that it should not be licensed in any jurisdiction.

The review was carried out by the Vocational Education, Employment and Training Committee (VEETAC) Working Party on Mutual Recognition.

The Working Party suggested several viable alternatives to registration which States and Territories could consider. These alternatives include: negative licensing, self regulation, co-regulation and business licensing. These mechanisms may prove equally effective in achieving the goals of consumer protection, probity and financial responsibility which underpin the reasons for much of the existing regulation of occupations.

The Working Party consulted extensively with the occupations concerned and received submissions. It should be noted that the Working Party considered the legislation in all jurisdictions, and received submissions from a range of bodies, government and private, in relation to the occupations of auctioneer, real estate manager and sales consultant. Submissions were made by the Auctioneers and Real Estate Agents Council of Tasmania.

The Working Party examined the occupation of general auctioneer only, and not real estate auctioneer. (The latter is also required to be a licensed real estate agent which is a fully registered occupation and was therefore not examined by the Working Party.)

The case for registration for general auctioneers was argued on consumer protection grounds.

It was argued that the registration of auctioneers establishes a degree of competence and knowledge of the legal obligations and responsibilities of practitioners. It was claimed that the incidence of exploitation of the public through unscrupulous and dishonest conduct, such as charging of unreasonable fees or misappropriation of money was reduced as a result.

It was pointed out that auctioneers are responsible for trust funds and in some jurisdictions must lodge fidelity bonds. Under this system, it was claimed, the keeping of business and trust accounting records was enforced.

The Working Party considered that there was no evidence to support the claim that registration has raised consumer awareness or reduced the incidence of unscrupulous operators. The Working Party also considered that insurance, in the absence of occupational registration, could provide consumers with access to a fidelity fund.

The Working Party noted the advice from the ACT Attorney-General's Department that a police check is not a particularly useful check on the suitability of a person for an occupation. A more useful alternative suggested was the use of a negative licensing scheme or a code of practice under a Fair Trading Act or equivalent, which prohibits unfair trading practices.

It was a recommendation of the VEETAC Report⁹ that registration should not be retained for this occupation.

Comments

The findings of the VEETAC Report have relevance to the industry in Tasmania. There have been no submissions received specifically in relation to general auctioneers. The market appears to consist of three pastoral companies which carry out auctions of wool and livestock and a number of chattel auctioneers. In 1999 18 general auctioneers licences were issued (10 to companies and 8 to individuals), together with 210 employed auctioneers licences and 5 probationary auctioneer licences. (Many of the employed auctioneers licences would be held by persons employed by real estate auctioneers.)

For the ongoing regulation of the industry to be justified, it is clear that there must be consumer protection issues which outweigh the competition issues. The two main issues are the requirement for trust accounts and the good character requirement.

The requirement for trust accounts does not necessarily need to be linked to a licensing arrangement and in any event pastoral companies are exempt from the trust accounting requirements nationally. It is a preliminary recommendation that persons in the auctioneering industry must comply with trust accounting and record keeping requirements unless otherwise exempt. These requirements are discussed in more detail at 6.4 and 6.5 in relation to real estate agents. The same arguments apply as to why it is in the public interest that such restrictions apply.

The good character requirement is also commented on in the VEETAC report. Many of the licences relate to employed auctioneers and it is not unreasonable that their employers should take the responsibility for employing honest persons. A licence is not necessary to require an employee to provide a character reference. Further, there are other remedies under the Criminal Code and the Fair Trading Act which would provide protection for consumers.

The final issue which has been raised in the submissions is the need for training for auctioneers and for relevant experience. A poorly performed auction could be costly to a

⁹ VEETAC *Working Party on Mutual Recognition*, 1994 No.266

seller of property. On the other hand, an auctioneer who cannot perform is unlikely to continue in business. Market forces would prevail. It is not unreasonable, and in fact is sensible, that an employer would require that employed auctioneering staff would have the necessary qualifications and experience to carry out the functions of an auctioneer.

Do the benefits of regulation outweigh the costs?

No substantial argument has been raised to retain the regulatory requirements in relation to general auctioneers, employed auctioneers, probationary auctioneers or temporary auctioneers. If there is considered to be a need for trust accounts for general auctioneers then such a requirement can be legislated for without the need for specific licensing. It is noted that the auctioneering industry is not fully regulated in other States. For example, in South Australia, there is no form of regulation of the general auctioneering industry, and in New South Wales, only real estate and livestock auctioneers are licensed. There is no licensing requirement for chattel auctioneers.

A. The preliminary conclusion is that there is no justification for the licensing of general auctioneers and their employees.

B. There is justification for continuing to impose trust accounting and record keeping requirements on general auctioneers.

C. Do you agree or disagree with these conclusions? Please state your reasons.

5. RESTRICTIONS ON COMPETITION - BARRIERS TO ENTRY

Having determined that regulation for the real estate industry in principle should be retained, each restriction will now be examined in detail to determine whether the restrictions are justified, and whether there are any specific alternatives to the current regulation.

5.1. Scope of work for which a licence or registration is required

5.1.1 Real Estate Agents

All real estate agents are required to be licensed under the Act. The Act defines an agent as a person who carries on a business that involves:

- (a) selling, buying, exchanging, leasing or otherwise dealing with, or disposing of, real estate or businesses; or
- (b) negotiating the sale, purchase, exchange, lease or any other dealing with, or the disposition of, real estate or businesses; or
- (c) collecting rents for real estate or businesses; or
- (d) managing real estate let or leased -

pursuant to instructions received from other people, and includes a person who, by publishing information or reports, represents himself or herself as carrying on that business;

The licensing requirement does not apply to the Crown, liquidators, legal practitioners and trustee companies.

Property management

A large part of the work of some licensed agents is the management of property. The functions relate to leasing, collecting rents and other dealings with the property but may not include the sale of the property. This could include property developers and retirement villages. In such cases is it necessary for a property manager to be a licensed agent?

- CPA stated that the definition of an agent is too restrictive if it means that developers cannot sell their own land or retirement villages cannot negotiate leases.

Property developers need not be licensed as the Trade Practices Act provides protection to consumers.

- REI stated that property developers do not need to be licensed but consumers should have the same level of protection.

Property managers need not be real estate agents but should have trust accounting knowledge, tenant liaison skills etc to provide an adequate level of protection for consumers.

- AREAC agreed that property developers did not need to be licensed provided they were limited to selling their own properties. However AREAC stated that property management should be restricted to real estate agents, except for owners of rental properties undertaking their own leasing arrangements. AREAC pointed out that property management involves an ongoing business relationship with the client and there is opportunity for misconduct or

misappropriation. They should be answerable to a regulatory authority. A suggested alternative is referral to the magistrates court.

The submissions showed a divergence in opinion about the scope of the work, but appear to agree that property developers do not need to be licensed if they are selling their own land. Again there was some difference in opinion about property management, but the preliminary view is that property managers do not require licensing.

There is, however, the issue of security deposits held by property managers which are currently held in trust. Given that this can be a large amount of money, there needs to be a formal trust account arrangement as currently exists. If property managers are not licensed, it would be sensible if the trust accounting arrangements remained. It is a preliminary recommendation that persons in the property management industry must comply with trust accounting and record keeping requirements. These requirements are discussed in more detail at 6.4 and 6.5 in relation to real estate agents. The same arguments apply as to why it is in the public interest that such restrictions apply.

Sale of businesses

The Act defines “business” to mean a hotel business, boarding house business, storekeepers business, manufacturing business, professional business or any trading business whatsoever, and any share in any such business or the good will of any such business but does not include any share in the capital of a corporation.

This aspect of the definition of an agent could be queried as other occupational groups, such as accountants, may be able to assist clients in the sale of their businesses. If an accountant arranged the sale of a business, is the accountant in breach of the Act? It should be noted that where an accountant is acting as a liquidator the Act does not apply.

Implications for competition

This definition restricts competition by restricting the practice of selling businesses to real estate agents and legal practitioners. This excludes other occupational groups, such as accountants, who may possess the competency to sell business.

One alternative to the current situation would be to exempt accountants, or members of certain professional bodies, from the Act. Another alternative would be to remove businesses from the definition of an agent so that the licence only applied to the sale of land.

The submissions appeared to accept that there is a restriction arising from limiting the sale of businesses to real estate agents and legal practitioners, but argued that such a restriction is justified. It is considered that the requirement that a person selling a business be either a real estate agent or a legal practitioner is a restriction on competition.

What are the benefits of the restriction on competition?

A number of benefits were identified by submissions. The main benefit appears to be that consumers are protected from risk. Accountants were perceived by some of submissions as lacking the necessary skills to sell businesses.

- The CPA said that there is a role for accountants in the sale of businesses, if they have the necessary expertise and are regulated by their professional body. Accountants as part of their basic education gain knowledge of contract law and are well equipped to understand valuation processes. The ASCPA could provide additional training and expertise as required.
- REI said there was a strong argument for restricting the sale of businesses to qualified business sales agents, thereby excluding solicitors, accountants and real estate agents not sufficiently trained in business sales. However it is agreed that solicitors and agents have specific training in contract and property law.
- AREAC agrees that other occupational groups such as accountants and solicitors possess the qualifications to assess the value of business but questions whether they have the necessary negotiating skills to obtain the best price in their client's interests.
- Harrison Humphreys commented that clearly accountants would have the skill to sell businesses and that in fact they do sell businesses.

The submissions have been considered and it is felt that these concerns are unwarranted. Members of the peak accounting bodies, the Institute of Chartered Accountants in Australia and the Australian Society for Certified Practising Accountants and the National Institute of Accountants, are required to have significant training in commercial law, and, indeed, may be considered to have more extensive training in relation to the situations arising with businesses than many real estate agents, who are currently permitted to sell businesses.

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

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

Two further risks could be that while solicitors and real estate agents have well established procedures in terms of managing trust accounts, this is not the case with accountants. Also

the accounting profession has no equivalent to the Guarantee Fund maintained by real estate agents, or the Guarantee Fund maintained by legal practitioners.

It is accepted that these risks are relevant in relation to some accountants, and that in so far as the restriction protects consumers from these risks, there is a relevant public benefit.

What are the costs of the restriction?

The only restriction would be lack of consumer choice.

It is also considered that if accountants were able to compete in this market, they may be able to offer an efficient service, and the increased competition may drive prices down and encourage present participants in the industry to increase their efficiency.

A cost/benefit analysis

The primary issue is whether accountants would be able to provide the service without increasing the risk posed to the consumer. If so, then there is clearly no justification for restricting practice to real estate agents and legal practitioners.

Any restriction which is keeping out people who would be able to provide a service at equivalent risk to the consumer of those currently permitted to provide that service will result in a public cost. Thus a significant public benefit would need to be demonstrated to outweigh that cost. It is not considered that such a benefit has been demonstrated at this stage.

One area of difficulty involves the sale of businesses accompanied by land. While accountants may be considered to possess sufficient expertise to sell businesses, they have no qualification which would enable them to sell land. However, this problem could be overcome by a restriction on accountants, which only allowed them to sell businesses. It should also be noted that those accountants who are liquidators can sell land and businesses anyway as part of that role.

A further difficulty is identifying which accountants should be allowed to sell businesses. The title 'accountant' is a somewhat generic term, applying to a group of professionals with a wide range of qualifications, experience and ethical, trust accounting and insurance requirements. Therefore, rather than introduce a generic 'accountants' exemption, it is considered that the exemption apply to members of the three main accounting bodies - the Australian Society of Certified Practising Accountants, the Institute of Chartered Accountants in Australia and the National Institute of Accountants.

What are the alternatives?

The same alternatives and considerations arise as with legal practitioners, namely an exemption from the requirement to be licensed. However, there is a further complication in that accountants do not possess competency to sell land.

(1) Exempt members of the Institute of Chartered Accountants in Australia, the Australian Society of Certified Practising Accountants and the National Institute of Accountants from the requirement to be licensed absolutely.

A complete exemption would be the most simple administrative means of eliminating the restriction. However, it would also mean that accountants would become able to perform activities in which they had no training. Thus transactions involving land would be included among the transactions which accountants would be permitted to negotiate on behalf of clients.

(2) Exempt members of the Institute of Chartered Accountants, the Australian Society of Certified Practising Accountants and the National Institute of Accountants from the requirement to be licensed in respect of the sale of businesses but only where they use a real estate agent for any dealings with land associated with the transaction

This option confines the scope of the exemption to the area in which certain accountants have relevant competency - that is, to the sale of businesses.

CPA's comment that there is a role for accountants in the sale of businesses, if they have the necessary expertise and are regulated by their professional body is supported by several other observations that accountants do in fact sell businesses. There is no evidence to suggest that the public has suffered as a result. CPA's comment that it could provide additional training and expertise as required would indicate that self regulation in that industry would be appropriate.

There were no comments about other professions which might be able to operate in the real estate business without the need for a licence.

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| <p>A. The preliminary conclusion is that the definition of a real estate agent is appropriate.</p> <p>B. The preliminary conclusion is that property developers do not need to be licensed to sell their own property.</p> <p>C. The preliminary conclusion is that property managers do not require licensing, but will be subject to trust account and record keeping requirements.</p> <p>D. The preliminary conclusion is that members of the Australian Society of Certified Practising Accountants, the Institute of Chartered Accountants in Australia and National Institute of Accountants hold sufficient qualifications in relevant law to enable them to sell businesses without posing a significant risk to consumers.</p> <p>E. The preliminary conclusion is that the best option is to amend the Act to provide that accountants who are members of ASCPA, ICAA or NIA are exempt from the operation of the Act in relation to the sale of businesses.</p> <p>F. Do you agree or disagree with these conclusions? Please state your reasons.</p> |
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5.1.2. Real Estate Auctioneers

Under the Act, a person cannot be a real estate auctioneer unless that person is also a real estate agent. The discussion above in relation to real estate agents applies therefore to real estate auctioneers. An important issue is whether a real estate auctioneer need to be licensed both as a real estate agent and a real estate auctioneer. Does this represent an unnecessary duplication?

- REI stated that it seems an unnecessary duplication and suggested an alternative structure:
 - Class A Auctioneer - this person would be licensed both as an estate agent and an auctioneer and would be responsible for a business, either as owner or manager. He or she could contract out his services as an auctioneer to other estate agents. A Class A licensee could employ a Class B auctioneer.
 - Class B Auctioneer - this person would be an employee of a Class A licensee, and would hold minimum qualifications. He or she would not need to be licensed as such.
- AREAC states an estate agent needs to have an auctioneering knowledge and experience before conducting an auction.

The main distinction between the two licences is a requirement that the real estate agent have a minimal qualification in auctioneering and some practical experience in conducting auctions. One option is rather than issuing a separate licence, a real estate agent would have an auctioneering endorsement on his or her licence, if appropriate. Another option is for the real estate agents' licence to include licensing as a real estate auctioneer automatically. It would then be a matter for the agent as to whether the agent or his or her employees have sufficient knowledge and experience to carry out a real estate auction competently

A. The preliminary conclusion is that a person undertaking a real estate auctioneering business only needs to be licensed as a real estate agent.

B. The preliminary conclusion is that there is no need for an additional licence or endorsement for the function of real estate auctioneer.

C. Do you agree or disagree with these conclusions? Please state your reasons.

5.1.3 Real Estate Manager

The Act defines a real estate manager. A "real estate manager" is a person engaged by a real estate agent to manage a place where the agent is authorised to carry on the business of a real estate agent. The real estate manager must hold a licence and is required to have the same qualifications as a real estate agent.

There are competition issues which flow from these definitions. The first is that the definition restricts this type of work to licensed managers in the employ of an agent. A

manager must have had extensive experience in real estate industry. This precludes persons who may be suitably qualified to manage a business but do not have the specific real estate background. If there are other people who could carry out this work without risk to consumers then the definition may be too broad.

The real estate agent remains responsible for the business, and it appears to be an unnecessary requirement for the manager to have almost identical qualifications as the employing agent. This requirement also prevents competent sales consultants who do not have the formal qualifications or experience from managing an office. The requirement also restricts agents from operating their businesses as they see fit.

The Act further places a limitation on the employment of these persons by providing that the person may not be engaged by more than one agent at any time.

There is also a reputation requirement for managers.

There are two aspects of reputation that are considered in assessing the eligibility of a person to hold a licence - general reputation and financial reputation. A person is not qualified to be a licensed real estate manager if the person is an undischarged bankrupt or has made a composition or arrangement with creditors and the composition or arrangement has not been paid or fulfilled. A person is also not qualified to be a licensee if the person has been convicted of an offence which makes it not in the public interest for the person to be granted licence.

What are the benefits of the restrictions?

The main benefit of the restriction is that it ensures that real estate managers are under the ongoing control and supervision of licensed real estate agents who are their employers. The managers have a high level of knowledge of and experience in the industry.

- AREAC advises that the requirement for a licensed manager is a means of ensuring that the business and accounting records are kept properly as well as the trust money received is accounted for and the staff are diligently supervised. The manager provides support and training for the consultants. Managers or consultants working for more than one person would lead to a conflict of interest - real or perceived.
- CPA states that managers should not be able to work for more than one agent as the function of the manager is to take care of the interest of the principals.

It is accepted there is a general public interest in the honesty of persons whose job is dealing with property and goods of others. Most submissions agree that it is vital that persons which have a bad reputation or background due to criminal dishonest or incompetent financial activities should be precluded from entry to the industry.

What are the costs of the restriction?

There is a reduction in flexibility and choice for the industry. As stated above, a manager must have had extensive experience in real estate industry. This precludes persons who may be suitably qualified to manage a business but who do not have the specific real estate

background. It also precludes experienced sales staff who do not have the formal real estate qualifications. It also restricts the manager from working part time for a number of offices.

- Roberts submitted that there was a case for allowing an agent/manager to supervise more than one premise. If this does not happen, the less populated regions of the State would gradually lose the services of a local real estate office because the cost of employing a manager cannot be justified by the amount of business generated. Allowing an agent/manager to supervise more than one premise would reduce costs and enable agents to reduce charges. It was suggested that perhaps it should be restricted to a maximum of two offices per manager and each being within a reasonable commuting distance to provide an adequate level of supervision. Roberts commented that the substantial attendance requirement for a manager was patently unfair and impossible to administer.
- Harrison Humphreys stated that the owner of the business or the person in effective control should be required to hold a licence and be skilled and qualified, but subject to that, an agent should be able to select a person to manage their business. To work for more than one agent would create a conflict of interest.
- CPA stated that management is itself becoming a specialist occupation and a good manager can manage any business. An agent should be able to select any person to manage the business if the person fits the regulatory requirement and is a fit and proper person.

CPA states that managers should not be able to work for more than one agent as the function of the manager is to take care of the interest of the principals.

- REI stated that the manager should be licensed but agreed that the onus rested with the agent. It opposed consultants becoming contractors as it would create confusion and would create problems with listing, sales and accountability of trust monies. Managers, however, should be able to manage more than one agency, and in fact this occurs today with “locum managers”.
- Another submission commented that the requirement for a manager’s licence was not complied with, as some businesses operated effectively without a manager or an agent. They would pay a person with a licence a fee for having the person’s name “above the door”, but it was a token gesture to comply with the Act.

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

What are the alternatives?

(a) a generic managers licence

This model might provide for a manager to hold a licence, the qualifications for which might include a range of matters relating to management with or without specific real estate experience and qualifications. Such a licence would be subject to good character requirements.

A problem with this model might be defining the appropriate management skills for such a position.

(b) no licensing requirement for a manager

Given that the business is owned by a real estate agent, the agent should be responsible for the proper running of the business and for ensuring that staff are suitably qualified to carry out their functions. It is not unreasonable that an employer carry out appropriate checks on staff before employing them.

The VEETAC report looked into the occupation of Real Estate Managers¹⁰.

The Working Party noted that no case was made to retain registration on the basis of public health and safety.

The Working Party questioned the need for three or more levels of regulation in the industry, and considered that licensing of real estate agents was the critical point, not the agent's employees.

It was influenced by a Prices Surveillance Authority Report of the Inquiry into Real Estate Agents Fees (Report No 43) which said:

"The Authority does not consider that branch managers should have to be specifically licensed. An employer agent will have a strong incentive to ensure that staff in a position of responsibility are competent, and will be responsible for the actions of branch managers. Furthermore, abolition of the requirement that branch managers be licensed may enable the industry to move to a more efficient structure; yielding economies that could be passed on to consumers. The benefits to consumers flowing from such efficiencies are likely to outweigh the alleged consumer protection provided by branch manager requirements."

It was a recommendation of the VEETAC Report that registration should not be retained for this occupation.

Preliminary Conclusions

Keeping in mind the findings of the VEETAC report, the submissions also agreed to some extent that the employing agent should be responsible for their staff selection, training and competence.

The preliminary view is that there is no justification in requiring a real estate manager to be licensed or to hold specific qualifications. It seems not unreasonable that an employer take responsibility for employing suitably qualified and honest staff, or for providing the necessary on the job training for his or her staff.

¹⁰ VEETAC Working Party on Mutual Recognition, 1994 No. 234

- A. The preliminary conclusion is that the occupation of real estate manager does not need to be licensed**
- B. The preliminary conclusion is that the issue of educational qualifications or reputation checks for employees should be a matter for employing agents.**
- C. Do you agree or disagree with these conclusions? Please state your reasons.**

5.1.4 Real Estate Sales Consultant

The Act defines a real estate sales consultant. A "**real estate sales consultant**" means a person who, acting for a real estate agent –

- (a) induces or attempts to induce, or negotiates with a view to inducing, people –
 - (i) to acquire, dispose of or lease real estate or businesses; or
 - (ii) to make an offer to acquire, dispose of or lease real estate or businesses; or
 - (iii) to enter into contracts for the acquisition, disposal or leasing of real estate or businesses; or
- (b) collects rents for real estate or businesses; or
- (c) manages real estate let or leased;

A person who wishes to work as a real estate sales consultant must be licensed, and to be licensed he or she must show, by examination, that he or she has sufficient knowledge to be able to carry out the functions of a real estate sales consultant. There is also a requirement of ongoing training, which is provided by the Council. During 1998 the Council required eight hours of training for real estate sales consultants. The main other requirement is that the person must not have been convicted of an offence of the nature which makes it not in the public interest for the person to be granted a licence.

A competition issue which flows from this definitions is that the definition restricts this type of work to licensed sales consultants engaged by an agent. If there are other people who could carry out this work without risk to consumers then the definitions may be too broad. The requirement also restricts agents from operating their businesses as they see fit.

A competition issue which arises out of the current requirements that sales consultants hold qualifications is whether the requirement is justified at all. It may be argued that sales consultants should not be required to hold qualifications in real estate before entering the industry. A sales consultant must satisfy the Council that he or she has sufficient knowledge to be able to carry out the functions of the position. This is achieved by an applicant satisfactorily passing either the training unit run by the Council, or a training course run by the Real Estate Institute.

The Council's Sales Consultant's Training Unit course requires approximately 40 hours self study. The Council provides a Training Unit folder at a cost of \$50, and the intention is that the applicant receive tuition from the real estate agent with whom the applicant is to be employed. The Unit is tested by Council examination. These are held monthly at a cost of \$50.

As an alternative, the Real Estate Institute offers a face to face training course of 16 hours training over four different sessions. This costs \$400. The Institute conducts its own examinations and a successful result is accepted by the Council as the prerequisite qualification for a sales consultants' licence.

The requirement that sales consultants hold a qualification is, prima facie, a barrier to entry.

Sales consultants work under the supervision of a real estate agent. It is arguable that the onus for ensuring that the sales consultant is appropriately trained would be on the agent rather than on the sales consultant. Rather than legislation requiring qualifications at the point of entry, agents could be given greater responsibility for the training of their employees.

The current requirements that sales consultants hold a qualification may limit the flexibility of employers to employ people with diverse backgrounds, such as law or marketing, as sales consultants. Removing the requirements to hold qualifications would allow such people to enter the industry and they could receive training in any areas specific to real estate on the job.

If individual agents required their consultants to hold qualifications, there would be nothing to stop them from doing so.

Only the personal reputation of sales consultants or employed auctioneers is relevant for the purposes of the Act. This requirement represents a barrier to entry. It may be more appropriate to place the onus of determining if a person should be employed upon the employer. Thus if the employer does not wish to employ a person with a conviction for an offence of dishonesty, that will be the decision of the employer.

Sales consultants do not hold money on trust, which is the area in which a person with a conviction for an offence of dishonesty poses the greatest risk to consumers. It may be argued, therefore, that barring those with convictions from the industry represents an inappropriate barrier to entry. On the other hand, sales consultants, in particular, have access to private homes and property and it may be considered highly desirable to protect consumers from persons with any form of conviction.

- REI believes that the current character requirements are not appropriate for sales consultants. It is the responsibility of the employing agent to ensure his employees are reputable.
- AREAC is of the view that all employees need the requirement as there may be instances when employees have access to trust money.
- CPA commented that reputation is a subjective concept. Also, necessary qualities such as honesty would presumably be tested by checking references, as for any job.

What are the benefits of the restrictions?

The requirement to be of good character could be argued to be in the public interest for consumer protection, because sales consultants have access to private homes and can influence vendors and purchasers, or tenants and landlords, in making important decisions.

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

The educational requirement means that the public can be satisfied that consultants have a minimum level of knowledge of the industry. The ongoing training also provides that the consultants have up to date knowledge of the industry. A number of submissions supported ongoing training for licensees, identifying the need to keep up to date with changes in the law, GST and the like.

- REI emphasised that the training for a consultant was the bare minimum necessary. Educational requirements were necessary given the responsibility placed on consultants. If the level of entry into the industry was reduced, it would have the effect of lowering the standard of industry practice and could increase litigation. The qualifications cover the basic issues of contract law, consumer protection, property management issues and general real estate terminology. It is not acceptable that the consumer has to rely on the fact that the employing agent is qualified and that he will be responsible for the default of the untrained sales person. However responsibility for ongoing training should rest with the employer.
- AREAC holds the view that in the public interest a sales person should have at least a basic knowledge of real estate and the obligations and responsibilities to the client. Most people are successful in achieving the qualification and the requirement for a qualification is not a barrier to entry, rather the availability of employment opportunities determines how many people enter the industry.
- HH does not see the prescribed qualifications as a barrier to entry. The qualifications are minimal and all staff should be encouraged to undergo training.

What are the costs of the restrictions?

The licensing requirement restricts the persons from working as sales consultants unless they undertake a formal program of study. It also restricts the pool of potential employees

available to employing agents. This is a cost, although AREAC has stated that it is not a barrier to entry as most applicants are successful in achieving the qualification.

There are financial costs in undertaking either AREAC's course of study or the REI course. These costs are not unduly high, from a time and money perspective, although they could deter persons who might otherwise have appropriate sales skills from entering the industry.

The good character requirement is a restriction. However, it should also be noted that the costs of this restriction are insignificant. There is no blanket prohibition on person with a conviction becoming a licensee, rather the current section of the Act refers to "an offence of a nature which, in the Council's opinion, makes it not in the public interest for the person to be granted a licence". As the scope of the provision is subject to the Council's opinion, it is unlikely that many people are being kept out of the industry who should be permitted to be in it. Thus it is likely that it is not, in practice, having a significant impact on competition in the industry.

What are the alternatives?

One alternative is that there be no licensing requirement for sales consultants.

Some of the submissions support the option that there is no need for such a licence. It seems not unreasonable that an employer take responsibility for employing suitably qualified staff, or for providing the necessary on the job training for his or her staff. Anecdotally, it has been said that under the current system, an employing agent still has to provide a lengthy period of on the job training for staff before they achieve the appropriate level of competence.

There is nothing to stop an employer from requiring a criminal record check from potential employees if there are concerns about potential criminal activity by employees.

Another alternative suggested was to reduce the scope of the work of sales consultants, suggesting that the function of negotiating with clients should be restricted to real estate agents (or managers). The submission was critical of the legislation in that sales consultants are permitted to carry out all the necessary acts to provide all client and customer services. From the perspective of both clients and customers, the activities of the real estate agent/manager and consultant are indistinguishable. It was suggested that this allows a misrepresentation as there is no distinction between the agent/manager with years of experience and substantial qualifications and the frequently inexperienced sales consultant with minimal educational qualifications. The reserved responsibilities of the agent/manager are not tangible and the client has no information as to the different level of skills and knowledge between the different licensees. This submission said that for consumer protection purposes, persons with less experience and educational qualifications should be excluded from the areas of negotiation with the clients.

The VEETAC report looked into the occupation Real Estate Sales consultants¹¹.

¹¹ VEETAC *Working Party on Mutual Recognition*, 1994 No. 260

The arguments put forward were on consumer protection grounds. It was argued that consumers, particularly inexperienced consumers, were vulnerable to financial loss through unprofessional conduct, incorrect information and incompetent negotiation.

It was argued that consultants hold a position of trust and as such have ready access to homes, families and children. The police check required through the licensing processes helps ensure the vetting of those unsuitable for such a position.

Other arguments for retaining licensing were that deregistration would harm employers by lowering standards, and result in an increase in fidelity guarantee payments. There would be a reduction in the ability to discipline for misconduct. Self regulation would not be a viable alternative as it would not be compulsory and would provide a limited range of sanctions against misconduct.

The Working Party noted that no case was made on the basis of public health and safety.

The Working Party considered that the case put forward did not demonstrate the necessary link between registration of this occupation and consumer protection. The arguments related to the benefits and protection of the public through the use of sales people who are competent practitioners.

The Working Party considered that safeguards against unethical or incompetent practice could be made by the employer of the sales consultant, the agent or licensee of the business and noted that several of the submissions acknowledged this. Currently real estate agents are responsible for the actions of their staff. The ACT Agents Act creates a code of conduct for practitioners, members of the Real Estate Institute (REI) are subject to a code of ethics and a fidelity guarantee fund operates to protect consumers.

The Working Party questioned the need for three or more levels of licensing in this industry. The Working Party considered that the licensed real estate agent is responsible for the selection, training, activities, conduct and functions of the sales consultant.

The Working Party noted the findings of a Prices Surveillance Authority report of the Inquiry into Real Estate Agents Fees Relating to Residential Property Transactions (Report No. 43) that *"The requirement for a Salesperson to be licensed is controversial. In most industries employers accept responsibility for the quality of their staff. The variations in licensing requirements across the States and Territories casts doubt on the necessity for licensing in this case."*

The Prices Surveillance report went on to recommend that *"Real estate salespersons not [be] subject to licensing. A process of certifying that the person has no relevant criminal convictions should be the only requirement. Agency employers have adequate commercial incentives to employ people who will do a competent job and who are not dishonest."*

The Working Party considered the effect of national competency standards developed for endorsement of the National Training Board which will apply in the near future to all sales consultants whether registered, or members of the REI, or not. The Working Party also noted the existence of consumer protection legislation operating in all jurisdictions such as Sale of Goods Acts and Fair Trading Acts and the Commonwealth Trade Practices Act.

The Working Party also considered that the keeping of industry records, requiring police checks, and public confidence could be monitored without occupational registration.

It was a recommendation of the VEETAC Report that registration should not be retained for this occupation.

Preliminary Conclusions

Keeping in mind the findings of the VEETAC report, the submissions also agreed to some extent that the employing agent should be responsible for their staff selection, training and competence.

The preliminary view is that there is no justification in requiring a sales consultant to be licensed or to hold specific qualifications. It seems not unreasonable that an employer take responsibility for employing suitably qualified and honest staff, or for providing the necessary on the job training for his or her staff.

The requirement for three levels of licensing in the industry seems excessive.

- A. The preliminary conclusion is that the occupation of real estate sales consultant does not need to be licensed.**
- B. The preliminary conclusion is that the issue of educational qualifications or reputation checks for employees should be a matter for employing agents.**
- C. Do you agree or disagree with these conclusions? Please state your reasons.**

5.1.5 Employed, Probationary and Temporary Real Estate Auctioneers

The Draft Report has made the recommendation that a real state agent who conducts a business as a real estate auctioneer does not require an additional licence. Instead, it is suggested that a real estate agents licence will include the right to conduct a real estate auctioneering business. The report has also recommended that employees of real estate agents, who carry out the functions of managers and sales consultants, need not be licensed. This section will look at the licensing requirement for employees of real estate auctioneers who currently conduct auctions on behalf of or under the supervision of a licensed real estate auctioneer. If the recommendations of the Report are accepted, then these employees will conduct real estate auctions under the supervision of real estate agents.

Under the Act, a person cannot conduct a real estate auction as a principal or employee unless the person is the holder of a licence. There are three types of employee licences - an employed auctioneer, a probationary auctioneer and a temporary auctioneer. To be granted an employee or probationary licence, a person must be employed by a real estate auctioneer and satisfy the Council that he or she has sufficient knowledge of the business of auctioneering to be able to carry on the functions of the particular licence.

For a probationary auctioneers licence, the Council requires that the applicant:

- carry out a short course of self study based on the Act and a textbook on auctioneering (Websters "Ancient Art of Auctioneering" is a recommended text); and
- pass a two hour examination on knowledge of the Act and text.

For an employed auctioneer, the requirement is that the person:

- holds a probationary auctioneers licence;
- has attended and participated in at least twelve auctions; and
- has attended a two day practical workshop run by the Council.

The cost of the exam is \$50 and the cost of the workshop is \$100.

A temporary auctioneers licence may be granted to a person who is engaged by a real estate auctioneer and who is authorised under a law of another State to conduct auctions.

The competition issues in relation to the licensing requirement and the other entry restrictions such as educational requirements and good character requirements are similar to those discussed in preceding sections in relation to other employees of real estate agents and need not be repeated in full.

Employed and probationary auctioneers work under the supervision of a real estate agent/auctioneer. It is arguable that the onus for ensuring that the employee is appropriately trained should be on the employer rather than on the employee. Rather than legislation requiring qualifications at the point of entry, the real estate agent/auctioneer could be given greater responsibility for the training of employees.

Only the personal reputation of employed and probationary auctioneers is relevant for the purposes of the Act. This requirement represents a barrier to entry. It may be more appropriate to place the onus of determining if a person should be employed upon the employer. Thus if the employer does not wish to employ a person with a conviction for an offence of dishonesty, that will be the decision of the employer.

Employed auctioneers do not hold money on trust, which is the area in which a person with a conviction for an offence of dishonesty poses the greatest risk to consumers.

Preliminary Conclusions

The preliminary view is that there is no justification in requiring an employed, probationary or temporary real estate auctioneer to be licensed or to hold specific qualifications. It seems not unreasonable that an employing agent take responsibility for employing suitably qualified and honest staff, or for providing the necessary on the job training for his or her staff.

A. The preliminary conclusion is that the occupations of employed, probationary and temporary real estate auctioneers do not need to be licensed.

B. The preliminary conclusion is that the issue of educational qualifications or reputation checks for employees should be a matter for employing agents.

C. Do you agree or disagree with these conclusions? Please state your reasons.

5.2. Qualifications - Education and Training

The Act requires that all licensees must have certain educational qualifications or undergo some form of training. This is, prima facie, a barrier to entry.

5.2.1 Real Estate Agents

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

There are two competition issues which arise from this barrier:

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

What are the benefits of requiring real estate agents to hold prescribed qualifications?

All submissions which commented on this discussion point agreed with the need for qualifications in the interests of the consumer.

- Both AREAC and REI point out that the requirement for qualifications assures the public that the agent has knowledge and experience in the industry. Without the qualifications, professional indemnity insurance would be unaffordable. Both say that the requirements are not a barrier to entry.

Apart from confirming the current real estate diploma, neither addressed the minimum level of training required, although it is clear from submissions that contract and property law and trust accounting knowledge are important matters for consumer protection.

- TUT endorsed the need for training and recommended that the minimum level of training should include targeted training such as residential property management, fair trading law, communication skills, conflict resolution and housing issues.

What are the benefits of this restriction?

Locating a service provider

The Act assists consumers in locating an appropriate service provider by requiring all real estate agents to be licensed. This gives consumers the assurance that the service provider with which they are dealing possesses appropriate qualifications and is less likely to default on the transaction. In the absence of licensing requirements, consumers would have to undertake other searches to identify whether the agent was an appropriate service provider.

The consumer may incur significant expense and waste considerable time in attempting to locate an appropriate service provider.

Reduction of information asymmetry

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

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

Reduced likelihood of misrepresentation in the advertising stage

Tasmania has laws dealing with misrepresentations, such as the *Fair Trading Act*, and the *Commonwealth Trade Practices Act* applies in relation to Corporations. When a real estate agent is advertising property, it is important that these laws are obeyed. A real estate agent who was unaware of those laws or who deliberately disobeyed them may misrepresent a property to contain features which it did not contain or to have other desirable characteristics which do not exist.

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

From a vendor's perspective, the situation is even worse. A misrepresentation made by the agent in order to induce the purchaser to enter the contract may render that contract voidable. This means that a vendor, believing him or herself to have sold the property, may suddenly discover that the contract is void. The vendor could suffer considerable loss as a result, especially if the vendor has purchased another property. The situation of a home buyer, for example, who has bought a new house, believing themselves to have sold their old house. If the contract is rescinded, the vendor could find themselves liable for two sets of mortgage payments, as well as a significant debt, while waiting for a new purchaser to buy the property. In some situations, it may be difficult for the vendor to find a purchaser on similar terms as the initial contract, or to find a purchaser within a reasonable period of time.

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

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

Reduced risk of contractual problems

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

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

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

What are the costs of this restriction?

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

A cost/benefit analysis

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

A. The preliminary conclusion is that the benefits of requiring real estate agents to hold prescribed qualifications outweigh the costs.

B. Do you agree or disagree with this conclusion? Please state your reasons.

Is the current level appropriate?

Regulation 43 states that the prescribed educational qualifications are either:

- (a) an Associate Diploma in Business (Real Estate) awarded by a College of Technical and Further Education; or

b) such other educational qualification as the Council, by resolution, determines is of a standard at least equivalent to the Diploma specified above.

The Associate Diploma is no longer offered as the training requirements have moved to competency based qualifications. A national training package has been endorsed by the National Training Authority and will be offered from 1 January 2002 by both TAFE and the Real Estate Institute which are approved training providers. In the interim the Council approved a competency based Diploma in Business (Real Estate Management) which is accredited until 31 December 2001. It is offered by both TAFE and the Real Estate Institute.

While the national training package has been approved, the implementation guide and curriculum are yet to be finalised at State level.

The current Real Estate Institute course is a face to face course, comprising approximately 30 full day or half day modules which are offered annually. The modules usually cost \$100 for a full day or \$50 for a half day session.

The TAFE course is offered by correspondence however only limited generic modules are available pending approval of the national training package. Each module costs approximately \$60 plus \$25 for materials (based on a rate of \$2 per hour).

Both these courses include modules which relate more to business management skills than to consumer protection issues involved in selling real estate or businesses. It is arguable that these qualifications are well in excess of the minimum level required for occupational licensing purpose.

The core modules offered by the Real Estate Institute include:

Introduction to Real Estate	Contract and Property Law
Contracts and the Sale of land	Managing Finance - Performance
Managing Finance: setting & achieving Budgets	Strategic Planning for Real Estate
Commercial Law Principles	Organising and Communicating Real Estate
Managing People: Training & Development	Real Estate Office Operations
Real Estate Computing	Real Estate Accounting
Marketing and Planning for Small Business	Managing Grievances and Disputes
Managing People - Recruitments Selection & Induction.	Managing People - Workplace Practice

The electives include Body Corporate Legal Requirements; Body Corporate Management and Property Investment Consulting.

Any barrier to entry to an industry should be set at the minimum level necessary to achieve the intended benefit, that is, the protection of consumers. This will not necessarily correspond with industry views of "best practice".

If a requirement to hold prescribed qualifications is to be retained, then some minimum acceptable level at which a licence will be granted must be established - otherwise the barrier to entry may become inappropriately high. It may be necessary to designate individual subjects within the current courses offered, completion of which will represent that minimum

qualification for licensing. If students wish to complete the entire course, that is their choice, but entry to the occupation should not be limited by courses which represent inappropriately high barriers to entry.

The submissions did not address the minimum level of training required.

The preliminary recommendation is that when National Competencies have been agreed, these competencies should be examined and only those competencies which are relevant and necessary to meet the consumer risk should be mandated for licensing purposes. Such competencies can be prescribed by regulation. This will allow for changes to be made as and when appropriate.

Ongoing training

The Council may also require licensees, as a condition for licence renewal, to undertake any education courses the Council requires holders of that types of licence to undertake¹². During 1998 the Council required eight hours of training for real estate agents, managers and sales consultants and three hours for general auctioneers. A variety of courses provided by different bodies were approved. The Guarantee Fund provided a grant of \$193,364 to subsidise the Real Estate Institute Continuing Education program in 2000.

The submissions supported the need for ongoing training.

- REI - the justification is to keep up to date with changing laws. It believes the current requirements are not excessive for licensees. There are some matters such as GST and the First Home Owner grant that practitioners need to know about so it is in the best interest of licensees to undergo ongoing training.
- AREAC also sees the need to maintain current competence by ongoing education.
- TUT agrees with the benefit of ongoing training as seen by the training sessions offered following the introduction of the *Residential Tenancy Act 1997*. However TUT also points out that there are licensees who are failing to meet their obligations under the Residential Tenancy Act. (*It could be questioned therefore whether the training requirement is effective.*)
- CPA agrees with the need to keep up to date.
- HH states that ongoing training is essential so why not make it a requirement.

The issue is whether the requirement needs to be legislated for. The requirement is a restriction, although it is not onerous. If the REI, which is the industry body, supports such ongoing training, then such training could be industry driven, rather than a statutory requirement.

¹² Section 39(5)

- A. The preliminary conclusion is that there is a need for competency based qualifications for the occupation of real estate agent.**
- B. The minimum level of competency based qualifications required, as opposed to industry best practice, has yet to be identified.**
- C. The preliminary conclusion is that it is desirable for ongoing training for real estate agents. Such ongoing training should be industry driven.**
- D. Do you agree or disagree with these conclusions? Please state your reasons.**

5.2.2 Real Estate Auctioneers

A real estate auctioneer must:

- hold a real estate agents licence; and
- must pass a two hour exam in relation to the requirements for an auctioneer.

The first requirement is discussed in the preceding section. On the basis that the preliminary conclusion is that that competency based qualifications are justified, that aspect will not be discussed further. The second requirement in relation to the real estate auctioneering component is discussed below.

Real estate auctioneers must undertake courses of study and participate in exams or workshops as required by the Council, in order to obtain a licence. This is, prima facie, a barrier to entry. It is a minor restriction.

- AREAC believes that auctioneers need to be aware of the liabilities and responsibilities as well as the practical process of conducting an auction. The entry requirements are minimal.
- REI confirms that a basic level of competence is required to auction property.
- CPA states that training of auctioneers is justified as a poorly performed auction could be very costly to a seller. The requirements could be a minimum course of study, an examination, practical workshop and participation in a number of auctions.

The preliminary conclusion is that the requirements for an agent to be competent to carry out an auction are minimal. It is also considered that these are not sufficiently significant to warrant the need for an additional licence or endorsement. As recommended in 5.1.2 the function of a real estate agent will include that of real estate auctioneer.

- A. The preliminary conclusion is that there is no need for additional competency based qualifications for the occupation of real estate auctioneer.**
- B. Do you agree or disagree with these conclusions? Please state your reasons.**

5.3 Reputation

There are two aspects of reputation that are considered in assessing the eligibility of a person to hold a licence - general reputation and financial reputation.

5.3.1. General reputation

The Act imposes further restrictions by requiring a person to be of good general reputation. This is assessed at the point of entry in to the industry by the requirement that the person must not have been convicted, in Tasmania or elsewhere, of an offence of a nature which, in the Council's opinion, makes it not in the public interest the person be granted a licence.

If a person has held a licence in another State or Territory which was suspended or revoked or renewal was refused, the Council may determine that it not in the public interest that the person be granted a licence.

Even if the Council is satisfied that an applicant is qualified to hold a licence, it may:

- (a) refuse to renew a licence if the applicant has had disciplinary action taken against him or her in respect of that licence; or
- (b) refuse to grant a licence if the applicant was previously the holder of a licence, and -
 - (i) had disciplinary action taken against him or her in respect of that licence; or
 - (ii) in the Council's opinion, would have had disciplinary action taken against him or her in respect of that licence if the applicant had not ceased to hold the licence - and the Council is satisfied that the person is not a fit and proper person to hold a licence.¹³

Clearly there is a general public interest in the honesty of persons whose job is dealing with property and goods of others.

5.3.2. Financial reputation

A real estate agent or a real estate auctioneer must not be an undischarged bankrupt or subject to a composition or deed or scheme of arrangement with or for the benefit of creditors, unless the debts to which the composition or arrangements relates have been paid in full or its terms have been fulfilled.

A body corporate which is in receivership or liquidation or has a winding up order made in respect of it cannot hold a licence. If a director or similar officer of a body corporate is disqualified from holding a licence following disciplinary action by the Council, then the body corporate cannot hold a licence.

While clearly restricting entry into the occupation, the restriction exists to protect consumers from the risk of financial loss and criminal activity. Consumers are at significant risk when employing agents. Significant amounts of money are placed in the agent's trust account. Those who have a history of dishonesty or financial mismanagement are thought to pose a greater risk to the consumer.

¹³ Section 41(4)

Implications of the requirement

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

Most submissions agree that it is vital that persons or corporations which have a bad reputation or background due to criminal dishonest or incompetent financial activities should be precluded from entry to the industry.

It is accepted there is a general public interest in the honesty of persons whose job is dealing with property and goods of others.

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

At the same time it should also be noted that the costs of this restriction are insignificant. There is no blanket prohibition on person with a conviction becoming a licensee, rather the current section of the Act refers to "an offence of a nature which, in the Council's opinion, makes it not in the public interest for the person to be granted a licence". As the scope of the provision is subject to the Council's opinion, it is unlikely that many people are being kept out of the industry who should be permitted to be in it. Thus it is likely that it is not, in practice, having a significant impact on competition in the industry.

What are the alternatives

At the present the good character requirement is, in part, a subjective assessment by the Council as to what is in the public interest. On one hand, this means there is uncertainty as to what may disqualify a person, on the other hand it does allow some scope for arguing a case as to why a person should not be disqualified for having a conviction for a particular offence.

It may be appropriate to designate some offences which will automatically result in a permanent disqualification to licensing, and some of which will have a restriction of a set period for a first offence and so on. There are some offences which are clearly of such a character that permanent disqualification from participation in the industry is warranted. There may be other offences where a first offence may be considered to warrant a shorter period of disqualification. This could be done by enacting a schedule of prescribed offences in a format similar to that recommended by the NCP Review for the Commercial and Inquiry Agents legislation. The prescribed offences would include offences relating to fraud, dishonesty or stealing; together with a general requirement that the applicant must be a fit and proper person to hold a licence.

It is considered that the continued requirement that real estate agents be subject to a good character requirement is justified. However, this restriction could be modified as suggested to enable those who have convictions which are either less serious or less closely linked to the

objectives of the Act to have certainty as to whether they will be qualified to enter or remain in the industry.

- A. The preliminary conclusion is that the benefits of requiring that real estate agents, (and real estate auctioneers) are of good reputation outweigh the costs.**
- B. The preliminary conclusion is that there should be a prescribed list of offences which would preclude a person from holding a licence for a specific or indefinite period.**
- C. Do you agree or disagree with these conclusions? Please state your reasons.**

6. RESTRICTIONS ON COMPETITION - CONDUCT RESTRICTIONS

6.1 Real estate agents agreements and commissions

While the Act provides for regulating the commission charged by agents, in fact the intention of the Act was that commissions be deregulated. However Regulation 47 provides that a real estate agent must cause a notice that clearly sets out the rates of commission and other charges relating to the services provided by principal auctioneers and real estate agents, as recommended by the Real Estate Institute of Tasmania, to be exhibited at each of the agent's business premises in a conspicuous position where it may be easily read by visitors to the business premises.

The REI has issued a notice of recommended rates of commission and charges and hence copies of the notice are displayed in real estate agents' offices. In practice, real estate agents follow the REI recommended rate.

The reliance on a recommended scale is considered to be inherently anti-competitive. There is little or no competition on fees among agents in relation to the residential real estate market. The evident uniformity of commissions charged by agents will further discourage negotiation by those vendors who have bothered to shop around. The existence of the REI recommended rate may well give vendors the impression that the agents' proposed fees are actually the sanctioned fee. On the other hand, to the extent that there is a recommended scale and if there is an issue of collusion in its application, it would be subject to the scrutiny of the Australian Competition and Consumer Commission under the provisions of the Trade Practices Act.

Comments:

- AREAC states that the scale fee can be a help and guide to clients.
- REI says that most clients are aware they can negotiate fees.
- HH commented in their experience clients were well aware of their right to negotiate fees. They supported the need for a recommended scale.
- Roberts recommended the removal of the recommended scale as it is anti-competitive.
- Michael O'Halloran recommended the abolition of the recommended scale of fees. Although the REI fee schedule is recommended, it is adopted almost unanimously by the industry. The result of this uniformity in fee levels and the lack of discounting is the lack of effective competition.
 - * He also recommend the invoicing of agents' commissions separately. It is current practice for agents to deduct their commission during property settlement. He says that the public would have a better appreciation of the true size of an agent's commission if the sum was invoiced separately, as do other service providers in the housing industry.
 - * Apparently agents pass on advertising costs to the clients. He argues that this shields the industry from one of the core risks of associated with selling - balancing

advertising exposure against maximising profit margins. If agents do not want these risks, then their commission should be reduced accordingly.

- * He recommends a ten day cooling off period on the signing of a contract.

A. The preliminary conclusion is that the requirement to display the prescribed notice for rates of commission and charges as per Regulation 47 is anti competitive. It is recommended that the requirement be removed.

B. Do you agree or disagree with this conclusion? Please state your reasons.

6.2 Fidelity Bonds - real estate agents

A real estate agent is required to lodge with the Council a fidelity bond in the sum of \$20,000. If a bond is not lodged with the Council, the licence is suspended.

- AREAC states that the requirement should be removed. In theory it is to cover misappropriation of trust account funds. However, in 40 years there have been only 2 claims on fidelity bonds. It suggests that the insurance companies are the only ones who benefit. The cost itself is reasonably small. AREAC has subsequently pointed out that with the collapse of a major insurance company, with whom most agents held their bonds, it would be difficult to make a claim on the policies. Apparently another insurer has taken over the current bonds, but from 1 January 2002, the premiums will increase significantly (to \$475 per annum).
- HH says that the requirement is appropriate and in fact it is surprising that the amount of the bond has not been increased.
- REI feels the bond is unnecessary given that professional indemnity insurance is also held. The Guarantee Fund should be maintained at its current level and should cover any future default.
- CPA suggests as an alternative a bank guarantee.

A claim against the Guarantee Fund may be made where a person suffers a pecuniary loss or loss of property arising from the criminal or fraudulent conduct of a licensee. It appears that neither the existing fidelity bond or the Guarantee Fund address a loss arising from negligence and that professional indemnity insurance would be the appropriate avenue. While it may be that most real estate agents and businesses already carry adequate professional indemnity insurance, it would seem appropriate to make this a requirement of granting and continuing to hold a licence.

A. The preliminary conclusion is that providing there are alternative requirements such as insurance and the Guarantee Fund, there is no need for a fidelity bond.

B. The preliminary conclusion is that it should be a condition of holding a licence that a real estate agents have appropriate professional indemnity insurance.

C. Do you agree or disagree with these conclusions? Please state your reasons.

6.3 Trust Accounts - auctioneers and real estate agents

Unless otherwise agreed by the parties, trust money received by an agent on behalf of client or as stakeholder or received by an auctioneer from the sale of lots must be placed into a trust account. Such trust accounts must be held with authorised deposit taking institutions which are approved by the Auctioneers and Real Estate Agents Council. Under a scheme of arrangement with the Council the institutions will pay interest on the money held in trust accounts to the Auctioneers and Real Estate Agents Trust for payment to the Guarantee Fund (see Part C 10). Neither the agent nor the parties are entitled to received interest earned on money held in a trust account.

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

A competition issue which arises from the trust accounting requirements is the additional costs imposed on business in complying with the legislation. Complying with record keeping requirements may increase the administrative burden, and hence the costs of the agent. The difficulty in determining whether money received is trust money or not may also increase the costs of doing business. In addition, some of the record keeping requirements restrict the availability of electronic commerce to agents.

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

All submissions agreed that although the requirements are a cost for businesses, they are necessary for consumer protection. REI suggested that the regulations needed to be updated to allow for computer accounting packages.

6.4 Records of transactions - auctioneers and real estate agents

The Act and Regulations require that licensees must keep records in relation to each transaction.

All submissions agreed that although the requirements are a cost for businesses, they are necessary for consumer protection. REI suggested that the record keeping processes should be updated to allow for computer packages.

As mentioned earlier in this draft Report, the trust accounting and record keeping requirements should also apply to other persons who hold money in trust for clients, that is, property managers and general auctioneers.

A. The preliminary conclusion is that the benefits outweigh the costs of the restrictions. Trust accounting and record keeping requirements should be retained.

B. Do you agree or disagree with these conclusions? Please state your reasons.

6.5 Method of operation of businesses

Additional restrictions apply to the way businesses are conducted. These include:

- ◆ In the case of a body corporate holding a real estate agents licence, at least half of the directors must hold the appropriate licences. This will have the effect of limiting a body corporate to operating a business predominantly that of real estate.
- ◆ Multi-disciplinary partnerships are not allowed. A real estate agent may only carry on the business in partnership with another real estate agent. This also has an effect on the types of businesses that may operate. It means, for example, that persons with similar and complementary skills, such as land valuers, surveyors, accountants and real estate agents cannot form partnerships.
- ◆ Agents may share commissions only with another agent, or with their own licensed employees.
- AREAC supports the retention of the requirements. Multi-disciplinary partnerships could be misleading to the public.
- CPA commented that multi-disciplinary practices are becoming more common as professions re-examine how they deliver services to the public.

6.5.1 Business restrictions

The Act does not allow a real estate agent to enter into an agreement or arrangement with an unlicensed person to share in the profits arising from the business. An agent can only be in partnership with another licensed agent. In the case of a body corporate, at least half of its directors must hold either a real estate agents licence or a real estate managers licence.

Thus the options for a real estate agent is to work:

- * as a sole agent;
- * in partnership with other licensed agents; or
- * as a director or co-director of a company which also holds a real estate agents licence.

Costs and benefits:

The regulation of business structures may impose costs on clients and the community by reducing competitive pressures and denying agents access to alternative organisational structures which may reduce costs and provide a more efficient service to clients.

The inability of agents to form multi-disciplinary partnerships or companies with non-licensed agents may restrict the ability of the industry to adapt to changing markets. This may act to reduce competitive pressures in markets in which agents could operate in conjunction with other professionals in providing client services. For example, the removal of limitations on the business arrangements of real estate agents would enable agents to form multi-disciplinary practices with other professionals (such as surveyors, accountants, financial advisers) to provide a range of services to clients. This may benefit consumers who require a range of specialist services as they would be able to purchase all services from a single provider. The concentration of services within a single organisation may result in scale economies, which may reduce the cost of providing those services to clients.

The underlying concern reflected in these restrictions is that the agents' adherence to professional obligations may be compromised in such structures. Such obligations may not necessarily apply to non agent owners or partners.

Thus, if by reason of business association, non-agents are placed in a position to exert influence over agents to maximise commercial return, this could compromise ethics or professional conduct. Examples might include pressure to over-service, to provide a lower quality service, or to act in conflict of interest, in the commercial interests of the business.

Conclusion:

It is concluded that the costs of the restrictions in relation to business structures contained in the Act outweigh the benefits and, as a consequence, the Act needs to be amended to enable real estate agents to adopt whatever business structures they deem appropriate. This is on the understanding that the person providing the real estate services, namely the licensed agent, whether in a multi-disciplinary practice or in a company, remains responsible to uphold ethical and professional responsibilities. In other words, that agent will be subject to the regulation of the relevant Real Estate Agents legislation in the same way as any other agent. The provisions in relation to trust accounting and the Guarantee Fund would still operate.

In relation to a body corporate, the requirement that at least half the directors be licensed agents should be changed to require at least one director be a licensed real estate agent. It has earlier been recommended that the owner of a real estate business needs to be licensed as a real estate agent. Similarly, in the case of a body corporate, there needs to be at least one director who holds a licence and who is responsible for running the business in accordance with the statutory requirements. If no director in a body corporate was required to hold a licence, then persons could avoid the licensing process by incorporating.

Once a business is licensed under these proposals, nobody providing real estate and real estate auctioneering services within that business needs to be licensed. The reasoning, under the proposal, is that the licensed agent bears responsibility for all actions of those persons employed in the business. If any employees do something in contravention of the Act, the agent is responsible and his or her licence is at risk. If a body corporate is not required to have a director who holds a real estate licence, the result could be a situation where no one in that business is licensed. If an employee breached the Act, there would be no come back to the business.

A. The preliminary conclusion is that real estate agents should be able to enter multi-disciplinary partnerships.

B. In the case of a body corporate, the number of licensed agents required to be directors be reduced to one.

Do you agree or disagree or disagree with these conclusions? Please state your reasons.

6.5.2 Commission sharing

The Act prohibits the payment of any or all of the commission or other consideration to which an agent is entitled for services as an agent, to any person other than another agent or a licensed employee of the agent. The intention of the prohibition was to prevent a licensed agent acting as a “front” for an unlicensed agent, and to prevent secret commissions. It also supports the restrictions on multi disciplinary partnerships. It is considered that the restriction can no longer be justified in its current form. Rather, it is considered that this would be better dealt with by enacting a specific disclosure requirement, rather than by the indirect method of limiting the sharing of commissions. Agents should be required to disclose any benefits received from or given to a third party in exchange for a referral of business or other benefit in relation to the client. This would prevent secret commissions. An informed consumer could then decide whether to continue to make use of that agent's services or to engage another agent.

It is therefore the preliminary recommendation that this section be repealed, and replaced by a section requiring agents to disclose any benefits received from or given to a third party in exchange for a referral of business or other benefit in relation to the client.

A. The preliminary conclusion is that the prohibition on the sharing of commissions is not justified.

B. The preliminary recommendation is that this section be repealed and replaced by a section requiring agents to disclose any benefits received from or given to a third party in exchange for referral of business or other benefits in relation to the client.

C. Do you agree or disagree with this recommendation? Please state your reasons.

7. EXEMPTIONS

There are a number of exemptions which may have some competitive impact or create a distortion in the market for real estate agent services.

7.1. Crown Exemption

The Act does not bind the Crown.

- DPIWE advised that there is no objection to the continued requirement that private licensed auctioneers must be used for auctions of Crown land. However it stated that the Crown must continue to be free to engage in its own private treaty sales together with advertising, leasing/tenanting etc. The Crown is governed by the *Crown Lands Act 1976* and by ministerial policies in relation to the sales process. The Crown does not compete in the traditional property/real estate markets and therefore offers no threat to competition policy or private practitioners.

The Crown is obliged to take into account various matters such as environmental, cultural, social and other values before leasing or selling Crown land which places it in a different position to that of the industry.

Most sales are handled by the Department rather than through private agents and are valued at less than \$10,000 per transaction and cover land such as reserved roads and the like.

A. The preliminary conclusion is that the Crown exemption has no impact on the industry market and should be retained.

B. Do you agree or disagree with these conclusions? Please state your reasons.

7.2. Professions and others

The requirement for a licence under the Act does not apply to-

- (a) a liquidator or receiver; or
- (b) the committee of the estate of a person appointed under a law relating to mental health; or
- (c) a trustee company within the meaning of the *Trustee Companies Act 1953*; or
- (d) a legal practitioner in respect of whom a practising certificate is in force -

exercising rights and powers or performing duties and obligations in that capacity.

- AREAC and REI take no issue with the exemption.

- CPA suggested that accountants could sell businesses and, if necessary, they could undertake relevant additional study through their professional associations.

It has been suggested in 5.1.1 that accountants should be exempt from the Act in relation to the sale of businesses.

A. The preliminary conclusion is that the professional exemption has no impact on the industry market and should be retained.

B. Do you agree or disagree with these conclusions? Please state your reasons.

7.3. Certain auctioneering activities

The prohibition on conducting an auction without a licence does not apply to certain types of auctions. These are:

- (a) an auction authorised by an Act being conducted by a person specified in the Act; or
- (b) an auction under a writ or process issued by or out of a court; or
- (c) an auction of property distrained for rent or arrears of rent; or
- (d) an auction, the gross proceeds of which are to be used for a charitable purpose.

If the exemption was not allowed, then those involved may need to be licensed as auctioneers or, alternatively, would need to rely on the professional services of a licensed auctioneer.

- AREAC takes no issue with the exemption and suggests that the charitable fundraising auction exemption could be broadened to include community and sporting type organisations who hold fundraising auctions.
- On the other hand, REI feels there should be a minimum educational standard for auctioneers.

Given the preliminary recommendations that chattel auctioneers do not need to be licensed, this is not an issue. However, if it has application to real estate auctions, then it should remain.

8. AUCTIONEERS AND REAL ESTATE AGENTS COUNCIL OF TASMANIA

The Council was established under the *Auctioneers and Estate Agents Act 1959* and continued by the current Act.

The functions of the Council are, for the protection of the public, to ensure acceptable standards of practice by auctioneers and real estate agents and people engaged by auctioneers and real estate agents.

To carry out these functions the Council, amongst other things, inquires into alleged breaches by licensees of any rules or regulations and imposes penalties, issues, refuses, renews, suspends or cancels licences under the Act, causes to be inspected and audited the accounts of trust monies of principal auctioneers and real estate agents, establishes, administers and processes claims against the Auctioneers and Real Estate Agents Guarantee Fund, and facilitates the continuing education of auctioneers and real estate agents and the people they employ.

The Council consists of a President, who must be a legal practitioner, and seven other members. Of these members, three are representatives of principal auctioneers and three are representatives of real estate agents. The remaining member must be unconnected with the industry and is representative of the general public.

The industry representatives must hold either an auctioneers licence or a real estate agents or managers licence (or be an officer of a licensed body corporate) and are appointed following consultation by the Minister with representative bodies such as the Real Estate Institute and major licensed bodies corporate. (In the past these have been Roberts and Websters.)

The Act clearly intends that the Council be industry weighted, and all industry representatives currently are in the real estate industry, whether as real estate auctioneers, agents, or managers. There are no general auctioneers on the Council. On one hand, it can be argued that it is appropriate for the Council to have a weighting to the industry as its members will have proper knowledge of the requirements of the Act. On the other hand, it could be queried whether it could be said to have the necessary impartiality to carry out its disciplinary and compliance functions. Should a separate body, such as Consumer Affairs and Fair Trading assume some or all of these functions?

- REI suggests that the membership could be broader, with two consumer representatives on the Council, fewer industry representatives and more persons with a more diverse range of professional disciplines. The term should be specified, with a minimum of 3 years and a maximum of 6 years.

The Council should have the responsibility for the regulatory functions and an industry body could have responsibility for setting the training standards.

An industry body could also carry out the functions of the Council.

REI also recommends that the Guarantee Fund must remain totally independent of government.

- HH have concerns that the membership of the Council is not representative. They suggest a Council of say 7 members, being 3 industry representatives, 3 community representatives (preferably business persons) and an independent Chairman with an appropriate background such as either legal or accounting qualifications.

The industry representatives should be varied and businesses or franchises should not have more than one representative on the Council.

It is also suggested that there be a maximum period served on the Council, with a term of 3 years with a maximum of 9 years at a time.

- TUT recommends at least equal numbers of members who are consumer representatives. It also points out that having the Council responsible for both licensing and regulatory functions could pose a conflict of interest. The Office of Consumer Affairs and Fair Trading would be an appropriate body to carry out the regulatory functions.
- AREAC suggests another person representing the public would add value to its deliberations.
- CAFT commented that the Council does not have a high public profile and many people confuse it with the REI. There is a perception that the Council is industry captured and therefore not necessarily serving the interests of the wider community. It is also recommended that the disciplinary function be dealt with by persons not directly associated with the industry and wherever possible in a non-court environment.

8.1 Control of Licences including disciplinary matters

The Council issues licences and also investigate breaches of the Act and imposes disciplinary action. The Act prescribes certain situations in which disciplinary action can be taken by the Council. They provide a way of excluding persons from the industry who have demonstrated that they pose a risk to consumers.

Section 45 sets out the grounds for imposing disciplinary action on a licensee as follows:

(a) that the licence of the licensee was obtained -

(i) by means of a misrepresentation or a false or misleading statement; or

(ii) contrary to the provisions of this Act;

(b) that the licensee has been convicted -

(i) of an offence against this Act; or

(ii) of an offence, in Tasmania or elsewhere, of a nature that, in the Council's opinion, makes it not in the public interest that the licensee should be allowed to continue the activities authorised by the licence;

(c) that the licensee has failed to comply with a rule of conduct specified in section 48;

(d) that a licence -

(i) granted to the licensee under the law of another State or Territory of Australia; and

(ii) similar in effect to a licence that may be granted under this Act -

has been suspended or revoked or refused renewal in circumstances which, in the Council's opinion, makes it not in the public interest that the licensee should be allowed to continue the activities authorised by the licence.

The Rules of Conduct in section 48 are:

(2) A licensee who does any of the following is guilty of a breach of a rule of conduct:

(a) contravenes or fails to comply with a provision of this Act or of a regulation made under this Act;

(b) without a client's consent, discloses, except if required to do so by law, information relating to the affairs of the client obtained by the licensee while acting for the client;

(c) without a client's consent uses, in a manner prejudicial to the client's interests, information obtained by the licensee while acting for the client;

(d) fails to perform the licensee's duties to a client;

(e) fails to carry out a client's lawful instructions;

(f) fails to exercise due skill, care or diligence in carrying out the licensee's duties for a client;

(g) having an interest in, or being likely to obtain an interest in, a transaction -

(i) entered into on behalf of a client; or

(ii) negotiated on behalf of a client -

fails to disclose to the client the exact nature of that interest;

(h) if, in the licensee's opinion, the consideration that a client is prepared to accept on the sale of property is less than the fair market value of that property, fails to inform the client;

(i) fails to ascertain all pertinent facts concerning a transaction which the licensee undertakes for a client so as to avoid error or misrepresentation;

(j) in the course of providing a service for a client, by the licensee's conduct, knowingly conveys or allows to be conveyed a false or misleading impression or knowingly makes a statement or representation that is false, misleading or likely to deceive;

(k) accepts or demands payment from a person other than a client in respect of work undertaken or to be undertaken by the licensee, being work in respect of which the licensee has received payment, or is entitled to receive payment, from a client;

(l) accepts or demands or negotiates or attempts to negotiate payment for work undertaken or to be undertaken for a client that is excessive;

(m) without a client's written consent, publishes, or causes to be published, an advertisement or any other mode of public notification which indicates that the licensee is authorised to sell property at a price higher than, or lower than, the price authorised by the client;

(n) fails to comply with, or contravenes a rule made by the Trust in accordance with section 107 (Trust may make rules);

(o) fails to comply with a rule of conduct prescribed under section 123(2)(e).

(3) A licensee who attempts to do an act the doing of which would be a breach of a rule of conduct set out in subsection (2) is guilty of a breach of that rule of conduct.

In hearing a disciplinary matter the Council is required to hold a formal inquiry under Part 9 of the Act. Section 46 sets out the disciplinary action the Council shall take under section 45 as follows:

46(1) (a) to reprimand or caution the licensee; or

(b) to require the licensee to pay a fine, not exceeding 50 penalty units, or, if another amount is prescribed, the amount so prescribed, to the Council; or

(c) to suspend the licensee's licence for a period, not exceeding 3 years, specified by the Council; or

(d) to revoke the licensee's licence.

(2) If the Council takes action under subsection (1)(a), (b) or (c) it may also direct the licensee to take, or to refrain from taking, specified action within a specified period.

If the Council revokes a licence under subsection (1)(d) it may also specify a period that must elapse; or impose a condition that must be fulfilled before the former licensee may apply for another licence.

There is a right of appeal to a magistrate against a decision of the Council.

During 2000 the Council convened two disciplinary inquiries as a consequence of apparent breaches of the Act. The result of the inquiries was that one complaint was not proved and the other person pleaded guilty to charges of carrying on a business from premises which were not specified in the real estate agent's licence and when they were not managed by a person authorised to do so. The penalty was a fine of \$1,500. Past penalties imposed have ranged from reprimands to fines between \$100 and \$1,000.

It may be argued that the disciplinary provisions contained in the Act do not distort competitive conduct in the market, but rather remove those whose conduct:-

- is anti-competitive itself; or
- is not to the benefit of consumers or the community generally.
- CPA states that disciplinary provisions could be included in a self regulatory scheme, without causing any undue distortion to competitive conduct.
- REI suggests the introduction of an independent appeals process which would need to be seen to be transparent.
- Harrison Humphreys stated the disciplinary provisions should be easier to apply, with the Council accepting complaints from agents against agents, as well as complaints from the public.
- TUT recommended an independent body be established to enforce consumer protection. It noted that the ACCC recently refused to endorse the REIA Code of Ethics as there was no appeal mechanism included in the Code. *(It should be noted that the REI and AREAC are different bodies with different functions.)* TUT expressed concern about low standards in rental property management in Tasmania.
- AREAC submitted that the disciplinary provisions are appropriate, and made some recommendations for minor amendment. It commented that the discipline of licensees as a result of trust account and record keeping breaches is very effective.
- A member of the public suggested that the Act did not protect consumers and did not facilitate an impartial inquiry of a complaint. It is suggested that time frames need to be tightened, penalties increased and the rules of conduct need to be strengthened.

8.2 Funding

The Council is funded by revenue from licences issued. In addition, grants are provided by the Auctioneers and Real Estate Agents Trust from the Guarantee Fund for industry training and education.

In 2000, the Council issued a total of 1,409 licences. This number was made up of 20 licences for general auctioneers, 94 real estate auctioneers, 211 employed auctioneers, 7 probationary auctioneers, 8 temporary auctioneers, 135 real estate agents, 202 managers and 732 sales consultants. Total revenue for licences fees for this period was \$106,000 including application fees. If the preliminary recommendations as set out in this review are accepted and only real estate agents are to be licensed, the total amount of revenue will be reduced. This would mean a substantially reduced level of income for the Council. It may not be viable to operate in its current form.

9. PROPOSED CHANGES TO THE LICENSING PROCESS

The preceding discussion in this Report makes recommendations in relation to existing provisions of the Act and Regulations. In addition to those changes, it is recommended that the licensing process itself be changed.

At present the Auctioneers and Real Estate Agents Council carries out the licensing, disciplinary and educative functions. An issue considered as part of the review process is whether it is in the public interest for an industry body, whose membership is made up mainly of industry representatives, to be responsible for regulating and disciplining the profession. It may be difficult for the Council to be truly independent, or perceived to be independent. There is a conflict, real or otherwise between the functions of regulating, promoting and representing the industry as a whole on one hand, and on the other hand, the process of investigating complaints against individual members of the industry.

In dealing with complaints from consumers, there maybe a perception that the Council is not independent as it is seen as the industry investigating itself. It is noted that the Council's Annual Report for the year 2000 states that "Many complaints continue to be a matter of one person's word against another's and so resolution to the satisfaction of both parties is seldom possible." If this is the case, it may be more appropriate that an independent body deal with complaints so that even if the complaints cannot be resolved satisfactorily, there will be no possibility of a perceived bias or conflict of interest.

It is noted that the submissions, including those from industry members, suggested that there be broader community representation on the Council to give a better consumer perspective. However, increased consumer input cannot not alter the basic industry focus.

As an alternative, it is proposed that the functions be transferred to the Office of Consumer Affairs and Fair Trading and managed by the Commissioner for Corporate Affairs. The Office of Consumer Affairs and Fair Trading would take over the licensing, supervisory and disciplinary functions of the Council. The Council would cease to exist. The Office would administer a revised licensing process, oversight the trust accounting requirements and receive and investigate complaints against licensees. The Office already has experience in licensing and investigation processes. There would continue to be a right of appeal to the Magistrates Court.

An application for a licence would be lodged with the Office of Consumer Affairs and Fair Trading, and the decision would be made by the Commissioner for Corporate Affairs. The Commissioner would have the power -

- to grant or renew a licence;
- to place conditions on a licence;
- to vary the conditions on a licence; or
- to refuse to grant or renew a licence; or
- to revoke or suspend a licence.

The Commissioner would also have the power to act on complaints. The power to place conditions and to vary conditions are standard practice in administrative decision making processes and should be included.

As this would be an administrative decision, the applicant or an interested party would have the right to apply to the Magistrates Court (Administrative Appeals Division) for a review of a decision of the Commissioner. On review, the Court would have the power -

- to affirm the decision under review; or
- to vary it; or
- to set it aside and make a decision in substitution; or
- to set it aside and remit the matter for reconsideration by the Commissioner in accordance with any directions or recommendations of the magistrate.

Consumer Affairs would envisage a role in providing education to the community in general but not explicitly for the education of industry. Generally, persons seeking real estate qualifications would have access to various approved service providers. However, if the Guarantee Fund remains, it may be appropriate to continue to provide grants from the Fund to industry for education which will contribute to the general standard of industry, or to fund specific research.

A. The preliminary conclusion is that the regulatory function be transferred from the AREA Council to the Office of Consumer Affairs and Fair Trading.

- Decisions in relation to the grant, renewal, variation or refusal of a licence be made by the Commissioner for Corporate Affairs;
- The Commissioner have to power to deal with complaints and have the power to place or vary conditions on a licence, or suspend or revoke a licence;
- There be a right of review of a decision of the Commissioner to the Magistrates Court (Administrative Appeals Division).

B. The preliminary conclusion is that the AREA Council would cease to exist.

C. Do you agree or disagree with these conclusions? Please state your reasons.

10. AUCTIONEERS AND REAL ESTATE AGENTS TRUST & GUARANTEE FUND.

The Act provides for the establishment and operation of the Auctioneers and Real Estate Agents Trust.

The Trust maintains the Auctioneers and Real Estate Agents Guarantee Fund which consists of money received by it as interest on money deposited in the trust deposit account. The objective of the Fund is to protect consumers who may lose money as a result of pecuniary loss or loss of property arising from the criminal or fraudulent conduct of an auctioneer or estate agent.¹⁴

The interest earned by the Trust over and above the minimum amount required for the Guarantee Fund is in excess of \$600,000 per year. In the year ending 31 December 1999, in addition to an amount directed to the Residential Tenancies Act, \$331,655 was provided as grants for research and education. Of these funds a total of \$213,211 was directed to training and staffing at both the Council and the Institute, and an amount of \$118,000 was granted to the Real Estate Scholarship Board as a subsidy for employment of trainees.

- Most submissions supported the current system of grants and REI suggests it could be expanded to cover in-house real estate training.

There is merit in maintaining the Guarantee Fund to provide protection for consumers against criminal or fraudulent conduct. Further, if the Fund ceased to exist, there would be no specific benefit to any person or business as the interest dividend arises only from the ability to pool small amounts of money.

To the extent that the Fund arises from utilising business infrastructure, there is an argument that the real estate industry should continue to derive some benefit from the Fund. However, as a substantial amount of the funds are residential tenancy bonds and consumer funds there is an argument that the funds should benefit the community generally. It may be appropriate to provide greater consumer input into decisions about disbursement.

If the proposal to cease operation of the Council is accepted it would be equally appropriate to cease the operation of the Trust. In this event a similar replacement Trust management structure will be required.

A. The preliminary conclusion is that the Guarantee Fund and a Trust management structure should be retained for the protection of consumers.

B. Do you agree or disagree with this conclusion? Please state your reasons.

¹⁴ Section 94 of the Act.

CONCLUSION

To summarise the proposed regulatory scheme as set out in the various preliminary recommendations:

Real Estate

- There is a case for regulation in the real estate industry
- Real estate agents should be licensed, subject to the achievement of competency based qualifications, and subject to good character checks, both personal and financial.
- A real estate auctioneering business can only be carried out by a real estate agent, but there is no need for a separate real estate auctioneers licence.
- Real estate agents should be able to enter into multi disciplinary partnerships.
- Real estate managers and sales consultants do not need to be licensed.
- Employed, probationary and temporary real estate auctioneers do not need to be licensed.
- Real estate agents would be subject to trust account, audit and record management requirements.
- That accountants be exempt from the licensing requirement in relation to the sale of businesses which do not involve the sale of land.
- Property managers do not need to be licensed, but will be subject to general trust accounting and record management requirements.

General Auctions

- There is no case for regulation of the general auctioneering industry.
- General auctioneers do not need to be licensed, but will be subject to general trust accounting and record management requirements.

Regulatory Functions

- The Council would cease its regulatory and disciplinary functions.
- Consumer Affairs and Fair Trading would be the licensing and regulatory body.
- Appeals from decisions of Consumer Affairs and Fair Trading in relation to licensing and regulatory matters would be to the Magistrates Court (Administrative Appeals Division).
- The Guarantee Fund and a Trust management structure would continue.

PART D: SUBMISSIONS

1. GUIDELINES

- 1) All submissions are to be in writing. Submissions may be sent electronically.
- 2) This Report is concerned with a general review of the Act with the intention of creating new and updated legislation. As part of this process NCP issues are relevant.

These issues are:

- (a) the effect of the Act and regulations on competition within the relevant market;
 - (b) the costs and benefits associated with any restrictions on competition; and
 - (c) any *less* regulatory alternatives or alternatives to regulation.
- 3) At various stages of the Report preliminary recommendations are made. Please read those recommendations and address them in your submission.
 - 4) Please nominate a contact person who can provide further information if required.

2. SUBMISSION CLOSING DATE

Please ensure that your written submission reaches the address below by **no later than close of business 10th December 2001**.

3. ADDRESS FOR SUBMISSIONS

All submissions should be forwarded to:

**The Secretary,
Department of Justice and Industrial Relations,
15 Murray Street Hobart 7000**

or

e-mail: anne.horner@justice.tas.gov.au

The contact officer for the review is:

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The Draft Report can be accessed on the Department of Justice & Industrial Relations website at <http://www.justice.tas.gov.au/legpol/areadraft.htm>