Department of Fair Trading

Review of the Valuers Registration Act 1975

Final Report

DEPARTMENT OF **FAIR TRADING**
NSW Consumer Protection Agency

Table of Contents

Tables

Appendices

Membership of the Valuers' Review Steering Committee

Committee Members
Mr Terry Downing - Department of Fair Trading (Chair)
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Terms of Reference for the Review

The terms of reference for the review comply with the National Competition Principles Agreement which are as follows:

1. Clarify the objectives of the legislation and identify any issues of market failure which need to be addressed.
2. Identify the nature of the restriction.
3. Analyse the likely effects of the restriction on competition and the economy generally.
4. Assess and balance the costs and benefits of the restrictions identified.
5. Consider and propose alternative means for achieving the Government's objectives, including non-legislative approaches.

In assessing the costs and benefits of particular legislation, the Council of Australian Governments (COAG) agreed that the following matters, where relevant, be taken into account:

- 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.

List of Abbreviations

API	-	Australian Property Institute (formally Australian Institute of Valuers and Land Economists)
ASREAV	-	Australian Society of Real Estate Agents and Valuers
ATO	-	Australian Tax Office
AVO	-	Australian Valuation Office
CGT	-	Capital Gains Tax
COAG	-	Council of Australian Governments
CPE/CPD	-	Continuing Professional Education/Development
GIS	-	Geographic Information Systems
ICMV	-	Institute of Consulting Mortgage Valuers Co-operative Limited
LGA	-	Local Government Authority
NCC	-	National Competition Council
NCPA	-	National Competition Principles Agreement
NPB	-	Net Public Benefit
OSR	-	Office of State Revenue
PI	-	Professional Indemnity (insurance)
REI of NSW	-	Real Estate Institute of New South Wales
RTA	-	Roads & Traffic Authority
SVO	-	State Valuation Office (NSW)
VEETAC	-	Vocational Education, Employment and Training Advisory Committee
VRBQ	-	Valuers Registration Board of Queensland
V-G	-	Valuer-General

Note: Since the date of this Report minor changes have been incorporated to reflect the name change of the Australian Property Institute from the Australian Institute of Valuers and Land Economists and to update references to the new Fair Trading Tribunal which was established on 1 March 1999.

Executive Summary

Clarify the objectives of legislation which regulates the provision of valuation services
The *Valuers Registration Act 1975* seeks to ensure consumer protection through regulating standards and conduct within the valuation profession.

The Act provides for an occupational licensing regime for land valuers. The Department registers valuers who have completed a course of study and have met practical experience requirements approved by the Minister for Fair Trading.

The Act defines a "real estate valuer" as a person who values land for fee or reward payable either to him or to a person who employs him, whether in the capacity of employee or agent or in any other capacity.

The work of a valuer involves assessing the value of a property, especially in the case of real property transactions where a purchase is being made with a loan from a financial institution. This work may include consideration of the location of the property, any planned developments in the area and the condition of the property. A valuer may act as a consultant to, and liaise with, solicitors, surveyors, town planners, architects, accountants, property developers and financiers.

The regulation of valuers seeks to protect consumers through setting entry requirements which ensure that a person is of good character and has successfully completed an approved course of study and a period of training in valuing land. These education, fitness and experience requirements aim to protect vulnerable consumers and maintain acceptable valuation standards.

The Act also contains disciplinary provisions which may be exercised against valuers who do not comply with industry standards. The ultimate sanction of the Act is removal of registration.

Identify any issues of market failure that need to be addressed
Valuation in Australia is based on the concept of market value. Australian courts have had significant influence over the concept of market value and the definitive statement of market value is generally regarded as that enunciated in the High Court case of Spencer v The Commonwealth of Australia (1907) 5 CLR 418, which is known as the "willing buyer willing seller" concept.

A valuer's opinion supports many real property transactions, particularly loan transactions. Valuers' opinions underpin many large investment decisions in organisations such as insurance companies, banks, building societies, and property trusts. Poor valuations could have adverse financial impacts on these institutions and their clients.

The regulation of the valuation profession is predicated on an identified market failure: imperfect information and asymmetric information. Imperfect information refers to the amount of information available to a person; asymmetric information describes the imbalance of information that exists between providers of valuation services and consumers.

Consumers generally may not possess the skills required to assess the ability of a valuer. They may also lack access to the information required to assess the ongoing performance or reliability of the valuer.

The main sources of information failure likely to effect the provision of valuation services are:

- disparity in knowledge and information about valuers skills;
- difficulty in selecting a valuer, reaching agreement on the service to be provided and ensuring the services are supplied as agreed; and
- difficulty in distinguishing between a qualified and an unqualified person offering a similar service.

Information failure occurs when a consumer has insufficient information on which to base a decision on the selection of a valuer, ie a valuer experienced in and knowledgeable about and therefore capable of valuing the property in question. Without knowing all the relevant facts, consumers may be misled by service providers into buying a good or service which does not meet their needs. In the case of valuers this may involve differing levels of skill and competency, so that it may be difficult for the consumer to judge the likelihood of obtaining adequate services at the quality and price they are seeking.

Obtaining and processing information about the services being provided, the quality of the services and the options for redress can increase transaction costs to the consumer. High transaction costs can inhibit informed decision making by consumers. In certain cases it can be more cost effective for the Government to lower transaction costs by making information available to consumers through various means. A regulatory scheme which signals to consumers that valuers are likely to be capable of providing services of at least a minimum competency level, is such a case.

However, the absence of "perfect information" is not necessarily evidence of market failure warranting direct government intervention in the marketplace. Information failure exists in cases where less than optimal levels of information are available to persons in the market. Markets sometimes develop means for addressing market imperfections of their own accord. It may be that the market is already taking some action to address a market imperfection, or is capable of doing so. For example, voluntary provision of information by professional associations and/or consumer organisations, or the establishment of voluntary accreditation and the use of quality assurance systems may assist consumers to overcome some aspects of market failure. In other cases, consumers may engage professionals to act on their behalf or they may buy insurance. Sometimes the existence of government regulation is itself a significant impediment to the development of market responses.

Identify the nature of the restriction on competition

The current regulatory arrangements are intended to exclude from the marketplace persons who do not operate in ways which provide adequate consumer protection. Occupational licensing, such as that for the valuation profession, may impact on competition by limiting the supply of valuation services, generating barriers to entry, and imposing rules of conduct and business practices which add to costs.

The current legislative requirements, by imposing conditions on potential market entrants, are creating barriers to entry. Those already operating in the industry may be shielded from competition. In the case of valuers the entry requirements include:

- completion of an approved course of study
- completion of an appropriate period of training
- a person of good character

Police checks are carried out on all applicants for registration to establish whether they have had any criminal convictions which would prevent them from properly fulfilling the duties of a real estate valuer. The approved courses are an indication of an applicant's competence in valuation. A period of training is undertaken so as to combine a practical knowledge of the property market with a theoretical understanding of the market.

For consumers there are two possible impacts. Firstly, the pool of land valuers from which to choose is reduced as the entry requirements exclude potential service providers from the marketplace. Secondly, there is the possibility that in a market where competition is restricted, prices may rise. Generally, the purpose of licensing professional occupations is to assist consumers identify suppliers of the service they require and protect them from unskilled or unsuitable service providers. This is particularly true where a consumer is unable to judge the quality of the service being offered because it is technically complex or so rarely required that they have no experience or other basis to support a purchasing decision.

Analyse the likely effect of any identified restriction on competition and the economy generally

The restriction on competition caused by the operation of the *Valuers Registration Act* is not considered to impose any significant impact on the economy. Rather, as stated above, a registration regulatory system such as that for valuers, can constrain open competition. For example capable persons can be disinclined to join a profession because of the time and cost necessary to meet prescribed criteria. The corollary of this is that the consumer does not theoretically have choice in the selection of one service provider over another. Currently there are 4,132 valuers registered to practice in NSW and more than 200 graduates in the valuation and land economics discipline each year. New registrants entering the valuation profession over the last three years average between 80-200 per year. The number of service providers relative to the demand for those services can be an indication of the level of competition. However, while the presence of a large number of service providers is conducive to competition, it does not guarantee it. The strength of competition is primarily governed by the ease of entry - by how contestable the market is.

The valuation industry seems to be contestable, despite the existence of the registration system. Before a person can operate in the valuation industry, he or she must be a person of good character, have successfully completed an approved course of study, and have undergone a period of training in valuing land. In recent years, the procedures for assessing whether a valuer is competent to practise in respect of various land types have been streamlined, removing inappropriate and unnecessary barriers to practise.

Furthermore, competency standards which are being developed for various industries to increase the competitiveness and productivity of Australian industry through responsive reform of the vocational education and training system, will be adopted by land valuers. Competency standards comprise the specific knowledge and skill needed to be able to do a job, and focus on what is expected of an employee in the workplace rather than on the learning process. Competency-based training is a more flexible approach to vocational qualification because it meets the needs of individual learners and industry. Accordingly, the future adoption of competency standards for valuers will mean that the eligibility requirement for practice in the industry will relate more directly to the purposes of regulation and to identifiable risks to the public in their dealings with valuers.

Assess and balance the costs and benefits of the restrictions identified

The existing regulation of valuers, while generally effective in meeting consumer protection objectives, tends to be inflexible and imposes costs on the community. From the perspective of the wider community, the justification for maintaining the current level of regulation is that it produces a net gain in the well-being of the community, so the benefits outweigh the costs. This means that implementation of the regulation option delivers a net public or social benefit or the least-costly burden to the community and to government.

However, the review has shown that under the existing system of regulation:

- the majority of valuers' clients are banks, legal practitioners and other market astute intermediaries, with ordinary consumers rarely directly calling upon the services of a valuer;
- the level of complaints and disciplinary action required is low;
- other existing redress mechanisms are effective in meeting consumer needs;
- industry associations have raised and are continuing to promote industry standards and accountability amongst their members; and
- legislative intervention in the regulation of valuers is disproportionately high given the above characteristics.

No significant changes have occurred in relation to the regulation of the activities of valuers since the introduction of the *Valuers Registration Act* in 1975. However, since then both the nature of the valuing profession has greatly changed and the importance of valuing to the business community has grown significantly. The valuation industry is also poised for fundamental change in the coming years in response to market demands - the increased use of technology will provide valuation solutions much more quickly, easily and cost effectively. Furthermore, financial institutions are adopting other assessment criteria for loan transactions which are likely to see a significant reduction in the number of valuations undertaken for loan purposes.

The market characteristics of the valuation profession indicate a market that is developing mechanisms to address market imperfections of its own accord. Users have developed means of accessing and utilising information to gauge the quality and ability of valuers. Such assessments are formed on the basis of professional association membership, reputation, and on the strength of appropriate insurance cover.

There is an extremely low incidence of complaints against valuers and formal disciplinary action has not been taken against a valuer for some time. This can be partly attributed to the high level of industry membership amongst valuers, and the practice of peer review which aims to maintain high standards within the profession.

Also, other redress mechanisms and risk management tools are considered to be more effective in minimisation of risk. Professional indemnity insurance is a risk management device which benefits both valuers and clients. When people obtain information about potential service providers they are attempting to minimise the risk. Choosing someone with appropriate insurance is a strategy to maximise the possibility of recompense for unsatisfactory service. The clients of any professional person have expectations about the services they will receive and, in an increasingly litigious society, clients who hold that they have suffered loss or damage due to negligence, recklessness or incompetence, are likely to take legal action against that person in an attempt to obtain compensation. There is a high uptake of insurance by valuers and valuation firms because of these market imperatives.

Further, the introduction of the *Consumer Credit Code (NSW) Act 1995* has significantly reduced the risk to those who most need regulatory protection. The code aims to discourage credit providers from allowing debtors to unknowingly overcommit themselves when taking out a loan. In the case of home loan borrowers, the code provides a mechanism by which the transaction can be reviewed and certain orders made if the transaction is found to be unjust.

Another clear indication of the valuation market addressing market information needs is through the examination of the relationship between market participants and service providers. Members of the general public are not significant direct consumers of valuation services, and are essentially passive users. Where valuations are required for individual purposes, consumers are usually assisted by an intermediary. The majority of valuers' clients are banks, legal practitioners, finance companies and other financial intermediaries who seek a valuation as part of their loan assessment process. Valuations undertaken for home mortgage purposes represents the major segment of the valuation market. These primary users are therefore well placed to be aware of the general value of property being transacted. Any concerns such clients might have about valuations can be addressed by gaining further advice or further valuations. These are active and astute users who adopt sophisticated methods in the selection of valuers. They choose providers from panels of valuers whose performance has been monitored over time and who hold professional indemnity insurance. This user group also recognises the benefits of industry membership in relation to continuing education and professional development programs. These users are also able to further minimise their risk through appropriate mortgage insurance cover.

Consider feasible alternative means for achieving the objectives, including non-legislative approaches

Less Prescriptive Regulation - Negative Licensing

There is considerable scope for regulatory modification while maintaining appropriate levels of protection. One of the main objectives of the review of the *Valuers Registration Act* under the National Competition Principles Agreement was to look at more effective ways of carrying out the Act's objectives.

The Review Committee considered that a system of "negative licensing", or regulation without registration, would provide an effective regime for the protection of consumers without the significant expense that traditional "positive licensing" regimes incur. This system would involve core legislation which provides for qualification and practice requirements and disciplinary action. The proposed scheme is similar to the regulatory approach introduced in South Australia in 1994 under the Land Valuers Act 1994.

There will no longer be a requirement for a valuer to be registered by the Department of Fair Trading. Instead, under a negative licensing scheme it would be an offence for a person to carry on business or purport to be a land valuer unless s/he holds certain prescribed qualifications or has been registered as a real estate valuer under the 1975 Act and has not been prevented from practising as a valuer in NSW or any other Australian jurisdiction.

These requirements would include persons registered under the 1975 Act with any existing limitations on practice; or the completion of an approved course and a period of training; and for the first time the legislative framework will facilitate the recognition of the achievement of competency standards approved for valuers as a "pre-practice" requirement. Prescription of competency standards will form an essential part of the practice requirement and the standards to be prescribed will be those that constitute a risk to the public and which relate to regulated functions. In this way focus will move away from prescribing a particular educational course or subjects rather the standards themselves would be prescribed. This will allow flexibility to move to a competency based system where competency may be achieved through different pathways.

As well as exclusion from practising in the industry, strong penalties would apply for contravention of these requirements. This regime would ensure that there is a minimum competency standard for entry into the occupation of valuer, thereby excluding incompetent valuers.

The system would include provisions aimed at protecting persons from unlawful, improper, unfair and incompetent practices of land valuers. Such behaviour would be subject to disciplinary action and a possible outcome of such disciplinary action could be that a person is barred from working as a land valuer. The threat of injunction from operating in the industry would operate as a severe and effective punishment and as an inducement to good conduct. Fines and reprimands would adversely affect professionals financially and in terms of their reputation.

The proposed negative licensing regulatory system provides for appropriately educated, trained and disciplined persons and would substantially reduce the risk to consumers. It would continue to exclude dishonest and incompetent persons from this area of enterprise, while leaving the fair and honest to carry on their activities with minimal intervention.

Recommendations

The Review Committee recommends that a "negative licensing" scheme should replace the current system of regulation of valuers. The objectives of the scheme would be to protect persons from the incompetent, unlawful or unfair practices of land valuers. The scheme would have the following features:

(1) Definition of a Valuer

A land valuer would be defined as a person who carries on a business that consists of, or involves valuing land. The definition would also include any person who formerly carried on such a business and hence, disciplinary proceedings could be taken against such a person.

(2) Administration of the Act

It is proposed the Director-General, Department of Fair Trading would be responsible for the administration of the Act.

(3) Qualifications requ ired to carry on business as a land valuer

There will no longer be a requirement for a valuer to be registered before being able to practise. Instead, it is proposed that the legislation state that a person may not carry on business or hold himself/herself out as a land valuer unless s/he:

(a) possesses qualifications approved by the Minister to carry on business as a land valuer; or

(b) has been registered as a land valuer under the repealed *Valuers Registration Act 1975* with any limitations on practice; or

(c) has not been convicted in NSW or elsewhere by any court of an offence involving dishonesty or been prohibited from acting as a land valuer in NSW or other Australian jurisdiction.

At present, registration as a valuer depends on educational qualifications, experience and good character. These criteria are assessed by the Department of Fair Trading. Under the proposed scheme it would be incumbent on the valuer to ensure that s/he does not carry on the work of a valuer unless s/he meets the qualification requirements prescribed by the legislation. These requirements would include persons registered under the 1975 Act with any existing limitations on practice (currently under the Act, limitations on a valuer's registration can be imposed as to location and land type); or the completion of an approved course and a period of training; or the achievement of competency standards approved for valuers, or other approved qualification.

The current requirement for a person to satisfy the Director-General that s/he is of good character would be replaced by the requirement that s/he has not been convicted in NSW or elsewhere by any court of an offence involving dishonesty, or been prohibited from acting as a land valuer in NSW or other Australian jurisdiction.

(4) Complaints

Any person may make a complaint to the Director-General of the Department of Fair Trading about the conduct of a land valuer or person holding themselves out as a land valuer.

(5) Investigation of Complaints

The Director-General would be responsible for investigating complaints, and any person may submit to the Director-General matters alleged to constitute grounds for disciplinary action under the Act. The Director-General may investigate the conduct of persons whether or not there has been a complaint made against those persons. The Director-General's investigative powers may be delegated to an authorised person/s.

(6) Cause for Disciplinary Action

Disciplinary action could be taken against a person in the following circumstances:

1. Where the person practises, advertises or holds himself/herself out as being entitled, or prepared to practise as a land valuer without complying with the qualification requirements of the legislation.

2. Where the land valuer, or any other person holding themselves out as a land valuer, has acted unlawfully, improperly, unfairly or incompetently in the course of conducting or being employed or otherwise engaged in the business of land valuation.

3. Where the land valuer has breached a provision of the Act or acted contrary to an undertaking accepted by the Director-General.

The legislative framework would also include a provision enabling the development of practice requirements setting out the expected behaviour of valuers covering matters such as disclosure of a valuer's qualifications, any conflict of interest and acting in the best interests of a client. These requirements would be developed in conjunction with industry.

(7) Disciplinary Action

A range of mechanisms would be available to ensure the appropriate resolution of the issue in dispute. Where it appears to the Director-General that a valuer or any other person purporting to be a land valuer has engaged in conduct of concern under the Act, the Director-General may request that that person execute a deed of undertaking to discontinue the particular conduct. Such conduct would include those matters which give cause for disciplinary action as outlined in (6) above.

Where a person executes a deed and fails to observe the undertakings in the deed the Director-General may take further disciplinary action. The Director-General, in such a case, may:

(a) reprimand the person;
(b) impose a fine;
(c) place limitations on practice; or
(d) prohibit conduct of the business of a land valuer or employment or involvement in the valuation industry.

Prohibition could apply permanently, for a specified period, until the fulfilment of stipulated conditions, or be extended under further order. Appropriate penalties would apply in cases where a person contravenes a prohibition order. Injunctive action under the Fair Trading Act 1987 could be taken by the Director-General to enforce a bar to practise.

(8) Register of Disciplinary Action

It is proposed that the Director-General would keep a register of disciplinary action taken against a person under the legislation, and make a notice on the register of any undertakings accepted by the Director-General in relation to a land valuer.

(9) Appeals

A person who is the subject of an order made by the Director-General may appeal to an independent tribunal, namely the Administrative Decisions Tribunal against the order.

(10) Professional Development

Continuing professional development would not be a compulsory pre-condition to carry on business as a valuer.

(11) Indemnity Insurance

Professional indemnity insurance would not be a compulsory pre-condition to carry on business as a valuer.