

Discussion paper

National Competition Policy Review of the
Conveyancers Act 1994
- Final Report

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Government
of South Australia



Office of
Consumer and
Business Affairs

National Competition Policy Review
Conveyancers Act 1994

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National Competition Policy Review *Conveyancers Act 1994*

Executive Summary

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

A conveyancer is one who prepares conveyancing instruments for fee or reward. A conveyancing instrument means and includes every document capable of registration under the provisions of any of the Real Property Acts, or in respect of which any entry is by any of the Real Property Acts directed, required or permitted to be made in the Register Book. In South Australia, conveyancing can be conducted by legal practitioners and registered conveyancers. The market for the provision of conveyancing services is the relevant market for the purposes of this Review.

The Act seeks to protect consumers from the risk of incompetent or dishonest conveyancers. It aims to achieve this by imposing strict entry controls, mandating professional indemnity insurance, regulating and supervising the operation of trust accounts, and providing a mechanism for the removal of unsuitable persons from the market.

There is a clear cost in restricting the provision of conveyancing services to registered conveyancers and legal practitioners. These costs flow from reduced competition in the market.

However, the Review Panel concludes that there is continuing justification for the continued regulation of conveyancers. Consumers are placed at risk of significant financial loss or disadvantage if conveyancers are incompetent, negligent or dishonest. While complaints against conveyancers have been few in number, the extent of losses suffered by consumers as a result of errors in the conveyancing of property is usually significant.

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

The Act contains a number of restrictions, in the form of barriers to entry and conduct restrictions. The definition of the scope of work is a barrier to entry, as it reserves a body of work to a particular class of person (that is, those who meet the requirements of the Act). Nonetheless, the Review Panel has concluded that the current scope of work is appropriate and can be justified.

The requirement to hold qualifications is the most significant barrier to entry in the legislation, however the Review Panel concludes that it is a justifiable one. A significant risk would be posed to the community if incompetent conveyancers were permitted to operate

within South Australia. The Review Panel considers that the conveyancing of property is a task which requires some form of training to be performed competently.

Currently, both TAFE and University-level qualifications are acceptable for registration purposes. While the Review Panel concludes that the subjects of TAFE qualification required for registration are appropriate, it is of the view that the University of South Australia postgraduate course is perhaps too onerous, and that consideration should be given to re-examining the current requirements.

Ensuring the fitness and propriety of a conveyancer is a prime objective of the Act. Currently, a person must not have been convicted of an offence of dishonesty if they wish to be registered as a conveyancer. The Review Panel is firmly of the view that the probity requirement must remain, but acknowledges that “an offence of dishonesty” has a broad meaning in law, and may act to exclude a person from operating in the market, even where the offence bears little relevance to the work of a conveyancer. The Review Panel therefore has recommended that convictions for summary offences of dishonesty should exclude a person or company from obtaining or holding a registration for a period of ten years, while convictions for others of a more serious nature would continue to impose a permanent prohibition.

The Act provides comprehensive controls over the operation of trust accounts by a conveyancer. Many of these controls have been assessed by the Review Panel as trivial in nature. The major restriction relates to the investment of trust money outside the trust account, a practice which is currently prohibited. The benefits of the restriction are the reduced risk of fiduciary default and protection of the Agents Indemnity Fund, while the prime cost is borne by purchasers who are deprived of the benefit of interest on their trust monies. The Review Panel has concluded that the benefits of the restriction outweigh the costs, but that the Commissioner for Consumer Affairs should investigate whether a scheme similar to that in place under the *Legal Practitioners Act 1981*, which allows for the establishment of a separate trust account for the exclusive benefit of a particular client, would be an appropriate less restrictive alternative.

The Act places significant restrictions on who can own an incorporated conveyancer. Ownership is restricted to registered conveyancers who are directors or employees (or who are prescribed relatives of these persons) of the incorporated conveyancer. Non-conveyancer employees may not hold more than 10 percent of the shares in the company. Further, incorporated conveyancers are prohibited from carrying on business in partnership with another person without the prior approval of the Commissioner for Consumer Affairs.

It is the view of the Review Panel that the costs of restricting ownership and partnership opportunities in the case of an incorporated practice cannot be justified. Among other things, the prohibition inhibits the development of multi-disciplinary practices, which may offer economies of scale and flexibility of service provision. However, a partnership between a conveyancer and a land agent would still be prohibited by the *Land and Business (Sale and Conveyancing) Act 1994*. The recommendation of the Review Panel is that the current prohibitions be removed, and replaced with a provision requiring the proper management and supervision of a registered incorporated conveyancer by a registered conveyancer who is a natural person.

A further restriction upon an incorporated conveyancer is the requirement that its constitution contain a “sole objects” clause, limiting the sole object of the company to the

carrying on of business as a conveyancer. By way of contrast, this requirement is not imposed on a natural person who is a conveyancer - only on an incorporated conveyancer. This effectively prevents an incorporated conveyancer being involved in the conduct of any other type of business. The Review Panel concludes that this restriction cannot be justified and should be removed from the legislation.

All conveyancers are required to hold indemnity insurance. The Review Panel concludes that the requirement that a conveyancer hold professional indemnity insurance is justified. While there is a cost involved, the risk inherent in the transaction is high, with the possibility that the consumer may be left unprotected.

While the requirement for indemnity insurance is justified, the Review Panel is less certain of the justification for the requirement for a conveyancer to subscribe to the master policy scheme. This master policy was negotiated in 1997, and all conveyancers will be covered by the middle of 1999. While insurance firms were able to compete for the initial insurance contract, they have been unable to do so since the firm of Marsh Limited was granted the right to operate the master scheme.

The Review Panel has considered the costs and benefits of the current scheme, and has formed the view that the current scheme, while restrictive, can be justified.

The Review Panel received no evidence, despite solicitations directly to the Insurance Council and a range of insurance brokers, that proposed alternative insurance schemes (not necessarily from within the conveyancing market) which could be introduced in South Australia.

The Act provides for disciplinary measures to be taken against a conveyancer under a range of circumstances. Disciplinary measures may result in a reduction in the number of persons who can provide land valuation services, and may therefore be seen as a mechanism by which competition within the marketplace can be restricted. However, normal competitive behaviour within the marketplace is unaffected by the operation of the Act, and the disciplinary procedures only operate to remove from the market those who engage in conduct which is against the interests of consumers generally. For these reasons, the Review Panel sees any restriction which may arise from the operation of the disciplinary provisions to be justified as being in the public interest.

The Review Panel concludes that there is a clear public benefit in the retention of regulatory control of the market for conveyancing services, and that the current legislation (other than those provisions identified during the course of this Review as being unjustified) is the least restrictive and most effective means of achieving the objective of consumer protection.

PART A: INTRODUCTION

1. WHY IS THE ACT BEING REVIEWED?

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

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

National competition policy ("NCP") is about

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

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

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

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

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

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

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

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

² Clause 5(1), Competition Principles Agreement

³ Clause 5(3), Competition Principles Agreement

⁴ Clause 5(6), Competition Principles Agreement

- consider alternative means for achieving the same result including non-legislative approaches.

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

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

2. WHAT IS BEING REVIEWED?

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

Accordingly, this Review applies to:-

Conveyancers Act 1994 ("the Act"); and
Conveyancers Regulations 1994 ("the regulations")

3. THE REVIEW PANEL

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

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

⁵ Clause 1(3), Competition Principles Agreement

4. THE REVIEW PROCESS

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

An Issues Paper was released for public consultation on 15 March 1999. Seven submissions were received by the Review Panel. A schedule showing the distribution of Issues Papers can be found in **Appendix 3**. A schedule of submissions received can be found in **Appendix 4**.

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

The Draft Report was released on 5 July 1999. Submissions were again invited, and the Review Panel allowed six weeks for responses. Seven submissions were received by the Review Panel. A schedule of submissions received can be found in **Appendix 4**.

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

PART B: OVERVIEW OF LEGISLATION

1. HISTORY

Prior to 1973, conveyancers (then known as land brokers) were licensed by the Registrar-General under the *Real Property Act 1886*. The only criterion for entry was that a person be a “fit and proper person to be a land broker”. The Registrar-General generally required applicants to have successfully completed a course at the then Institute of Technology. There was no authority which had jurisdiction to undertake investigations into the conduct of licensed land brokers.

In 1973, in the course of a general restructuring of the licensing of other occupations dealing with land, other than land valuers, it was decided to set up a licensing body for land brokers. The *Land and Business Agents Act 1973*⁶ created a licensing and disciplinary authority for land brokers, and developed trust account and audit provisions. The objective in doing so was “to establish land broking as a semi-professional calling with independence, status and security”.⁷ Licensing and disciplining authority was initially vested in a board, but later transferred to the Commercial Tribunal.

In 1994, following a review of the *Land Agents Brokers and Valuers Act 1973*, the government decided to repeal the *Land Agents, Brokers and Valuers Act* and create three separate Acts to deal with the occupational licensing of the three occupations governed by that Act, as well as a fourth Act to deal with certain conduct issues relating to those occupations. This decision was based on a recognition that the interests of consumers in relation to those three occupations varied considerably: although all related to interests in real estate, the types of interests involved and the way those interests could be affected by the conduct of agents, conveyancers and valuers respectively were distinct.

Thus in 1994, the *Conveyancers Act* was enacted.

2. CURRENT OPERATION OF THE ACT

2.1 The “market” for the purposes of this Review

One market affected by the Act is the market for the provision of conveyancing services.

The Australian Institute of Conveyancers (“the Institute”) considered that the market should be characterised as the ‘market for the provision of legal services’. The Review Panel does not consider that this is an appropriate definition of the market. It is too broad. While the market may form part of the wider market for the provision of legal services generally, it is a distinct market in its own right. Other legal services cannot be substituted for conveyancing services. Therefore, the market is properly characterised as the market for the provision of conveyancing services.

⁶ Later the *Land Agents, Brokers and Valuers Act 1973*.

⁷ Second Reading Speech of the Hon A.F.Kneebone, Chief Secretary, November 7, 1973.

In South Australia, conveyancing services are provided by registered conveyancers and legal practitioners. As at 30 June 1998, there were 687 conveyancers registered. Of these, 15 were bodies corporate and 672 were natural persons.

It should also be recognised that under mutual recognition legislation, trades and professions regulated in one jurisdiction have the ability to obtain registration in another jurisdiction by means of administrative process. It may be appropriate to consider that the market for these services extends beyond the boundaries of South Australia.

The Act also affects the market for the provision of professional indemnity insurance.

Conclusion

The relevant market is the market for the provision of conveyancing services. The Act also affects the market for the provision of professional indemnity insurance.

2.2 Provisions of the Act

The Act covers six main areas:-

- Registration of conveyancers
- Provisions regulating incorporated conveyancers
- Maintenance and inspection of trust accounts
- Provisions relating to the Indemnity Fund
- Discipline of conveyancers
- Other miscellaneous provisions

The Act defines a conveyancer as a person who prepares conveyancing instruments for fee or reward.

A conveyancing instrument is an instrument as defined in the *Real Property Act*:-

"instrument" shall mean and include every document capable of registration under the provisions of any of the Real Property Acts, or in respect of which any entry is by any of the Real Property Acts directed, required, or permitted to be made in the Register Book:⁸

2.2.1 Registration of conveyancers

Section 5 prohibits a person from carrying on business as a conveyancer unless that person is registered under the Act. This section includes a corporation which carries on business as a conveyancer.

The registration requirements are established in Part 2 of the Act. A natural person must hold the qualifications required by regulation, and must not:-

- a) have been convicted of an offence of dishonesty;

- b) be suspended or disqualified from practising or carrying on an occupation, trade or business under a law of this State, the Commonwealth, another State or a Territory of the Commonwealth;
- c) be an undischarged bankrupt or subject to a composition or deed or scheme of arrangement with or for the benefit of creditors; or
- d) during the period of five years preceding the application for registration, have been a director of a body corporate wound up for the benefit of creditors-
 - i) when the body was being so wound up; or
 - ii) within the period of six months preceding the commencement of the winding up.

The criteria for a corporation are even stricter. The company itself must not be suspended or disqualified from practising or carrying on an occupation, trade or business in one or more Australian jurisdiction nor be being wound up, under official management or in receivership. The directors of the company also have to comply with certain criteria relating to honesty and financial management.⁹

In addition to these criteria, however, the company must comply with strict conditions relating to the contents of its constitution and its membership. The constitution of an incorporated conveyancer must contain stipulations that:-

- a) the sole object of the company must be to carry on business as a conveyancer;
- b) the directors of the company must be natural persons who are registered conveyancers (although where there are only two directors one may be a registered conveyancer and the other may be a prescribed relative¹⁰ of that conveyancer);
- c) no share in the capital of the company, and no rights to participate in distribution of profits of the company, may be owned beneficially except by-
 - i) a registered conveyancer who is a director or employee of the company; or
 - ii) a prescribed relative of a registered conveyancer who is a director or employee of the company; or
 - iii) a prescribed relative
- d) not more than 10 per cent of the issued shares of the company may be owned beneficially by employees who are not registered conveyancers;
- e) the total voting rights exercisable at a meeting of the company must be held by registered conveyancers who are directors or employees of the company.

There are various administrative procedures to be complied with by conveyancers, including lodging annual returns accompanied by a fee fixed by regulation.

2.2.2 Professional Indemnity Insurance

Section 9 requires all conveyancers to hold professional indemnity insurance.

A master policy of professional indemnity insurance has been developed in consultation with the Australian Institute of Conveyancers. This policy should have covered all

⁹ See section 7(2)(b) of the Act for the specific criteria for directors.

¹⁰ That is, a spouse, parent, child or grandchild of the person. Spouse includes a person who is a putative spouse (whether or not a declaration has been made under the *Family Relationships Act 1975* in relation to that person).

conveyancers by mid-1999. It provides indemnity cover for all claims against conveyancers up to a maximum of \$750,000 per claim (conveyancers may insure for greater cover at a higher premium), provided that the claim does not arise from the fraud or dishonest act of the conveyancer.¹¹ All conveyancers must be insured under this policy.

The rationale for making professional indemnity insurance compulsory for conveyancers is unclear. It appears to have been founded on the fact that professional indemnity insurance is required for legal practitioners, who represent the competition for conveyancers. It can be assumed that the legislators wanted to maintain some form of equality between legal practitioners and conveyancers.

However, the objective could equally be to provide protection for consumers in relation to a transaction which involves significant amounts of money and affects significant legal rights.

2.2.3 Partnership restriction

Section 12 prohibits incorporated conveyancers from carrying on business in partnership with another person without the prior approval of the Commissioner.

2.2.4 Operation, maintenance and inspection of trust accounts

Conveyancers are subject to comprehensive trust accounting requirements. These requirements are set out in Divisions 1 and 2 of Part 4 of the Act (sections 14-30).

The trust accounting provisions are fairly standard. Conveyancers are required to deposit all trust money¹² in an approved account¹³ as soon as practicable after receiving the money. No other money is to go into the account, and the money may not be withdrawn except in certain circumstances, which are outlined in section 16 and include, *inter alia*, payment to the person entitled to the money or payment of fees and disbursements. The interest on trust accounts is paid to the Commissioner.

The Act gives the Commissioner power to appoint an administrator or a temporary manager in certain circumstances.

The records to be kept by the conveyancer are detailed in section 23 and the regulations.

2.2.5 Indemnity Fund

The Act provides for claims to be made on the indemnity fund created under the *Land Agents Act 1994* where a consumer has suffered financial loss as a result of fiduciary default and has no reasonable prospect of recovering the full amount of that loss. The objective of

¹¹ There are other exclusions - including death, bodily injury, physical loss or physical damage to property, payment of trading debts, *force majeure*, practices conducted wholly outside Australia, disbursements, breach of partnership agreement, or claim for wrongful dismissal.

¹² Defined as money received by the conveyancer when acting as an conveyancer to which the conveyancer is not wholly entitled in law and in equity. It does not include money received by a conveyancer in the course of mortgage financing.

¹³ Accounts are approved by the Commissioner for Consumer Affairs, and may be at a bank, building society or credit union.

this is to protect consumers who may lose money as a result of the default of an conveyancer and are unable to recover that money because the conveyancer has entered into bankruptcy or has absconded.

The indemnity fund is comprised of the interest paid to the Commissioner on trust accounts, any money recovered by the Commissioner from a conveyancer in relation to that conveyancer's default, fines recovered from disciplinary proceedings, interest accruing from investment of the fund, and other money required to be paid into the fund under the Act or any other Act, as well as the money which was standing to the credit of the fund kept under the *Land Agents Brokers and Valuers Act 1973*.

Consumers can make a claim for compensation from the fund where they have suffered loss as a result of the fiduciary default of a conveyancer and there is no reasonable prospect of recovering the full amount of that loss from the conveyancer. Additionally, partners of a conveyancer who find themselves vicariously liable for their partner's wrongdoing may be able to make a claim on the fund, provided they themselves acted honestly and reasonably in all the circumstances. Money from the fund may also be used for educational programs for conveyancers or members of the public, the costs of investigating and disciplining conveyancers and other relevant costs.

2.2.6 Disciplinary Proceedings

The Act prescribes certain situations in which disciplinary action can be taken. The objective of these provisions is to provide remedies over and above those which exist under other Acts and at common law. They provide a way of excluding persons from the industry who have demonstrated that they pose a risk to consumers.

Disciplinary action may be taken against a conveyancer under four circumstances:-

- (a) the registration of the conveyancer was improperly obtained;
- (b) the conveyancer has acted contrary to an assurance accepted by the Commissioner under the *Fair Trading Act 1987*;
- (c) the conveyancer or any other person has acted contrary to the Act or the *Land and Business (Sale and Conveyancing) Act 1994* or otherwise unlawfully, or improperly, negligently or unfairly, in the course of conducting, or being employed or otherwise engaged in, the business of the conveyancer;
- (d) events have occurred such that:-
 - (i) the conveyancer would not be entitled to be registered as a conveyancer if he or she were to apply for registration; or
 - (ii) the conveyancer is not a fit and proper person to be registered as a conveyancer; or
 - (iii) in the case of a conveyancer that is a company, a director is not a fit and proper person to be the director of a company that is registered as a conveyancer.¹⁴

Action may be taken against each director of a body corporate where there is proper cause for disciplinary action against the body corporate. This includes a shadow director.¹⁵ This

¹⁴ Section 45(1)

¹⁵ Section 45(2)

prevents people hiding behind the corporate veil in an attempt to evade the provisions of the Act.

If the Court is satisfied on the balance of probabilities that there is proper cause for disciplinary action against a person, the Court has the power to:-

- (a) reprimand the person
- (b) impose a fine not exceeding \$20 000 on the person
- (c) in the case of a person registered as a conveyancer -
 - (i) suspend the registration for a specified period or until the fulfilment of stipulated conditions or until further order
 - (ii) cancel the registration
- (d) in the case of a person whose registration is suspended - impose conditions as to the conduct of the person or the person's business as a conveyancer after the end of the period of suspension;
- (e) disqualify the person from being registered under the Act
- (f) prohibit the person from being employed or otherwise engaged in the business of a conveyancer
- (g) prohibit the person from being a director of a company that is a conveyancer.¹⁶

These orders are not mutually exclusive. The Court may make orders for more than one of them.

The grounds for disciplinary action are quite extensive, as are the types of disciplinary action which may be taken. This allows flexibility in the treatment of conveyancers, and enable proportionality in the action taken against conveyancers, while concurrently ensuring that consumers are properly protected.

2.3 What are the objectives of the Act?

The objectives of the Act encompass a number of different areas. The Act seeks to protect consumers, and aims to achieve this by imposing point-of-entry controls, mandating professional indemnity insurance, imposing strict controls on trust accounts, providing a means for removing unsuitable persons from the industry and allowing access to the indemnity fund in the event of fiduciary default by the conveyancer.

2.3.1 What is the nature of the industry?

The majority of conveyancers operate as sole practitioners. Some work in partnership. The remainder work as employees of incorporated conveyancers or legal practitioners.

The majority of conveyancers are members of the main industry body, the Australian Institute of Conveyancers. It has been suggested that between 80 and 85 per cent of practising conveyancers are members of the Institute. The total number of individuals and companies registered as conveyancers is illustrated in the table below:-

	Conveyancers
Individuals	646
Companies	17
Total	663

2.4 Is the continuation of regulation of the conveyancing industry justified?

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 market for conveyancing services. The market for the provision of conveyancing services is 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 conveyancing services. This can have the flow on costs outlined above. Additionally, the Act imposes certain practices and standards that must be followed by conveyancers. Compliance with these provisions will impose further costs. Where the costs of compliance are prohibitively high (for example, if insurance premiums are too high), this may pose a further barrier to entry.

For the ongoing regulation of the market for conveyancing services 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

2.4.1 Risk of market failure

Market failure may arise from:-

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

2.4.1.1 *Transaction Costs*

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

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

Market failure may occur where consumers experience 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 conveyancing 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 conveyancing services are less likely to undertake such searches, and may make less than optimal decisions as a result. Licensing¹⁷ seeks to provide information about conveyancers. 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 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.

2.4.1.2 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 conveyancing 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. Conveyancers are used by most consumers at some point in their lives, but generally on an infrequent basis. The most frequent transaction in which consumers will make use of conveyancers 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 conveyancer is aware.

¹⁷ In whatever form, ie licensing, registration, negative licensing.

Requiring all conveyancers to be registered, and to comply with all the requirements which accompany such registration, is one way of addressing this information asymmetry. Consumers can be assured that a person providing conveyancing 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 conveyancer is competent; the Government 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.

2.4.1.3 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 conveyancing services.

2.4.2 Provider Failure

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

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

2.4.2.1 Risk of financial loss

Real estate transactions generally involve significant amounts of money. They often represent a large proportion of a person's assets. In many transactions, a conveyancer will hold the funds on trust until settlement. There is a significant risk, therefore, that an unscrupulous conveyancer could, in the absence of legislative interference, defraud clients of a significant proportion of the clients' overall wealth.

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

In late 1980's and early 1990's, a substantial number of claims were made on the Indemnity Fund in relation to the activities of conveyancers who had been involved in mortgage financing activities. In some cases, the claims were worth millions of dollars. Since then, mortgage financing has been excluded from the application of the fund. This is an example, however, of the level of risk which may be involved in using conveyancers.

The Act deals with this risk in six 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 conveyancers and ultimate removal from the industry of those who have demonstrated that they are unfit to be members of the industry.
- (5) it supports this process by requiring an annual return to be made by each conveyancer every year. This return must be in the form set by the Commissioner for Consumer Affairs. Currently, the form includes current business name and address requirements and statements regarding convictions for criminal offences or involvement in bankruptcy or winding up. This provides a means of tracing holders of trust accounts, ensuring trust accounts are properly managed, and discovering information which may lead to disciplinary action being taken.
- (6) when all these measures fail to protect the consumer, the Act provides for compensation from the indemnity fund.

In addition, where financial loss is not caused by the deliberate act of the conveyancer, the consumer may have recourse to the conveyancer's compulsory professional indemnity insurance.

2.4.2.2 Risk of substandard work being performed

2.4.2.2.1 Risk of incorrect documentation

Property rights are included among the most fundamental legal rights.

It follows that any error made in dealing with these rights will have a significant effect on the person against whom the error is made. The documents which must be prepared to convey land correctly are often complex, and mistakes may very easily be made by the untrained.

In addition to this, real estate is often the primary asset of consumers, and may represent a very large proportion of their total asset base. If they do not get the property they believe they are entitled to, they may incur substantial losses. From this it follows that consumers are at significant risk if errors are made in the transfer of property.

2.4.2.2.2 Risk of incorrect advice

In addition to this risk, the Australian Institute of Conveyancers (hereafter 'the Institute') pointed out that conveyancers also are involved in providing advice to consumers on a wide range of areas. It was their submission that:-

"the main role of conveyancers is in the provision of advice, such as advice on contracts, settlement disputes, leases, disclosure statements, land tax implications, and the advisability of consulting other professionals such as accountants or surveyors."

It is accepted that the giving of advice is a significant aspect of the work of the conveyancer. Where consumers may rely on advice from an incompetent conveyancer, they clearly face the risk of relying on incorrect advice to their detriment. As was pointed out by the Law Society of South Australia (hereafter 'the Law Society'):-

"there is always a risk of incorrect advice or no advice due to ignorance or misunderstanding relating to associated legal matters, eg tenants in common v joint tenancy especially in de facto or second marriage situations where people may wish to be able to bequeath their share on death or in a will."

Additionally, problems may arise where the conveyancer gives advice on an areas which is outside his or her knowledge. The Law Society pointed out that there is a risk posed to consumers where conveyancers:-

"undertake other work outside the traditional ambit of conveyancing, eg wills/powers of attorney/loan agreements, etc, where the conveyancer may have insufficient knowledge or understanding of the subject matter to properly prepare such documents to protect the client's best interests."

Thus it is clear that the risk of inadequate, incorrect or inappropriate advice is a substantial one.

2.4.2.2.3 Failure to collect stamp duty

It was pointed out by the Law Society that conveyancers act as tax collection agents for the State Government. It was submitted that *"relaxation of standards would possibly result in more documents remaining unstamped"*. This is a risk to the general revenue which ultimately is used for the benefit of the public. Further, there is a risk to consumers if documents remain unstamped. Such documents cannot be used in evidence, except in criminal proceedings. Section 22 of the *Stamp Duties Act 1923* provides that:-

"No instrument chargeable with duty executed in any part of South Australia, or relating, wherever it was executed, to any property situated, or to any matter or thing done or to be done, in any part of South Australia, shall, except in criminal proceedings, be pleaded or given in evidence, or admitted to be good, useful or available at law or in equity, unless duly stamped."

Thus it is accepted by the Review Panel that this is another risk which should be considered by the Review Panel.

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

2.4.2.3 Risks to health and safety

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

2.4.2.4 Risk of criminal activity

There is some risk of fraudulent conduct in the market for conveyancing services. This risk arises because conveyancers 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.

2.5 Do the benefits of regulation outweigh the costs?

There is a clear cost in restricting the provision of conveyancing services to registered conveyancers and legal practitioners. 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, the Review Panel considers that the benefits which flow from the regulation of the industry generally outweigh these costs.

It has been demonstrated that there are four main benefits of regulation of the market for conveyancing services: reduction of transaction costs and information asymmetry, reduced 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.

The Review Panel therefore considers that, in principle, these benefits outweigh the general costs of regulation.

It is therefore the conclusion of the Review Panel that the ongoing regulation of the market for conveyancing services is justified. While individual restrictions must be analysed on a case by case basis, the Review Panel remains of the opinion that regulation of the market for conveyancing services in some form is necessary.

2.6 What are the alternatives?

2.6.1 Deregulation

Whenever alternatives to regulation of an occupation are considered, complete de-regulation is an option which must be considered. In the case of conveyancers, 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 conveyancing market 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, remembering that for the “Mum and Dad” type consumer, the family home is the most significant asset owned. Placing consumers at this kind of risk is undesirable.

Secondly, consumer confidence in conveyancers 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 ultimately lead to less

competition in practice and potentially a significant increase in the cost of buying or selling real estate¹⁸.

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

The Review Panel acknowledges that complete deregulation would not leave consumers without protection. A number of statutory requirements would still apply to the relationship between conveyancer and client, including a number of contractual remedies available under consumer protection legislation, as follows.

2.6.1.1.1 *Fair Trading Act 1987*

The *Fair Trading Act 1987* (SA) prohibits misleading and deceptive advertising and other conduct. The more general sections read as follows:-

Misleading or deceptive conduct

56. (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

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

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

2.6.1.1.2 *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:-

¹⁸ When non-solicitor conveyancing was first introduced in NSW, the cost of conveyancing services fell dramatically, suggesting that in an uncompetitive market, legal practitioners are likely to charge more for the provision of their services.

Warranties in relation to the supply of services

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

(2) Where a corporation supplies services (other than services of a professional nature provided by a qualified architect or engineer) to a consumer in the course of a business and the consumer, expressly or by implication, makes known to the corporation any particular purpose for which the services are required or the result that he desires the services to achieve, there is an implied warranty that the services supplied under the contract for the supply of the services and any materials supplied in connexion with those services will be reasonably fit for that purpose or are of such a nature and quality that they might reasonably be expected to achieve that result, except where the circumstances show that the consumer does not rely, or that it is unreasonable for him to rely, on the corporation's skill or judgment.¹⁹

The section only implies these terms into contracts for the supply of services struck between a corporation and a consumer. A conveyancer carrying on business as a sole trader or in partnership with another does not have these terms implied into their dealings with consumers.

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.²⁰ A conveyancer 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 conveyancers, it would generally not be fair and reasonable to limit the liability to the resupply of the services or 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 conveyancer'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.

¹⁹ Emphasis added.

²⁰ *Trade Practices Act* 1974 (Cth), section 84(2).

2.6.1.1.3 Consumer Transactions Act 1974 (SA) - Implied Terms

South Australian law has a similar set of terms that are implied into contracts for the performance of services.²¹ However, it only applies to a limited range of services, which are defined in that Act and its regulations. Conveyancing services are not a "service" for the purposes of that Act²². In a deregulated market, it would therefore be desirable to prescribe conveyancing services as a service under the *Consumer Transactions Act*.

If conveyancing services were prescribed as a service under the *Consumer Transactions Act*, then consumers would have access to the remedies under that Act. The main benefit for consumers would be that the warranty under section 7 would be implied into their contract with the conveyancer. This warranty is that "the services will be rendered with due skill and that any materials supplied in connection with those services will be reasonably fit for the purpose for which they are supplied".

The benefit of this is that consumer would have a remedy in contract.

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 conveyancers. In addition they have some deterrent effect, because conveyancers 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 conveyancer is bankrupt or insolvent, 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 conveyancing 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.

Thus complete deregulation of the industry is not considered to be a viable alternative.

2.6.2 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 self-regulation is accountants. There is no legislation regulating accountancy as a profession, but most accountant 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.

²¹ *Consumer Transactions Act 1972 (SA)*, section 7(1), (2).

²² See discussion of the possibility of prescribing conveyancing services under the Act in section 0, below.

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 conveyancing industry, the Australian Institute of Conveyancers estimates its current membership at between 80 and 85% of registered conveyancers who are practising. Thus this is a body with fairly broad industry coverage.

However, in a self-regulated market 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.

2.6.3 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 *Land Valuers Act 1994* and the *Hairdressers Act 1988*. Additionally, sales representatives are negatively licensed under the *Land Agents Act*.

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.

2.6.4 Co-regulation

In recent years, the Government has developed a new regime of occupational licensing in which provision has been made for increased industry involvement. The Commissioner for Consumer Affairs now has the power to enter into agreements under which groups or organisations associated with certain regulated industries undertake a specified role in the administration and enforcement of a particular Act. Delegations to a particular industry group must be recorded in a formal agreement which must be laid before Parliament.

Agreements will be dependent on industry groups demonstrating their capacity to achieve certain outcomes required by law. The Government must be satisfied that, in any industry seeking delegated authority and an industry agreement, there is a degree of maturity and an ability to look objectively at itself.

Under an agreement, elements of the enforcement and administration of the relevant Act may be delegated to key industry groups. However, certain functions cannot be delegated. These include the registration/licensing function, the power to request the Commissioner of Police to investigate and report on matters, the power to commence prosecutions under the Acts and some aspects specific to the individual Acts.

Typically, the industry group will participate in an informal way in dispute resolution and giving consumers advice. In some industries, it has become the practice for disputes to be referred first to the relevant industry group before it is brought to Consumer Affairs. However, such groups will not be able to make a final determination in a dispute; their role will be to conciliate or mediate the dispute only.

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.

The *Conveyancers Act* currently contains provisions which could lead to the development of a co-regulatory system. While such involvement may reduce the costs to government, it does not necessarily make any difference to the restrictions on competition. It is more of a cost-shifting exercise.

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.

2.6.5 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 conveyancers 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.

Certification is therefore not considered to be a viable alternative.

2.6.6 Restriction of title

Under this option, any person would be allowed to be involved in the conveyancing of property, but only those holding prescribed qualifications and fulfilling other criteria could call themselves a conveyancer. In some ways, this option resembles certification, but there could potentially be greater control over who could call themselves an conveyancer. This system operates in respect of building design services. Only those with certain qualifications can call themselves architects, but anyone can offer their services in the industry in general.

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 conveyancing 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 conveyancers 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 conveyancers 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 conveyancing and business transactions.

The Review Panel therefore does not consider restriction of title to be a viable alternative.

2.7 Conclusion

The Review Panel has determined that the benefits of regulation in principle outweigh the costs. There are no viable alternatives. It is therefore the conclusion of the Review Panel that the *Conveyancers Act* should be retained.

Conclusion

There is an ongoing need for regulation of conveyancers.

3. RESTRICTIONS ON COMPETITION - BARRIERS TO ENTRY

Having determined that in general the continued regulation of the conveyancing industry is justified, it is now necessary to examine specific areas of possible restriction upon competition within the Act and regulations.

3.1 Scope of work for which registration is required

The Act applies to the preparation of any conveyancing instruments. These instruments are *"every document capable of registration under the provisions of any of the Real Property Acts, or in respect of which any entry is by any of the Real Property Acts directed, required, or permitted to be made in the Register Book"*.²³

The Act limits the carrying on of a business that involves the preparation of conveyancing instruments to legal practitioners and persons registered under the Act.

This definition may be restrictive of competition if it is too broad and therefore entails work which could be performed by anyone without risk to the consumer. Thus if some conveyancing instruments were able to be prepared by unskilled persons without risk to the consumer, there could be an unjustified restriction on competition. Both the Institute and the Law Society rejected the suggestion that there may be documents which could be satisfactorily prepared by unskilled persons. The Institute submitted that conveyancing 'is a matter of skill and judgement involving the provision of advice, rather than the mere filing of documents', while the Law Society submitted that *"there are no aspects which could be performed without risk to the consumer by non-qualified people"*.

The Review Panel accepts these submissions. The risks associated with the advice and documentation involved in conveyancing are outlined above, and the Review Panel is not aware of any instances where the documentation would be so simple or advice to be given so straightforward that an unskilled person could safely do so. As was pointed out in the Institute's submissions, even in the case of domestic conveyancing, which is generally the most straightforward area of conveyancing, problems may arise *"which require a great deal of expertise"*.

The Institute raised a second concern with the definition of conveyancer; namely, that the definition is not broad enough. This raises a more complex issue of the interrelationship

²³ Section 3 *Real Property Act 1886*

between this Act and the *Legal Practitioners Act 1981*. The *Conveyancers Act 1994* sets out the scope of work which a conveyancer is permitted to do in South Australia. The *Legal Practitioners Act 1981* prescribes certain work as being that of a legal practitioner. There will obviously be some overlap between the two in some circumstances. In particular, the Review Panel notes sections 21(3)(o), (p) and (q) of the *Legal Practitioners Act 1981*, and notes that these provisions should be read in conjunction with the provisions of the *Conveyancers Act 1994*, which deals specifically with conveyancers.

Review Panel takes the view that this is an issue best raised with the Review Panel for the upcoming review of the *Legal Practitioners Act*. As outlined at Part 2.3, the *Conveyancers Act 1994* has several objectives, all of which are related to the practice of conveyancing. If the broadening of the definition sought by the Institute is to include matters which display no causal nexus with the practice of conveyancing, then such matters are beyond the scope of this report. However, the Review Panel acknowledges that should the review of the *Legal Practitioners Act* recommend an extension in the scope of work which conveyancers are permitted to perform, the definition of conveyancer under the *Conveyancers Act* should be expanded to encompass the increase in scope.

Conclusion

The definition of conveyancer does not restrict competition unduly. Any broadening of the scope of work undertaken by a conveyancer should be considered under the review of the Legal Practitioners Act.

3.2 Qualifications

The Act requires all conveyancers to hold prescribed qualifications.

Currently prescribed qualifications include designated subjects from the Certificate IV In Conveyancing offered by TAFE, together with designated subjects from the Advanced Diploma of Conveyancing offered by TAFE, a degree in Business (Property) which includes designated subjects relating to conveyancing, or a Graduate Diploma in Property relating to conveyancing.

3.2.1 Implications of the qualification requirements for competition

Two competition issues arise out of the training requirement; firstly, whether the continued requirement for some level of training is justified, and secondly, if so, whether the training requirements are too onerous and thus unduly restrictive of competition.

3.2.2 Is the continued requirement for some level of training justified?

The Review Panel has identified a number of benefits in requiring conveyancers to hold prescribed qualifications.

3.2.2.1 Reduction of information asymmetry

Consumers suffer from a significant level of information asymmetry when using a conveyancer, for reasons outlined in section 2.4.1.2.

The requirement that a conveyancer hold prescribed qualifications may assist in this process by providing the consumer with the assurance that the conveyancer is someone who possesses certain knowledge, thereby preventing the consumer having to search for that information themselves.

3.2.2.2 Reduced risk of provider failure

There is a further benefit for consumers in the reduction of the risk of provider failure in the industry. As pointed out by CASA, when a consumer sells or purchases land or a business:-

"the correct transfer of significant property... is a fundamental part of the whole transaction and the consumer places much reliance on the conveyancer's competency."

Requiring conveyancers to hold prescribed qualifications ensures that they have received a minimum level of training in the necessary skills of conveyancing. This reduces the risk of provider failure. The situations in which provider failure may arise were examined in the general discussion of the justification for the continued regulation of the conveyancing market.

3.2.3 What are the costs?

Requiring conveyancers to hold qualifications may also give rise to additional costs. Each conveyancer will bear the cost of acquiring the qualifications. There is also the reduction in competition which may have further costs by including higher prices, reduced innovation and reduced incentive to compete in methods of service delivery and offer new services.

3.2.4 Assessing the costs and benefits

The Review Panel considers that the costs of this restriction are clearly outweighed by the benefits. Because of the nature of the transaction involved, consumers are at a significant risk and disadvantage on a number of fronts. Requiring that all conveyancers hold prescribed qualifications addresses these risks, while imposing only minimal costs. Certainly there is some restriction to competition - it is not a completely open marketplace. It is of utmost importance, however, that when a person is transferring such fundamental rights as property rights, that the person is competent to do so. It is probable that there would be a far greater public cost, in the form of uncertain transactions, threats to the integrity of the Land Titles system and the possibility of significant financial losses, if no restriction existed.

All submissions agreed that the benefits of the qualification requirement outweigh the costs. CASA pointed out that:-

"the correct transfer of significant property, such as land and houses, is a fundamental part of the whole transaction and the consumer places much reliance on the conveyancer's competency."

The alternatives suggested leave the consumer largely unprotected until the damage is done, which is not an acceptable risk in such a significant purchase"

DAIS submitted that:-

"qualified conveyancers play an important role in maintaining the integrity of the Real Property Act and providing a high quality service to customers. Unskilled conveyancers will lower standards and jeopardise Land Services Group systems and add expense to its operations."

The Law Society said that the requirement for conveyancers to hold prescribed qualifications *"protects the consumer from otherwise unscrupulous practitioners"*, while the Institute stated that it has the benefit of *"ensur[ing] that the public can have confidence in the ability of a conveyancer to perform the work for which he or she is engaged"*. As pointed out by the Law Society, a large number of consumers do not know what a conveyancer does. Requiring conveyancers to hold qualifications ensures that consumers can be *"relatively sure of getting good service from whomever they end up with"* (Law Society).

The conclusion of the Review Panel is therefore that the benefits of the restriction outweigh the costs.

3.2.5 What are the alternatives?

One alternative to this requirement would be to adopt a system of self regulation, whereby the industry itself would take the responsibility for ensuring that its members maintained high standards. Membership of an industry organisation would be the sign to the consumer that the person held relevant qualifications or had sufficient expertise.

Another alternative would be certification, which eliminates barriers to entry, but provides a certificate or registration to those who have completed a course of training. Again, this would be a symbol to the consumer that the conveyancer has sufficient expertise in the area.

The difficulty with both of these alternatives is that without some statutory backing they would allow people with no qualifications to enter the industry. Given the risks posed to the consumer by unskilled conveyancers, and the expense to the community at large if the integrity of the Lands Titles system is thrown into question by unskilled conveyancers, any system which enabled unskilled practitioners to work in the industry may fail to provide adequate protection to the consumer and the community at large.

Conclusion

The benefits of the requirement to hold prescribed qualifications outweigh the costs. There is no viable alternative to this requirement.

Recommendation

The Review Panel recommends that the requirement to hold prescribed qualifications be retained.

3.2.6 Are the current requirements appropriate?

There appears to be an inconsistency in the current requirements. While only certain subjects from the TAFE course are required, a complete degree or a complete graduate diploma are required for those who elect to study at University rather than TAFE.

The rationale behind designating certain subjects within the TAFE course appears to have been that other subjects were being included in the course which were irrelevant to the protection of the consumer. Thus only those subjects which relate specifically to the competence of the individual to convey land or business are required for registration purposes.

The criticisms of the TAFE course may equally be made of the degree course. All students are required to take at least one "broadening" subject, which is a subject taken outside the faculty, three elective subjects from within the Faculty of Business and Management, which may or may not be specifically relevant to conveyancing, and eight "core" subjects from within the faculty which include such subjects as "Communication and the media" and "Work and Organisation".

One reason for the distinction between the two courses is that TAFE courses are competency based, whereas University courses are based on knowledge acquisition. Thus, whereas individual subjects at TAFE will lead to the development of specific competencies, the subjects at University are supposed to combine to provide a gradual accumulation of knowledge. The validity of this distinction in relation to the objectives of requiring qualifications for the purposes of occupational licensing is open to question, however.

DAIS suggested that it may be appropriate to canvass with the University whether an earlier exit point, eg a certificate, could be established. This is certainly an option which may be worth pursuing.

However, the Consumers Association of South Australia (hereafter "CASA") pointed out that under the current requirements, prospective conveyancers have a choice of which course to do. Provided such choice remains open, it may not matter how excessive the degree requirements are. Thus those who wish to complete only the applicable subjects from the TAFE course are free to do so.

All submissions agreed that the current requirements from the TAFE course represent an appropriate level of training. Subjects which are specifically relevant to the occupation of conveyancing are the only subjects required for licensing, thus representing an appropriate balance between the need to ensure some training and the need to ensure that the barrier to entry is not excessive.

The Review Panel understands that National Competencies for conveyancers are being developed. The Review Panel considers that once these competencies have been decided, the Office of Consumer and Business Affairs should revisit the qualifications required under the regulations and prescribe competencies rather than courses for registration purposes. This would ensure that the barrier to entry was restricted to completion of those competencies necessary to ensure consumer protection.

Conclusion

Current requirements under the Regulations for particular subjects from the TAFE course are appropriate. The requirements of the degree course may be excessive. However, given that prospective conveyancers still have a choice of which course to pursue, the Review Panel considers that this is not a restriction on competition.

Recommendation

Nonetheless, the Review Panel considers that it may be appropriate to revisit the qualifications once National Competencies have been developed.

3.3 Reputation

3.3.1 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 into the industry by the requirement that a person must not:-

- a) have been convicted of an offence of dishonesty; or
- b) be suspended or disqualified from practising or carrying on an occupation, trade or business under a law of this State, the Commonwealth, another State or a Territory of the Commonwealth.

3.3.2 Financial reputation

The requirement that a person be of good financial reputation may pose a further barrier to entry. This is assessed at the point of entry into the industry by the requirement that a person must not:-

- a) be an undischarged bankrupt or subject to a composition or deed or scheme of arrangement with or for the benefit of creditors; or
- b) during the period of five years preceding the application for registration, have been a director of a body corporate wound up for the benefit of creditors-
 - i) when the body was being so wound up; or
 - ii) within the period of six months preceding the commencement of the winding up.

3.3.3 Implications of the requirements

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 using the services of conveyancers. Significant amounts of money are placed in the conveyancer'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.

3.3.4 What are the benefits of this requirements?

The benefits of this requirement are that those who are likely to pose a risk to consumers are kept out of the industry. This reduces the risk of provider failure, especially in an industry where large amounts of money are handled on a daily basis.

3.3.5 What are the costs?

The only cost of this requirement is that it keeps some people out of the industry who may otherwise have been able to participate in it. In *Commissioner for Consumer Affairs v Standley*²⁴ the Full Court of the Supreme Court held, in relation to a similar provision under the *Security and Investigation Agents Act 1995*, that the Commissioner for Consumer Affairs has no discretion to grant a licence to a person convicted of a prescribed offence. This decision would apply, by implication, to applications for registration under the *Conveyancers Act*. Thus conviction for a single offence will exclude a person from the industry for life.

It is arguable that this is an undesirable restriction on competition. As the provisions are specifically targeted, this is not a significant restriction. Nonetheless, it may be possible to target the restriction with even greater precision so that only those who have committed the offences most relevant to the identified risks are permanently prevented from participation in the industry. If this is so, then there is a cost associated with the exclusion of those people from the industry.

3.3.6 Assessing the costs and benefits

The Review Panel considers that the benefits of this restriction outweigh the costs. All submissions agreed that the current requirements do not impose an unnecessary restriction on competition. Current requirements are narrow and specifically directed at aspects of a conveyancer's reputation which could directly affect the work of the conveyancer. This is in contrast to other Acts which have a more general "fit and proper person" requirement. By specifically targeting the provisions, the Act ensures that only relevant criteria are taken into consideration.

3.3.7 What are the alternatives?

The only alternative would be to narrow even further the range of offences which result in permanent disqualification from participation in the industry. Currently, any person who has committed any offence of dishonesty is prevented from obtaining registration as a conveyancer, no matter what offence of dishonesty was committed or how long ago it was committed. While there are some offences which are clearly of such a character that permanent disqualification from participation in the industry is warranted, there may be

²⁴ (1998) 71 SASR 152

other offences where a first offence may be considered to warrant a shorter period of disqualification - for example, ten years.

The Review Panel considers that where a person has been convicted of a summary offence of dishonesty, or an offence of dishonesty for which the maximum penalty is no more than 2 years imprisonment, that conviction should not disqualify the person from obtaining a licence after a certain period of time has elapsed. The Review Panel considers that ten years would be an appropriate time period. To give some idea of the scope of offences which would be affected by this, the following list details summary offences under the Criminal Law Consolidation Act. It should be noted that these offences will only be summary offences if they involve less than \$2000.

Section of Criminal Law Consolidation Act 1934	Description
131	Simple larceny
132	Larceny by bailee
136	Stealing cattle
137	Killing animals with intent to steal the carcass
138	Stealing deer llama or alpaca in enclosed land
144	Stealing or fraudulently destroying cancelling or obliterating valuable security
145	Stealing or fraudulently destroying cancelling obliterating or concealing title to land or a will
146	Stealing or fraudulently taking or unlawfully and maliciously cancelling obliterating injuring or destroying a court record
147	Stealing or attempting to steal fixtures or parts of a building
148	Stealing or attempting to steal vegetation in any pleasure ground garden or other enclosed land
152A	Stealing or attempting to steal precious stones
153	Fraudulently removing or concealing precious stones or ore from mine
154	Stealing electricity
173	Larceny in dwelling houses
174	Stealing goods in process of manufacture
175	Stealing from ships or docks
183	Larceny by tenants and lodgers
184	Fraudulent misappropriation
189	Fraudulent appropriation of company property
192	Director public officer or manager publishing fraudulent statements
195	False pretences
196	Receiving
197A	Receiving goods stolen outside the State
202	Corruptly taking reward for recovery of stolen property
204	Impersonation in order to obtain property
205	Impersonating the owner of stock
214 except an offence against paragraph (a)(i) (ii) or (iii)	Forgery of deeds wills bills of exchange etc.
215	Forgery in relation to transfer of stock

216	Forgery of power of attorney in relation to transfer of stock
234	Demanding property under forged instruments
235	Forgery of other instrument or matter

It is proposed that after ten years, a conviction for any of these summary offences, or any other summary offences of dishonesty, for example under Commonwealth tax and social security laws or other South Australian law, will not be taken into consideration for registration purposes.

The Review Panel acknowledges that there may be some concerns where a person has been convicted of many offences of dishonesty but has not offended in that way for ten years. The Review Panel considered two options for addressing this issue.

The first option considered was to provide that only a *first* conviction for a summary offence of dishonesty would be disregarded for registration purposes. Any subsequent conviction would permanently disqualify a person from participation in the industry. However, the Review Panel considered that this may be draconian and, in terms of the intended effect of the new provision, may be ineffective. If, for example, a person at the age of 18 committed a number of "shoplifting" offences, but then reformed and applied for registration at the age of 35, then the Act would be keeping such a person out of the industry unduly. Therefore, the Review Panel rejected this option.

The other option was to reintroduce a fitness and propriety requirement. This would give the Commissioner for Consumer Affairs a discretion not to register someone where they had a history of offending which indicated that such registration would be inappropriate.

The difficulty presented by this option however, is the potential arbitrariness of the fitness and propriety requirement. Assessments of this nature involve an exercise of administrative discretion and are necessarily subjective to a degree. Subjectivity in an assessment process reduces certainty for applicants and has the potential both to distort competition at the point of entry and to act as a barrier to entry. Without clear definition of entitlement criteria, it may be the case that those who would otherwise seek to enter the industry are discouraged at the prospect of their application being rejected on this indeterminate ground. It is not possible for an applicant to ascertain prior to embarking on the assessment process whether or not they will be adjudged a fit and proper person.

Further, as identified above, an exercise of administrative discretion is required in a fitness and propriety test. This of itself brings costs to the government and the wider community as a whole. In the first instance, a more detailed assessment process is required by the government upon receipt of an application for registration. Unlike an assessment against fixed criteria, such as whether or not an applicant has certain qualifications, or has been convicted of certain offences, which are simply matters of objective fact, a discretion must be exercised when making an assessment of fitness and propriety. This necessitates more time and resources being expended by government, which are costs ultimately borne by the wider community.

There is also the risk that the discretion may be incorrectly exercised resulting in a reduction of competition at the point of entry, with concomitant costs being imposed in the community. Further, it must be appreciated that a decision not to grant registration on fitness and propriety ground may be subject of an appeal to the District Court. Of course, the Review Panel acknowledges that any decision to refuse a registration is potentially

reviewable. However, where all that is involved is a review of an administrative assessment of objective criteria, there will be much less scope for the Court reviewing the decision to overturn it. On the other hand, in the case of a rejection on fitness and propriety grounds, based on the exercise of an administrative discretion, there is more likely to be extensive argument before a Court. Administrative law principles such as the proper exercise of the discretion may be raised and disputed. It is also considered that there would be more appeals to the Court from rejections on fitness and propriety grounds as a person seeking legal advice is more likely to be advised that they have some prospect of success. Any such appeals will be lengthy and involve more complicated legal issues, which will in turn be a source of costs being imposed on the wider community.

The Review Panel therefore considers that the costs involved in the introduction of a fitness and propriety test would be significant.

When weighing these costs against the benefits which would accrue from the imposition of the test, it must be borne in mind that the ten year disqualification period refers to **summary** offences of dishonesty and not the more serious categories of **indictable** offences, which will still permanently exclude a person. By definition, summary offences of dishonesty will be at the low end of the scale in terms of seriousness of offending. As pointed out in the example offences detailed in the table above, in many instances the amounts involved must be \$2,000 or less to be a summary offence.

The Review Panel has recommended a person be disqualified for the relatively long period of ten years following a conviction for a summary offence. This position recognises that any offence of dishonesty is serious, summary or otherwise, but does take into consideration rehabilitation principles bearing in mind that summary offences are of less gravity than indictable offences.

Further, the risk against which regulation seeks to protect in terms of personal reputation is the risk of fiduciary default, or criminal or fraudulent behaviour in relation to trust money. To this end it is noted that the Act provisions regulating the operation of trust accounts, including an ongoing audit requirement, as another means by which these risks may be addressed.

As a final point, the Review Panel considers that in an industry as mature as this, the imposition of a fit and proper person test would be an inappropriate step towards a licensing rather than a registration scheme. In addition, a licensing scheme may be viewed as a more "heavy handed" regulatory system than registration, and to that extent beyond the scope of this Review.

Given that any convictions for anything other than a summary offence of dishonesty will permanently exclude a person from being registered as a conveyancer, the risk protection mechanisms in the Act, and the recommendation that those convicted of summary offences be excluded from the industry for ten years, the Review Panel concludes that the costs of a fit and proper person test outweigh the benefits.

On the basis of the foregoing, the Review Panel considers that the ten year exclusion period in relation to summary offences, be it a first or subsequent offence, is sufficient, in conjunction with other protection mechanisms in the Act, to provide consumer protection in relation to the personal reputation of a conveyancer.

Conclusion

The benefits of the restriction relating to reputation outweigh the costs.

Recommendation

The Review Panel recommends that the restriction be retained, but that it be modified so that a conviction for a summary offence of dishonesty will only disqualify a person from registration as a conveyancer for ten years.

3.4 Requirement to hold professional indemnity insurance

Section 9 requires all conveyancers to hold professional indemnity insurance.

A master policy of professional indemnity insurance has been developed in consultation with the Australian Institute of Conveyancers. This policy will cover all conveyancers by mid-1999. It provides indemnity cover for all claims against conveyancers up to a maximum of \$750,000 per claim (conveyancers may insure for greater cover at a higher premium), provided that the claim does not arise from the fraud or dishonest act of the conveyancer.²⁵ All conveyancers must be insured under this policy

3.4.1 What are the implications of the requirement for competition

The requirement to hold professional indemnity insurance may present a barrier to entry. The premium for professional indemnity insurance may be a significant restriction for those newly entering the industry with possibly very little capital. However, because of the master policy nature of the scheme, a lower premium has been able to be negotiated for new entrants, which helps to keep this barrier down. Thus current premiums start at \$494.60 and go up to over \$2000.00 depending on the level of cover desired and the income of the conveyancer, less disbursements.

Additionally, the requirement to maintain professional indemnity insurance may increase the costs of business, which may also deter entry to the occupation. However, although compulsory professional indemnity insurance may increase the costs of business in some cases, it may be that most conveyancers would wish to hold professional indemnity insurance in any case, to protect themselves from the financial risk of having a claim made against them. Professional indemnity insurance is also compulsory for member of the Australian Institute of Conveyancers, of which the majority of conveyancers are members.

²⁵ There are other exclusions - including death, bodily injury, physical loss or physical damage to property, payment of trading debts, *force majeure*, practices conducted wholly outside Australia, disbursements, breach of partnership agreement, or claim for wrongful dismissal.

It also appears that most people who complete a conveyancing course end up working in the industry. It may be, therefore, that in practice professional indemnity insurance does not present a significant restriction on competition.

3.4.2 What are the benefits of this requirement?

The benefits of requiring all conveyancers to hold professional indemnity insurance include providing consumers with a means to be compensated for loss suffered as a result of the actions of a negligent practitioner, even if the conveyancer has gone bankrupt.

There is potential for consumers to suffer significant loss if property rights are transferred incorrectly. In some instances, there will be no recourse to the conveyancer, because the conveyancer does not possess the funds to compensate the consumer for the loss. Access to the indemnity fund will be limited unless there is fiduciary default involved. Under such circumstances, the only way for a consumer to get compensation would be to make a claim on the conveyancer's insurer. If the conveyancer was not insured, then the consumer would be left with no redress.

The Law Society pointed out that *"most responsible conveyancers would wish to voluntarily insure in any event"*. Because of the large amounts of money involved in these transactions, *"the potential for significant claims is ever present"* (Law Society).

The Institute pointed out that:-

"In relation to domestic conveyancing, consumers are often engaged in the largest financial transaction with which they will ever be involved. In relation to commercial transactions, small business people may be involved in a lease or a business settlement which represents enormous investment of capital."

If loss occurs, consumers may face the risk of going uncompensated if the conveyancers does not hold professional indemnity insurance.

3.4.3 What are the costs of this requirement?

Professional indemnity insurance is a cost to the individual conveyancer, which may well be passed on to the consumer. In this way, what is a private cost may become a public one. If the cost of indemnity insurance is keeping people out of the industry, then this is a further cost. It means that competition is reduced, which can have all the effects outlined in the general discussion of the costs and benefits of regulation.

3.4.4 Weighing the costs and benefits

The Review Panel considers that the costs of compulsory professional indemnity insurance are outweighed by the benefits. While it is a cost, it is necessary that consumers be protected from the risks involved in this transaction. It is often a transaction which is of tremendous significance to the parties, and may involve a large proportion of the parties' assets. The risk of a transaction going wrong and the consumer being left unprotected is too great.

3.4.5 Alternatives

The Review Panel considered two alternative to this restriction. The first is no regulation of professional indemnity insurance. This would leave the purchase of insurance as a decision to be made by the individual conveyancer. A prudent conveyancer would continue to insure in any event. Those that did insure could use this as a marketing tool.

The Review Panel did not consider that this alone would offer sufficient protection to consumers. Consumers would not know, without asking, whether the conveyancer had professional indemnity insurance, and this is unlikely to be a high priority with them at the time of engaging the conveyancer. It would only be later, if the transaction went wrong, that the consumer would even realise that professional indemnity insurance was not held by every conveyancer, and that there was now no way to recoup the loss.

Another alternative that the Review Panel considered was to have a mandatory disclosure requirement. Any conveyancer which did not hold professional indemnity insurance would be required to disclose this to the client and obtain written acknowledgment that this information had been disclosed (in a similar form to current waiver provisions under the *Land and Business (Sale and Conveyancing) Act 1994*). The Review Panel did not, however, consider that this would offer adequate protection to consumers.

Such a provision would be difficult to enforce. Under the current system, conveyancers are required to lodge certification that they hold professional indemnity insurance with the Office of Consumer and Business Affairs. This enables the Office of Consumer and Business Affairs to be aware of any conveyancer who does not hold professional indemnity insurance, and to take steps to enforce the holding of such insurance.

Similarly, under a voluntary system a requirement to lodge with the Office of Consumer and Business Affairs certification that a person holds professional indemnity insurance could also be imposed. By implication the Office of Consumer and Business Affairs would therefore be aware of those who did not hold insurance. However, such a system would present difficulties in enforcement in so far as it would be almost impossible to determine whether a disclosure requirement was being complied with. It would be too easy for a conveyancer who did not hold professional indemnity insurance to dispense with the disclosure requirement. It would only become an issue when a transaction went wrong, and it was then discovered that the conveyancer had failed to inform his or her clients that he or she did not hold professional indemnity insurance. It would be too late to remedy the situation. The client would have lost money, and would be unable to be compensated.

It is therefore the conclusion of the Review Panel that there are no viable alternatives.

The implications of the requirement that the insurance policy be held with the nominated provider will be discussed in section 4.2 this report.

Conclusion

The benefits of the requiring conveyancers to hold professional indemnity insurance outweigh the costs. The Review Panel did not identify any viable alternatives to this requirement.

Recommendation

The Review Panel recommends that the requirement that all conveyancers hold professional indemnity insurance be retained.

3.5 Ownership and partnership restrictions

The Act places significant restrictions on who can own an incorporated conveyancer. Ownership is restricted to registered conveyancers who are directors or employees of the or their prescribed relatives, or employees of the incorporated conveyancer. Non-conveyancer employees may not hold any more than ten percent of the shares in the company. In addition, incorporated conveyancers are prohibited from carrying on business in partnership with another person without the prior approval of the Commissioner.

These provisions are similar to provisions contained in a number of Acts regulating professions, including the *Legal Practitioners Act 1981*²⁶, *Medical Practitioners Act 1983*²⁷, *Dentists Act 1984*²⁸, *Veterinary Surgeons Act 1985*²⁹, *Physiotherapists Act 1991*³⁰, *Chiropractors Act 1991*³¹, *Pharmacists Act 1991*³², *Architects Act 1939*³³ and *Survey Act 1992*³⁴ (all of which are currently subject to review).

The underlying concern that has led to these restrictions is that unregistered persons in control of a business providing professional services will not be subject to an adequate level of accountability to protect the public interest. This could lead to such problems as the following:-

- attempts to influence registered persons to provide inadequate services which might put consumers at risk
- attempts to influence registered persons to over-service
- inappropriate use of confidential consumer information

While these concerns may be relevant in relation to many of the regulated professions, where members of the profession are subject to regulation and control by a statutory board, they are of less relevance in relation to conveyancers. As directors of incorporated conveyancers are subject to the same disciplinary provisions as registered conveyancers (regardless of whether they are conveyancers or not), limiting the ownership of such companies seems unnecessary from an enforcement point of view.

The costs of restricting ownership may include the lessening of competition, which may lead to higher prices, less incentive to innovate, and less incentive to offer new services or

²⁶ Section 16(2).

²⁷ Section 37.

²⁸ Section 45.

²⁹ Section 31.

³⁰ Section 18(2).

³¹ Section 18(2).

³² Section 18(2).

³³ Section 32A.

³⁴ Section 22.

methods of service delivery to consumers. In addition, restrictions on ownership may deter investment in conveyancing businesses.

Partnership restrictions may inhibit the development of multi-disciplinary partnerships, which may offer economies of scale and flexibility of service provision. However, conveyancers are already restricted from entering into partnership with land agents as a result of section 28 of the *Land and Business (Sale and Conveyancing) Act 1994*, which forbids a person providing conveyancing services from being in a prescribed relationship to a land agent. Therefore any partnership that they were to enter into, in the absence of this provision, would have to be with someone other than a land agent.

Submissions generally expressed concern at the prospect of conveyancers being able to enter into partnership with land agents. The Review Panel considers that this issue needs to be considered in the context of the *Land and Business (Sale and Conveyancing) Act 1994*, as that Act imposes a restriction on the relationship between a conveyancer and an agent. Thus even if the ownership and partnership restrictions of the *Conveyancers Act* were removed, conveyancers and agents would still be prohibited from being in any form of prescribed relationship.

The concept of multi-disciplinary partnerships generally was more widely accepted by submissions. The Institute expressed some interest in opening up the provisions to enable “multi-disciplinary partnerships between conveyancers and legal practitioners.”³⁵

Concern was expressed that removing the ownership restrictions on conveyancers would create a system of market inequality, as legal practitioners, with whom conveyancers are in direct competition, are currently restricted in the same way as conveyancers. While taking these concerns into consideration, the Review Panel does not believe that such concerns should preclude the lifting of the restrictions. The market for the provision of conveyancing services is a market in its own right, as well as being a section of the broader market for the provision of legal services. The restrictions on legal practitioners, if justified, may be justified on the basis of other transactions in which legal practitioners may be involved. Conveyancers are not legal practitioners. There are a number of differences between the operation of the two occupational groups.

The fundamental issue to be considered in determining whether restrictions on the ownership of incorporated conveyancers should remain is not whether any other participants in the market are subject to similar constraints, but whether there is a risk inherent in the practice of conveyancing which is appropriately addressed by such restrictions. None of the submissions received was able to point to such a risk. In discussions with the Institute, it was conceded that from a rational point of view, there is no justification for retaining these restrictions.

The same reasons apply to partnerships. While there may be some justification for the retention of a restriction on the relationship between conveyancers and agents (an issue which is addressed in the review of the *Land and Business (Sale and Conveyancing) Act 1994*), there appears to be no justification for a general restriction on partnerships between conveyancers and non-conveyancers.

³⁵ Of course, any such development would require removal of limitations on multi-disciplinary partnerships within the *Legal Practitioners Act* and *Professional Conduct Rules*.

Obviously there is a benefit in requiring the conveyancing work of incorporated conveyancers to be carried out by registered conveyancers - in other words, persons holding prescribed qualifications. Otherwise, any person who wished to be a conveyancer but did not hold prescribed qualifications could set up a company and use that company's registration to evade the Act. Such a requirement, however, may be enforced without restricting ownership of the conveyancer.

The Review Panel considered that an effective alternative would be to follow the example of the *Land Agents Act 1994*. Under this Act, any person may be a director or shareholder of an incorporated land agent, but the land agent's business must be managed and supervised by a registered land agent³⁶. In a similar way, the Act could provide that any person may be a director or shareholder of an incorporated conveyancer, but the business must be managed and supervised by a registered conveyancer who is a natural person. The advantage of this alternative is that it provides the requisite consumer protection, in ensuring that conveyancing work is carried out by conveyancers, while allowing others to participate in the industry via their ownership of such business. This enables funds to be injected into such businesses, which may enable them to develop more efficient practices (including by upgrading computers, etc) which in the long run is good for consumers and for the economy generally.

Some submissions remained concerned that conveyancers in practices which were owned by non-conveyancers may be subject to undue influence. The Review Panel accepts that this is a ground for concern. It is suggested that to overcome this, a provision should be inserted into the Act to the effect that non-conveyancers must not influence conveyancers in the performance of their professional duties. A further ground for disciplinary action should be added, to the effect that there is proper cause for disciplinary action against a director of an incorporated conveyancer if that director unduly influences or attempts to unduly influence a registered conveyancer in relation to the performance of his or her professional duties.

Conclusion

There is no justification for the continued retention of general ownership and partnership restrictions for conveyancers.

Recommendation

The Review Panel recommends that sections 7(3), 10, 11 and 12 of the *Conveyancers Act* be repealed and replaced by a requirement that an incorporated conveyancer be properly managed and supervised by a registered conveyancer. In addition, it should be an offence under the Act for a director of an incorporated conveyancer to unduly influence a registered conveyancer in relation to the performance of his or her duties. This Review Panel recommends that this be both an offence and cause for disciplinary action against both the director and the incorporated conveyancer.

³⁶ Section 10, *Land Agents Act 1994*.

3.6 Fees

Applicants for registration must currently pay an application fee. If the application is successful, they must then pay a grant fee. Each year thereafter the conveyancer must provide an annual return accompanied by a fee. Current fees are as follows:-

Application fees	
Application for registration	\$155.00
Grant fees	
for a natural person	\$190.00
for a body corporate	\$285.00
Periodic Fees	
Annual registration fee	
for a natural person	\$190.00
for a body corporate	\$285.00

All submissions considered that the fees at their current level represent a trivial restriction on competition. The Review Panel concurs with this conclusion.

Conclusion

The fees at their current level are a trivial restriction on competition.

4. RESTRICTIONS ON COMPETITION - CONDUCT RESTRICTIONS

4.1 Compliance with trust account provisions

Conveyancers are subject to comprehensive trust accounting requirements. These requirements are set out in Divisions 1 and 2 of Part 4 of the Act (sections 14-30).

As in most industries where money is held on trust, the trust accounts of conveyancers 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.

The trust accounting provisions are fairly standard. Conveyancers are required to deposit all trust money³⁷ in an approved account³⁸ as soon as practicable after receiving the money. No other money is to go into the account, and the money may not be withdrawn except in certain circumstances, which are outlined in section 16 and include, *inter alia*, payment to the person entitled to the money or payment of fees and disbursements. The interest on trust accounts is paid to the Commissioner.

The Act gives the Commissioner power to appoint an administrator or a temporary manager in certain circumstances.

³⁷ Defined as money received by the conveyancer when acting as an conveyancer to which the conveyancer is not wholly entitled in law and in equity. It does not include money received by a conveyancer in the course of mortgage financing.

³⁸ Accounts are approved by the Commissioner for Consumer Affairs, and may be at a bank, building society or credit union.

The records to be kept by the conveyancer are detailed in section 23 and the regulations.

4.1.1 Implications of the trust accounting requirements for competition

There are a number of competition issues which arise from the trust accounting requirements.

4.1.1.1 Additional costs from record keeping

The first is the additional costs imposed on business by the extensive trust accounting requirements. Complying with the record keeping requirements may increase the administrative burden and hence the costs of the conveyancer. The difficulty in determining whether money is trust money or not may also increase the costs of doing business.

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 considered that they are easily justified by the protection they offer to consumers. Conveyancers often hold large amounts of money on trust and there would be the potential for significant consumer detriment if such conditions were not imposed.

Conclusion

The benefits of trust accounting requirements outweigh the costs.

4.1.1.2 Restrictions on the use of electronic commerce

Some of the record-keeping requirements restrict the availability of electronic commerce to conveyancers.

These may be able to be modified without reducing the level of protection for consumers. It is understood that the Government as a whole is currently reviewing electronic commerce. The Review Panel therefore considers that it is more appropriate for changes to be made to these restrictions once a uniform approach has been established. However, the Review Panel considers that it would be preferable for the current trust accounting provisions to be altered to reflect the development of electronic commerce, but in such a way as to ensure consumers are still protected. The exact means for doing so should be determined through the electronic commerce project as a whole.

Conclusion

Any alteration of the restrictions on the use of electronic commerce should wait until a whole of government approach to this issue has been established.

4.1.1.3 Requirement to hold money in a prescribed financial institution

Another restriction is the requirement to deposit money in an approved account. In theory, this requirement may limit the choice available to conveyancers and represents a restriction on their conduct. However, in practice, there is little difficulty for an institution in gaining approval to hold trust accounts. The Commissioner for Consumer Affairs has set three requirements for approving accounts for receiving trust monies:-

- the account must pay interest, calculated daily, at a rate of at least 65% of the most recent average monthly 90 day Bank Accepted Bill rate quoted in the previous month's Reserve Bank Bulletin in Table F1: Interest Rates and Yields - Money Market. For example, interest calculations in respect of April 1999 Trust Account balances would use the February average rate quoted in March's Bulletin.
- the account must not be debited any account keeping fees or Government charges. Any such imposts must be charged to the Conveyancer's working account.
- the account must be known by the relevant financial institution to be Year 2000 compliant, or, the relevant financial institution must be currently taking appropriate action to ensure that the account is Year 2000 compliant.

Provided an account complies with these criteria, it is an approved account for the purposes of section 15 of the Act. The choice of financial institution is broad - it includes banks, building societies and credit unions.

It is therefore the conclusion of the Review Panel that the requirement to deposit money into an approved account is a trivial restriction on competition.

Conclusion

The requirement to deposit money into an approved account is a trivial restriction on competition.

4.1.1.4 Requirement to have accounts audited by a registered company auditor

This issue was raised by the National Institute of Accountants, which considers that the current requirement is too restrictive. It suggested that a more appropriate approach would be to require a person acting as an auditor under the Act to either be a registered company auditor OR have completed an appropriate course of study and training conducted over a period of not less than three years and have had practical experience in auditing under the direction of a registered company auditor.

The requirement to use a registered company auditor may be considered to be a more serious restriction on competition. The National Institute of Accountants (hereafter 'NIA') submitted that:-

"the requirement under the Act for a registered company auditor to undertake the audits of Conveyancers' trust accounts is very restrictive and uncompetitive...[S]uch audits, which are known as compliance audits, are not as complex as company audits and do not require the services of a registered company auditor"

Raoul P Dunk also submitted that the current provisions are too restrictive. He argued that members of the Institute of Chartered Accountants or the Australian Society of Certified Practising Accountants should be able to audit trust accounts.

The Review Panel has considered the situation in other States. In those States which permit non-solicitor conveyancing, conveyancers' trust accounts must be audited by a registered company auditor³⁹. The Review Panel has also considered the requirements in relation to land agents' trust accounts, in relation to which similar issues arise. In most States, audits of agents' trust accounts are only permitted to be conducted by registered company auditors or those granted special permission, whether by exemption from the requirement or otherwise⁴⁰. In Queensland, the only exception to this, trust accounts must be audited by members of either the Institute of Chartered Accountants in Australia or the Australian Society of Certified Practising Accountants⁴¹. Thus it is clear that in all States, significant restrictions are imposed on who may audit trust accounts.

There are significant benefits in only permitting registered company auditors to audit conveyancers' trust accounts. It is in the course of audits that problems in the treatment of trust monies first come to light. It is necessary that those auditing practitioners trust accounts are sufficiently skilled in doing so in order to ensure that such problems are identified.

In addition, there is an advantage in having an objective standard set by another regulator, such that when trust accounts are audited, the auditors are accountable to another body as well as the Commissioner for Consumer Affairs. This helps to ensure that appropriate standards are maintained.

When the Conveyancers Act was introduced, the requirement that a Registered Company Auditor audit trust accounts was deliberately inserted, because it was desired to ensure that sufficient rigour was exercised by auditors. There had been a number of problems with trust accounts which had not been realised because of a lack of rigorous auditing. Registered Company Auditors have a lot to lose if they are not sufficiently diligent in their work. This provides an incentive for the necessary high standards to be maintained. The Office of Consumer and Business Affairs has noticed that these auditors are extremely rigorous in the way in which they conduct audits. The Review Panel considers that any lowering of the standards required of auditors would place consumers money at risk.

If members of the National Institute of Accountants or any other persons wish to audit trust accounts, then they should apply for registration under the *Corporations Law*. It is really the standard set by that law which raises a competition issue, not the application of that law by the Office of Consumer and Business Affairs.

Conclusion

The benefits of requiring registered company auditors to audit conveyancers trust accounts outweigh the costs.

³⁹ Conveyancers Licensing Act 1995 (NSW) s86, Settlement Agents Act 1981 (WA) s53.

⁴⁰ *Property, Stock and Business Agents Act 1941* (NSW) s38E, *Estate Agents Act 1980* (Vic) s4 & 66, *Real Estate and Business Agents Act 1978* (WA) s72, *Auctioneers and Real Estate Agents Act 1991* (Tas) s4, *Agents Licensing Act* (NT) s60.

⁴¹ *Auctioneers and Agents Act 1971* (Qld) s108.

4.1.1.5 Restrictions on the investment of trust money

A more significant restriction on competition is the restrictions on the investment of trust money. Depending on the interpretation of the trust account provisions, the Act may prevent conveyancers from withdrawing money from their trust accounts for investment.

There are two possible interpretations of section 16(a), the provision which deals with the payment of money from the trust account:-

- it may mean that the conveyancer may withdraw money from the trust account for payment to the person(s) entitled to it only for the purposes of settlement or other termination of the contract or to satisfy some other debt which it is proper to pay in accordance with the directions of the person(s) entitled to the trust money.
- it may mean that the conveyancer may withdraw the money either for payment to the person entitled or for payment at any time in accordance with the directions of that person, including for purposes such as investment.

The Act does not make clear which interpretation is the correct one. If the former interpretation is correct, then the Act places a restriction on competition. In the absence of the trust account requirements, conveyancers would be able to offer investment as part of their services (to the extent that they did not breach the Corporations Law in doing so). This appears to be an intermediate restriction on conveyancers' conduct. Currently, few transactions involve significant amounts of money being held for a substantial period of time.

4.1.1.5.1 What are the benefits of restricting the investment of trust money outside trust accounts?

Reduced risk of fiduciary default

Where investment outside an agents or conveyancers authorised trust account is permitted, there is a much greater risk of fiduciary default. This greater risk arises because such investments are not subject to the same auditing and record keeping requirements as trust accounts, nor are the financial institutions required to report any problems associated with such investments, unlike trust accounts. This makes it easier for fiduciary default to occur. This is obvious when one considers the objectives of trust account requirements in the first place. If the consumer was not at greater risk where trust monies are being held, then there would be no need for restrictions on trust accounts. However, it is widely acknowledged, throughout Australia and internationally, that consumers are at a special risk in occupations where money is held on trust, and that trust accounting requirements offer a greater protection to consumers than regular accounts do. Investment outside of the trust account takes the money outside this regime and thus exposes it to greater risk.

Protection of the Indemnity Fund

Where conveyancers invest trust money in an account other than the approved trust account, the indemnity fund is deprived of the interest that would otherwise accrue on the

money held in the conveyancer's approved trust account. Concurrently, the risk of monetary loss by the persons entitled to the money is increased, as it will no longer be in a readily traceable and approved trust account. Thus the indemnity fund is exposed on two fronts:-

- (1) loss of income through reduced interest payments; and
- (2) increased risk of default, since the money is no longer in a readily traceable and approved trust account.

If such transactions were to occur on a frequent basis, the viability of the fund may be threatened. This would ultimately result in a reduction of consumer protection.

4.1.1.5.2 What are the costs of restricting investment outside the approved trust accounts?

Purchasers are deprived of the benefit of interest

The main cost of this restriction is that purchasers who have paid deposits are deprived of any interest on their money while that money is held on trust. In smaller transactions, this will not be a significant cost, as both the money invested and the time for which it is held will be relatively small. However, where large deposits are held, and particularly where those deposits are to be held for a long period of time, purchasers may lose significant amounts of money which they would otherwise have earned by way of interest.

Potential for negative impact on development

From the former cost, it follows that there is a potential for a negative impact on development as a result of this restriction. This impact may arise because the types of transactions which will involve large deposits being held for long periods of time will generally be large developments, and potential purchasers may be reluctant to invest in properties where they have to pay large deposits and will earn no benefit on that money for months or even, in some cases, years. However, no evidence has been presented to the Review Panel of purchasers' reluctance to invest in developments as a result of this requirement.

4.1.1.5.3 Cost/benefit analysis

Weighing these factors in the balance, the Review Panel considers that the benefits of the restriction outweigh the costs. Trust money is at such a risk that stringent requirements for its investment are justified.

4.1.1.5.4 What are the alternatives?

The Review Panel considered a number of alternatives to the current restriction.

(a) Allowing investment outside the trust account in limited circumstances

One option for dealing with this issue which the Review Panel considered was to amend the Act to make it expressly clear that such behaviour was permissible.

Were this option to be followed, there would be a number of issues which would arise in relation to the continued protection of consumers and the ongoing viability of the indemnity fund.

Where conveyancers invest trust money in an account other than the approved trust account, the indemnity fund is deprived of the interest that would otherwise accrue on the money held in the conveyancer's approved trust account. Concurrently, the risk to the persons entitled to the money of loss of that money is increased, as it will no longer be in a readily traceable and approved trust account. Thus the indemnity fund would be exposed on two fronts:-

- (1) loss of income through reduced interest payments; and
- (2) increased risk of default, since the money is no longer in a readily traceable and approved trust account.

If this option were pursued, it would be advisable to amend the legislation to create specific requirements for such investments. There are a number of ways in which this could be done.

- The policy of Western Australia and Victoria could be adopted. In these States, large deposits (over \$20,000) must be held in the conveyancer's trust account for a minimum of 60 days, before they can be moved to other investments. This ensures that the fund receives at least some interest on such monies.
- A provision could be enacted to the effect that the trust fund will no longer be liable where the purchaser opts to have the funds moved to another account. This is the current situation in Queensland. It would protect the fund from all liability in such instances.

If either of these options were pursued, it would also be necessary to develop some means to protect purchasers who believe, wrongly, that they are protected by the Act. Purchasers could be protected to some degree by a requirement that all conveyancers disclose, prior to entering into transactions involving the investment of trust monies outside of the approved trust account, that entering into such an arrangement excludes the operation of the Indemnity Fund. Failure to disclose could be made an offence under the Act.

This raises the issue of the liability of the fund should the dealer fail to disclose. The two options are:-

- (a) the fund remains liable; or
- (b) the fund will not be liable.

The advantage of the fund remaining liable would be that it prevents a situation where an unwitting purchaser, believing themselves to be protected by the fund, finds themselves with no form of recourse on default by the conveyancer. The advantage of the fund not being liable is the same as that of limiting the liability of the fund in the first place, namely that the fund is protected from:-

- a) loss of income through reduced interest payments; and
- b) increased risk of default, since the money is no longer in a readily traceable and approved trust account.

Given that the fund exists for the protection of consumers in the first place, any unnecessary reduction in the fund should be avoided.

The use of such a system is not without precedent. Currently under the rules of the Stock Exchange, where certain transactions are entered into the protection of the indemnity fund is lost. Where this occurs, the broker involved is required to disclose the loss of protection to the purchaser. Non-disclosure, however, will not affect the fund's liability (ie if the conveyancer fails to disclose, the fund will still not be liable).

In considering this option, it is necessary to consider how this relates to the public policy objectives of the Act.

The clear objective of the Act is to protect persons who deal with conveyancers from the risk of fiduciary default. Excluding the operation of the indemnity fund where the money was invested other than in the approved trust account would seem contrary to this objective. It is arguable, however, that in a commercial world purchasers should be able to make a commercial decision to either:-

- 1. receive the benefit of interest and bear the risk of fiduciary default; or
- 2. not receive the benefit of interest but have the assurance of protection in case of fiduciary default.

The advantage of such a system is that it enables these transactions to continue, which encourages development, while concurrently protecting the indemnity fund from liability in situations where it has not received the benefit of interest. Essentially, this option enables the purchaser either to have the money invested and gain the benefit thereof, or to retain the protection of the indemnity fund.

On the other hand, it must be acknowledged that there are some valid objections that could be made to this course of action. The clear objective of the fund is to ensure protection of persons entitled to trust money. Prohibiting the investment of trust monies into other than approved trust accounts provides consumers with this protection.

Submissions were divided as to whether such investment should be permitted. The Institute and the Law Society were opposed to such investment being permitted in the case of conveyancers. It was submitted that a conveyancer 'would have money in the trust account for a very short time and the question as to the investment of money does not even arise' (Law Society). The Institute considered that:-

"A prohibition on conveyancers investing trust monies on behalf of clients would be preferable to a policy under which clients would decide whether to receive the benefit of interest and bear the risk of fiduciary default, or forgo the benefit of interest for the assurance of protection in case of fiduciary default. Investment of trust monies by conveyancers on behalf of clients is infrequent, and it would be better to prohibit these transactions rather than encourage them."

The Real Estate Institute of South Australia, on the other hand, considered that such investment should be permitted, under certain circumstances.

The Review Panel considers that a uniform approach should be adopted to the treatment of land agents and conveyancers trust monies. However, it does not feel that the approach outlined above adequately protects either consumers or the fund (which is there for the protection of consumers).

(b) Allowing conveyancers to negotiate a higher interest rate with the bank and purchasers receive the difference

A further alternative has been considered by the Review Panel which may better ensure the protection of consumers and the fund, but would still allow some flexibility in the use of trust money. The suggestion is to allow conveyancers to negotiate a better rate of interest than the current minimum required by the Commissioner for Consumer Affairs. Where conveyancers are able to do so, then the difference between the interest rate set by the Commissioner for Consumer Affairs and the negotiated rate would be passed on to the person on whose behalf the money was being held.

This system would have two advantages:-

(1) protection of the indemnity fund

The money would still be being held in a trust account and subject to the same auditing requirements as all trust accounts held by conveyancers. Thus there would be considerably less risk to the fund than if any form of investment outside the trust account was permitted. Further, the fund would continue to receive the benefit of interest, so that its ongoing viability would be better assured.

(2) Those paying large deposits are not completely deprived of interest

The type of situation in which this level of flexibility would be most beneficial is where a purchaser has paid a large deposit to the vendor, and settlement will not take place for a significant period of time. In such a situation, preventing any form of investment of the money would result in the purchaser being deprived of any interest that could have been earned on that money for however long the period is until settlement. This could have a negative impact on investment in this State. However, where investors may receive at least some of the benefit of their money over the period in which it is held on trust, there may be more benefit for purchasers.

While the Review Panel seriously considered this option, it was pointed out that there would be significant administrative problems with it. There are already substantial difficulties in keeping financial institutions informed and educated on their responsibilities regarding the accurate calculation and forwarding of interest to the Commissioner for Consumer Affairs. Implementation of the recommendation would introduce an additional layer of complexity and potential source of confusion.

(c) Establishment of Trust Accounts maintained for the exclusive benefit of a particular client

The Review Panel has also considered the scheme in place under the *Legal Practitioners Act 1981*. Under that scheme a legal practitioner is required to place all trust money received into an interest bearing trust account. Interest paid on these monies is to be passed on to the Law Society and is ultimately applied to the funding of the Legal Practitioner's Guarantee Fund and the Legal Services Commission.

However the scheme differs from that under the *Conveyancers Act 1994* to the extent that legal practitioners may establish a trust account for the exclusive benefit of a particular client⁴². Upon receipt of written direction from the person entitled to the money,⁴³ a legal practitioner may deposit trust money into that account rather than into their general trust account. In this event, the interest earned on the trust money is not required to be paid to the Law Society, rather the interest may be passed back to the person entitled to the money. Therefore the consumer does not lose the benefit of interest payments on large amounts held for a significant time.

The Review Panel understands that the scheme is most commonly used in instances such as the administration of an estate where the matter involves significant sums of money and is likely to take a long time to settle.

There are two important points to note about the scheme. Firstly, trust money dealt with in this way does not lose its nature, it remains trust money. Therefore, in the case that the legal practitioner commits fiduciary or professional default in relation to the money, the person entitled to the money may still be able to claim against the guarantee fund.⁴⁴

The second point to note is that the scheme imposes stringent reporting requirements on legal practitioners. If a legal practitioner receives a written direction from a client to place trust money into a trust account maintained for the exclusive benefit of the client, then they must retain that written direction as part of their records.⁴⁵ A practitioner must also keep a register of direct payments and any trust money not deposited in the practitioner's trust account is required to be noted in that register.⁴⁶ The details which are required to be kept in the register include the date of the receipt, the name of the person on whose behalf the money is received, the amount of the receipt and the reference number of any cheque. In this example the practitioner would need to make such an entry as a deposit into the account would be a direct payment. These requirements allow an audit trail to be established in the event that a dispute arises or a default occurs.

This system therefore has two advantages :

- (1) it overcomes the problem of consumers being deprived of interest on trust money where the amount is significant and held for a long time; and
- (2) it addresses problems of increased risk of default as identified in the other proposals by implementing a strict reporting regime.

⁴² *Legal Practitioners Act 1981* section 57A

⁴³ *Legal Practitioners Act 1981* section 31(2)

⁴⁴ The Review Panel notes that a claimant will have to satisfy all the criteria for claiming against the Guarantee Fund as set out in Part 5 of the *Legal Practitioners Act 1981*.

⁴⁵ *Legal Practitioners Regulations* regulation 17

⁴⁶ *Legal Practitioners Regulations* regulation 18

The Review Panel accepts that the system does have a disadvantage in so far as the money retains its character as trust money and therefore in the event of fiduciary default the indemnity fund would be liable. This is problematic as the indemnity fund would not receive the benefit of interest on these accounts. Therefore, those consumers who place money into a conveyancer's ordinary trust account would be effectively subsidising those who chose to place their money into the exclusive personal trust account.

If such a scheme were to be adopted in relation to Conveyancers, the Review Panel considers that this may be a less restrictive alternative to the current scheme. The Review Panel therefore recommends that the Commissioner for Consumer Affairs further investigate this proposal in consultation with industry, consumer and other interested parties.

Recommendation

That the Commissioner for Consumer Affairs investigate this proposal further in consultation with industry, consumer and other interested parties.

4.2 Professional Indemnity Insurance

The barrier to entry presented by the requirement that all conveyancers hold professional indemnity insurance was discussed above. However, the mandatory nature of the insurance scheme represents a further restriction on competition. Under the regulations, all conveyancers are required to be insured with the approved scheme of insurance. Regulation 7B provides that:-

- (1) A conveyancer who, according to the terms of the approved scheme, may obtain coverage under the scheme must do so unless the person was, immediately before the commencement of this subregulation, insured under some other professional indemnity insurance policy.
- (2) The exemption under subregulation (1) ceases to apply to a conveyancer when the professional indemnity insurance policy under which the conveyancer is insured expires or 12 months after the commencement of subregulation (1), whichever is sooner.

A scheme has been organised through Marsh Ltd, and all conveyancers are required to be insured under this policy.

The prescription of the scheme restricts competition between insurers for the professional indemnity insurance of conveyancers. While firms are able to compete for the master policy insurance contract, once the master policy has been developed, other firms cannot compete to insure individual conveyancers. This may result in higher premiums for some conveyancers, who, in the absence of the master policy, may be able to negotiate lower premiums on the basis of their claims record.

4.2.1 What are the benefits of this restriction?

The Institute detailed a number of benefits of the system, as follows:-

- *Every conveyancer is guaranteed insurability. There would be no 'uninsurable risks' and consequently, insurers would not become de facto licensing authorities.*
- *Bargaining power is increased and there is an ability to negotiate the premiums collectively. There is an ability to change the policy in order to meet changing markets and risk, for example where conveyancers extend the range of work as with community titles.*
- *Insurers cannot avoid paying out for non-disclosure or misrepresentation.*
- *Institute involvement means that claims handling can be done with more sensitivity and fairness since there is some participation in the underwriter's claims handling philosophy.*
- *The provision of statistics and information affords the ability to identify problems and respond to them.*
- *Free run-off cover backed by the master policy.*
- *The policy will cover any claim made against a practitioner regardless of how long ago the action giving rise to the claim occurred and regardless of the fact that the practitioner was never insured prior to the master policy.*
- *The policy is a true civil liability policy which has extensively wide cover.*
- *Ease of administration, a master policy will eliminate problems involved with monitoring policies, regulation the policy wording and policing of policies in general.*
- *Under the master policy the broker is agent for the Institute not the insurer and has a fiduciary duty to the Institute.*

The benefits of the policy can therefore be divided into 4 different categories:-

- (a) reduced barrier to entry
- (b) wide ranging cover
- (c) administrative ease; and
- (d) assistance in risk management and prevention.

4.2.1.1 Reduced barrier to entry

Having a master policy has also enabled the policy to be negotiated so that low fee earners pay a lower premium. This reduces the barrier to entry, particularly for casual or part-time conveyancers. The reduced premium for low fee earners also assists those in their first years of practice, where they are unlikely to have the income of more experienced practitioners. If these conveyancers were forced to pay the same premium as those with greater incomes, it may keep some out of the industry, resulting in a further barrier to entry.

Additionally, it is likely that if there were an approved provider scheme, rather than a mandatory one, the lower risk conveyancers would find it easy to get insurance, while higher risk conveyancers may have considerably more difficulty, or may find it impossible to get insurance. If the holding of professional indemnity insurance from an approved provider was a requirement for registration as a conveyancer, this could have the end result

of reducing competition within the industry, by raising a further barrier to entry. Even where higher risk conveyancers were able to obtain professional indemnity insurance, the premiums may be too high for some to afford.

4.2.1.2 Wide ranging cover

Having a master policy has enabled wide ranging cover to be negotiated with the provider. This cover includes run off cover, and cover over any claim made against a practitioner regardless of how long ago the action giving rise to the claim occurred and regardless of the fact that the practitioner was never insured prior to the master policy.

If the policy were not a master policy, it would have been much more difficult, if not impossible, to get this level of cover.

This is a benefit for consumers. It means that the consumer is protected, regardless of how long ago a claim arose and regardless of the fact that the practitioner was never insured prior to the policy. It must be remembered that the reason for making professional indemnity insurance mandatory is not to protect conveyancers but to protect consumers. They are the ones who ultimately benefit from a wider ranging cover.

4.2.1.3 Administrative ease

Having a master policy of insurance results in greater ease of administration. Rather than the Office of Consumer and Business Affairs having to assess a number of different policies applicable to different conveyancers to ensure that all comply with any statutory requirements, one policy has been developed to cover all conveyancers. This also obviates the need for requirements of the policy to be laid down by regulation, which allows for greater flexibility to meet the changing requirements of the conveyancing occupation, and thus protect consumers in all situations in which conveyancers are providing services to the consumer.

4.2.1.4 Assistance in risk management and prevention

A further benefit of a mandatory scheme is that it assists in risk management and prevention. It does so by allowing all claims on the insurance to be recorded in one place, which then enables these claims to be analysed and any areas where risks are identified as arising frequently can be addressed through educational programs or other risk management strategies. This has an ultimate public benefit in the reduction of the risks faced by consumers and the greater professionalism of conveyancers.

4.2.2 What are the costs?

The Institute submitted that *"the costs are comparable to an approved insurer scheme"*. It was submitted that:-

"Premiums can only be reduced by refusing to insure conveyancers who might be considered to be at greater risk or by deleting important provisions of the master policy, such as those relating to payment of claims in cases of non-disclosure or misrepresentation."

While this is true, a master policy does prevent individual conveyancers from seeking alternative insurance. This is particularly relevant for lower risk conveyancers, who may be able to achieve lower premiums if able to achieve individual insurance. It should be noted that no evidence has been presented to the Review Panel that lower premiums would be available to low risk conveyancers. However, notwithstanding this, the Review Panel acknowledges that some conveyancers may be able to negotiate lower premiums and that for these conveyancers and their clients, there is an additional cost associated with being required to insure under a mandatory scheme.

A master policy scheme means that in effect, “good conveyancers” are subsidising “bad conveyancers”. This is a market problem which is not easily addressed. However, the use of excesses may alleviate this problem to some extent (the more claims made, the greater the excess).

The restriction also limits competition between insurers for conveyancers professional indemnity insurance. However, this is partly addressed by the tendering process which occurred when the policy was first negotiated. There was significant competition between insurance providers at that time. Further, the Insurers are subject to annual review by the broker and the Institute. The broker’s appointment is ongoing, subject to the Institute’s option to re-tender the services at their discretion at any stage in the future.

4.2.3 Assessing the costs and benefits

There are many benefits of the master policy which could not be achieved if each conveyancer could nominate an individual insurer. The Review Panel has assessed these benefits against the costs of the master policy and considers that the benefits of the scheme outweigh the costs. Implicit in this analysis has been a consideration of the only alternative, namely an approved insurer scheme. While this would eliminate the costs of the mandatory scheme, it would not be possible to achieve the benefits of that scheme with an approved insurer scheme.

All of these factors were considered when the legislation was first introduced, and, after detailed consideration of the costs and benefits and the use of an independent consultant, it was decided at that stage that a mandatory scheme was the scheme that would provide the optimum benefit to consumers. The Review Panel does not consider that this situation has changed. Indeed, the Review Panel considers that not only are there significant benefits to consumers in the form of the type of cover which is available, but also that it is likely that it is possible to obtain a better price at the moment given the current characteristics of the market.

The Review Panel’s position is based on two main factors: the size of the market in South Australia and the current characteristics of the market for professional indemnity insurance generally.

South Australia is a small market. There are less than 700 registered conveyancers. Where individual conveyancers are wanting insurance, there is unlikely to be sufficient enough competition for these conveyancers to have bargaining power to obtain the best type of cover. There is no use in inserting requirements for professional indemnity insurance in the regulations if no insurer is willing to offer that level of cover. Alternatively, the cover would

be likely to be offered at a premium which was so high as to represent a far more significant restriction on market conduct than that which currently exists.

The Review Panel specifically sought information from insurance brokers and the Insurance Council regarding the market alternatives to the scheme. As already acknowledged, it may be the case that in a deregulated market some conveyancers might be able to negotiate lower premiums. Therefore, these conveyancers presently bear a cost as a result of the current scheme. However, it must be noted that these constitute private rather than public costs. National Competition Principles require the weighing of public costs and benefits, not private costs and benefits. Whilst it is acknowledged that in some cases private costs can be of such magnitude that they result in public costs being incurred, this is not always the case. Rather, private costs may in certain circumstances lead to public benefit. However, no information was provided indicating that deregulation of the scheme would result in lower prices and further, the Review Panel received no suggestions for alternative regimes.

The Review Panel therefore considers that the benefits of the master policy outweigh the costs. The Review Panel further concludes that there are no viable alternatives to the master policy scheme.

Conclusion

The benefits of having a master policy outweigh the costs.

There is no viable alternative to a master policy.

4.3 Disciplinary Provisions

The Act prescribes certain situations in which disciplinary action can be taken. The objective of these provisions is to provide remedies over and above those which exist under other Acts and at common law. They provide a way of excluding persons from the industry who have demonstrated that they pose a risk to consumers.

Disciplinary action may be taken against a conveyancer where the registration of the conveyancer was improperly obtained, where the conveyancer has acted contrary to an assurance accepted by the Commissioner under the *Fair Trading Act 1987*, contrary to other Acts governing the conduct of conveyancers, has acted unlawfully, improperly or negligently, or has acted in such a way that the conveyancer would not be able to obtain registration if they attempted to apply, or are otherwise no longer fit and proper.

Action may be taken against each director of a body corporate where there is proper cause for disciplinary action against the body corporate. This includes a shadow director. This prevents people hiding behind the corporate veil in an attempt to evade the provisions of the Act.

There are a number of penalties available which range from a reprimand or a fine to suspension or expulsion from the industry. The grounds for disciplinary action are quite extensive, as are the types of disciplinary action which may be taken. This allows flexibility in the treatment of conveyancers, and enable proportionality in the action taken against conveyancers, while concurrently ensuring that consumers are properly protected.

4.3.1 Implications of the provisions

The disciplinary provisions may be seen as placing some restrictions on market conduct. The market conduct which is restricted by these provisions, however, is conduct which is wholly undesirable - negligence or deliberate wrongdoing. Restricting such conduct cannot be seen as truly restricting competition. Additionally, such conduct is penalised under the common law.

All submissions agreed that the disciplinary provisions are necessary for the protection of consumers and do not unduly restrict competition. The Review Panel considers that disciplinary provisions are a trivial restriction on competition.

Conclusion

The disciplinary provisions are a trivial restriction on competition

Recommendation

The Review Panel recommends that the disciplinary provisions be retained.

4.4 Sole purpose requirement

In addition to the general restrictions on market conduct which apply to both incorporated conveyancers and conveyancers who are natural persons, specific provisions regulate the market conduct of incorporated conveyancers. Such conveyancers must contain a provision in their constitution to the effect that the sole object of the company is to carry on business as a conveyancer. Non-compliance with a provision of the constitution of the company is an offence under the Act.

This stipulation imposes a significant restriction on the way in which an incorporated conveyancer can conduct its business. It prevents an incorporated conveyancer from carrying on any other business, regardless of any skills that its employees may possess in other areas. This can be contrasted with natural persons who are conveyancers, who may carry on any other business in conjunction with their conveyancing practice.

The area where this may be particularly relevant is the area of mortgage financing. Conveyancers have frequently carried on business in this area. However, mortgage financing activities do not come within the definition of "conveyancer" contained within the Act. Therefore, natural persons may carry on mortgage financing in conjunction with their conveyancing business, but incorporated conveyancers may not.

The Law Society submitted that *"there should be no difference between the activities allowed to be undertaken by a conveyancer as a 'natural person' and an incorporated one"*. The Review Panel considers that this is a strong argument. CASA agreed that the restriction *"is a restriction not justified on a consumer protection basis"*.

No submissions raised any compelling evidence of benefits arising from this restriction. The costs are clear: reduced flexibility and innovation. In this light, the Review Panel considers that the costs of this restriction outweigh the benefits and that it should be removed.

Conclusion

The costs of the sole purpose requirement outweigh the benefits.

Recommendation

The Review Panel recommends that the sole purpose requirement be removed.

*Appendix 1 - Conclusions and Recommendations***CONCLUSIONS****Conclusion 1**

The relevant market is the market for the provision of conveyancing services. The Act also affects the market for the provision of professional indemnity insurance.

Conclusion 2

There is an ongoing need for regulation of conveyancers.

Conclusion 3

The definition of conveyancer does not restrict competition unduly. Any broadening of the scope of work undertaken by a conveyancer should be considered under the review of the Legal Practitioners Act.

Conclusion 4

The benefits of the requirement to hold prescribed qualifications outweigh the costs. There is no viable alternative to this requirement.

Conclusion 5

Current requirements under the TAFE course are appropriate. The requirements of the degree course may be excessive. However, given that prospective conveyancers still have a choice of which course to pursue, the Review Panel considers that this is not a restriction on competition.

Conclusion 6

The benefits of the restrictions on reputation outweigh the costs

Conclusion 7

The benefits of the requiring conveyancers to hold professional indemnity insurance outweigh the costs. The Review Panel did not identify any viable alternatives to this requirement.

Conclusion 8

There is no justification for the continued retention of general ownership and partnership restrictions for conveyancers.

Conclusion 9

The fees at their current level are a trivial restriction on competition.

Conclusion 10

The benefits of trust accounting requirements outweigh the costs.

Conclusion 11

Any alteration of the restrictions on the use of electronic commerce should wait until a whole of government approach to this issue has been established.

Conclusion 12

The requirement to deposit money into an approved account is a trivial restriction on competition.

Conclusion 13

The benefits of requiring registered company auditors to audit conveyancers trust accounts outweigh the costs.

Conclusion 14

There are no viable alternatives which would enable investment outside the trust account.

Conclusion 15

The benefits of having a master policy outweigh the costs.

Conclusion 16

There is no viable alternative to a master policy.

Conclusion 17

The disciplinary provisions are a trivial restriction on competition

Conclusion 18

The costs of the sole purpose requirement outweigh the benefits.

RECOMMENDATIONS

Recommendation 1

The Review Panel recommends that the requirement to hold prescribed qualifications be retained.

Recommendation 2

Nonetheless, the Review Panel considers that it may be appropriate to revisit the qualifications once National Competencies have been developed.

Recommendation 3

The Review Panel recommends that a restriction be retained, but that it be modified so that a conviction for a summary offence of dishonesty will only disqualify a person from registration as a conveyancer for ten years.

Recommendation 4

The Review Panel recommends that the requirement that all conveyancers hold professional indemnity insurance be retained.

Recommendation 5

The Review Panel recommends that sections 7(3), 10, 11 and 12 of the *Conveyancers Act* be repealed and replaced by a requirement that an incorporated conveyancer be properly managed and supervised by a registered conveyancer. In addition, it should be an offence under the Act for a director of an incorporated conveyancer to unduly influence a registered conveyancer in relation to the performance of his or her duties. This Review Panel recommends that this be both an offence and cause for disciplinary action against both the director and the incorporated conveyancer.

Recommendation 6

The Review Panel recommends that the disciplinary provisions be retained.

Recommendation 7

The Review Panel recommends that the sole purpose requirement be removed.

Appendix 2 - Terms of Reference

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

Consistent with the Competition Principles Agreement, the review should assess whether any restrictions on competitive conduct represented by the *Conveyancers Act* are justified in the public interest by:-

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

1. METHODOLOGY AND TIMETABLE FOR REVIEW

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

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

2. CONSULTATION

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

3. THE REVIEW PANEL

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

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

4. CONTACT OFFICER

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Appendix 3 - Consultation List

- * Mr E.C. Dixon
- * Ms H. Scotcher
- * ACT Consumer Affairs Bureau
- * Australian Institute of Conveyancers (SA Division) Inc
- * Australian Small Business Association
- * Committee of Investigating Mortgagees
- * Consumers Association of South Australia
- * Department of Education, Training and Employment (SA)
- * Department of Human Services (SA)
- * Department of Justice (Vic)
- * Institute of Chartered Accountants in Australia (SA Division)
- * Knight Frank
- * Local Government Association
- * MMAL
- * Office of Consumer Affairs (Qld)
- * Office of Consumer Affairs and Fair Trading (NT)
- * Real Estate Employers Federation of South Australia
- * Society of Auctioneers and Appraisers (SA) Inc
- * Mr P. Wood
- * Accreditation and Registration Council
- * Australian Competition and Consumer Commission
- * Australian Property Institute (SA Division)
- * Australian Society of Certified Practising Accountants
- * Consumer Affairs Division, Commonwealth Treasury
- * Delfin Property Group
- * Department of Fair Trading (NSW)
- * Department of Justice (Tas)
- * Department of Transport, Urban Planning and the Arts (SA)
- * Insurance Council of Australia
- * Law Society of South Australia
- * Ministry of Fair Trading (WA)
- * NSW Consumer Protection Agency
- * Office of Consumer Affairs (Tas)
- * Office of Fair Trading and Business Affairs (Vic)
- * Real Estate Institute of South Australia
- * South Australian Employers Chamber of Commerce and Industry

Appendix 4 - Submissions Received

Organisation	Issues Paper	Draft Report
* The Law Society of South Australia	✓	✗
* National Institute of Accountants	✓	✗
* Australian Institute of Conveyancers	✓	✓
* Real Estate Institute of SA	✓	✓
* Consumers Association of SA	✓	✗
* Department for Administrative and Information Services (SA)	✓	✓
* Department of Fair Trading (NSW)	✓	✓
* Raoul P. Dunk & Co	✗	✓
* Insolvency Practitioners Association of Australia (SA & NT Division)	✗	✓
* Department of Human Services	✗	✓