

ESTATE AGENTS COUNCIL LICENSING SYSTEM REVIEW 2006

In October 2005, the Minister for Consumer Affairs asked the Estate Agents Council to conduct a review of the scope of the licensing system under the *Estate Agents Act* 1980 and its associated regulations.

The objective of the review is to establish the industry's perspective on the feasibility of creating greater competition within the real estate industry. To this end, the Council was asked to assess the benefits and costs of broadening the scope of the existing licensing system in Victoria; and in particular, to identify any advantage or detriment that arise for consumers.

TERMS OF REFERENCE

The Estate Agents Council (“EAC”) is to enquire and report to the Minister for Consumer Affairs in writing on the scope of the licensing system under the Estate Agents Act 1980 (“the Act”) and regulations there under (“the Regulations”).

The report should be based on consultation with all stakeholders, including representatives from the industry, consumers groups and relevant professional bodies including bodies representing professional lawyers and accountants.

The objective of the enquiry is to establish the industry’s perspective on the feasibility of creating greater competition within the real estate industry.

In undertaking this enquiry, the EAC should endeavour to assess the benefits and costs of broadening the scope of the existing licensing system in Victoria. In particular, it should attempt to quantify any advantage or detriment that it identifies that might be incurred by consumers and others arising as a result of broadening the licensing system.

In considering the costs and benefits of relaxing the present requirements on lawyers, accountants and other suitably qualified professionals to obtain an estate agent’s licence, the EAC should—

- have regard to the existing licensing criteria under the Act and the Regulations;
- consider whether there are any elements in the training of estate agents or other criteria to obtain a licence that are not effectively covered by the current training, accreditation or other requirements of legal, accounting and other professionals who might wish to be exempted from part or all of the requirements existing licensing criteria;
- evaluate whether the elements of the training identified in the above dot point are necessary for the protection of consumers and why; and
- recommend what changes, if any, might be made to the current requirements for members of each of the relevant categories to qualify for licensing.

*Estate Agents Council
Licensing System Review
2006*

Interim Report

1. Terms of Reference

In late 2005, the Estate Agents Council was asked to review the Estate Agents' Licensing system using the following terms of reference.

TERMS OF REFERENCE

The Estate Agents Council ("EAC") is to enquire and report to the Minister for Consumer Affairs on the following matter:

- the scope of the licensing system under the *Estate Agents Act 1980* ("the Act") and regulations there under ("the Regulations");

The report should be based on consultation with all stakeholders, including representatives from the industry and consumers groups, and in especially in the case of the first enquiry, relevant professional bodies including bodies representing professional lawyers and accountants.

The objective of the enquiry is to establish the industry's perspective on the feasibility of creating greater competition within the estate agents industry.

In undertaking this enquiry, the EAC should endeavour to assess the benefits and costs of broadening the scope of the existing licensing system in Victoria. In particular, it should attempt to quantify any advantage or detriment that it identifies that might be incurred by consumers and others arising as a result of broadening the licensing system.

In considering the costs and benefits of relaxing the present requirements on lawyers, accountants and other suitably qualified professionals to obtain a real estate agents license, the EAC should:

- have regard to the existing licensing criteria under the Act and the Regulations;
- consider whether there are any elements in the training of real estate agents or other requirements to obtain a license that are not effectively covered by the current training, accreditation or other requirements of legal, accounting and other professionals who might wish to be exempted from part or all of the requirements existing license conditions;
- evaluate whether the elements of the training identified in the above dot point are necessary for the protection of consumers and why; and
- recommend what changes, if any, might be made to the current requirements for members any of the existing of each of the relevant categories to qualify for licensing.

2. *Interpreting the requirements of the TOR*

In determining the overall objective of the Terms of Reference, the Council has been assisted by Consumer Affairs Victoria's *Background Paper To Support Review of Scope of Real Estate Licensing by the Estate Agents Council*.¹

The overall objective is to provide a report that establishes 'the industry's perspective on the feasibility of creating greater competition within the estate agents industry', and recommend what changes might be made (if any) to licensing arrangements. While the ToR specifically refer to 'lawyers, accountants and other professionals', the review is not limited to them.

The EAC agrees with CAV² that it has been tasked to consider the following matters:

- existing licensing regimes under other Acts and Regulations
- scope of training requirements of lawyers, accountants and other suitably qualified professionals compared to those of estate agents
- the need for the training required to protect consumers
- changes need to the qualifications of persons who are lawyers, accountants or other suitably qualified professionals and estate agents to qualify for an estate agent's license

The benefits and costs of broadening the scope of the regulatory regime needs to:

- quantify any advantage to consumers and others
- quantify any detriment to consumers and others

The assessment relates to consumers and other persons served by estate agents.

CAV also advises that in assessing benefits and costs, general principles of regulatory best practice need to be considered.

To properly consider these matters, the EAC believes it also needs to know the current level of competition in the sector (and how this is best determined) and the extent to which previous changes have affected this level of competition. It would be also useful to know the capacity of the industry (or relevant segments of it) to effectively move to a more self-regulatory model.

As CAV points out, there are a number of previous reports that have ranged across these issues that may be able to provide some guidance for the EAC in assessing the submissions.

¹ *Background Paper to Support Review of Scope of Real Estate Licensing by the Estate Agents Council*, Consumer Affairs Victoria/Tunstall Consulting, March 2006.

² *Ibid*, page 3.

3. Submission received

While submissions formally closed on March 6, a number of submissions arrived (with permission) after that date. The last was received on March 27. Submissions have been received from the following:

- individual estate agents and solicitors (22)
(This includes two submission made via Members of Parliament)
- specialist consultants (1)
- Real Estate Institute of Victoria Ltd (2)
- Law Institute Victoria (Property and Environmental Law Section)
- Australia Livestock and Property Agents Association Ltd
- CPA Australia
- National Institute of Accountants
- Shopping Centre Council of Australia
- Tenants' Union of Victoria Ltd
- Property Council of Australia
- CBRE

The following presented a submission more in the way of a background/issues paper:

- Consumer Affairs Victoria
- Business Licensing Authority

The following stakeholders declined the opportunity to participate:

- Property Investment Association of Australia

The following did not respond to the invitation to participate:

- Australian Consumers' Association
- Financial & Consumer Rights Council
- Property Owners Association of Vic Inc
- Consumer Law Centre
- The Institute of Chartered Accountants
- Financial Planning Association of Aus (Vic)
- Australian Property Institute
- Jones Lang LaSalle
- Knight Frank
- Colliers International

4. Overview of submissions/papers

The outlines of the submissions/background papers received so far are as follows:

Consumer Affairs Victoria

Consumer Affairs Victoria provided a background paper to assist the EAC. The paper covers a range of issues including:

- The objectives of the Estate Agents Act and regulations
- The EAC reference
- Industry concerns
- Previous reviews
- Determining the public interest
- Assessing costs and benefits
- Broader issues

The objectives of the Act

While the Act does not have explicit objectives, CAV believes the implicit objectives of the Act relevant to this review might be characterised as being to:

- promote adequate standards of competency in the provision of services by estate agents
- minimise defalcation of clients' money held in trust including sales deposits, rents and other moneys paid in advance, and
- maximise the recovery of funds lost (due to residual dishonesty and incompetence) through defalcation

Industry concerns

The background paper summarises industry concerns as follows:

Standards, training and experience requirements

- Removing or reducing existing standards under the Act could make it more difficult for skilled estate agents to differentiate themselves from less competent operators, to the detriment of consumers dealing with the latter
- Inexperienced persons beginning real estate businesses may not fully comprehend the needs of vendors and purchasers, creating substantial risk for consumers
- Other business competence may be lacking such as negotiation ability, the capacity to encourage bids or offers that would realise market values, attending to proper disclosure documentation, and avoidance of discrimination in favour of some persons over others

One-stop-shops

- If lawyers, accountants or other relevant professionals were able to become licensed estate agents more easily than at present, they could set up one-stop-shops without involving proven estate agency specialists
- While this may appear attractive to customers, it may not be in their best interests as they may not get the best advice free of 'conflicts of interest'.

- Estate agents would be at a disadvantage to lawyers and accountants as they would not be qualified to perform the legal aspects of a conveyance or provide financial advice as a financial service provider.

Previous Reviews

The background paper points out that training, experience and conduct requirements have been the subject of previous reviews. These were:

- an inquiry into real estate agents' fees by the Prices Surveillance Authority (1992);
- a review of the Real Estate Agents' Act under National Competition Policy by KPMG (2000), and
- a report on directions for the harmonisation of real estate regulation prepared by Jaguar Consulting (2005) which was managed by CAV on behalf of the Standing Committee of Officials of Consumer Affairs (2005)

The paper lists the following key points made about the reviews:

Training and experience

- analysis of these reviews demonstrates that many of the claims of consumer benefit from high mandatory standards for training and experience remain unsubstantiated
- all the reviews argue the Act should provide only the essential requirements for training, experience and conduct; that is requirements that clearly address unacceptable risks to consumers
- while there were differing views about the experience requirement, it had been reduced considerably in Victoria since 1992, it is no longer a requirement in Queensland, New South Wales, the ACT and South Australia
- the KPMG review in relation to National Competition Policy did not identify training requirements per se as an issue of concerns. However NCP reviews in SA and NT found existing educational standards were restrictive
- the Jaguar Consulting review found: there was no substantial basis for the inclusion of business skills training in qualifications for real estate licensing; mandatory training should be in accordance with consumer protection objectives only with a focus on real estate regulatory requirements, property sales and property management and communicating effectively with consumers, and that training thought desirable for other purposes should be promoted through encouragement of industry-based accreditation schemes
- the PSA and KPMG reviews found education and training requirements for licensing were excessive and a barrier to entry to other professions

Entry of other professions

- the Government accepted the KPMG Review's proposal to amend the Act to provide an alternative route for appropriately qualified persons to obtain estate agents licences, which by-passes the experience and training requirements. However, no regulation has been made to prescribe these alternative arrangements

- there is a trend for government to move away from ‘fit and proper person’ tests’ because they are open to anti-competitive abuses and arbitrariness

Levels and types of licenses/regulations

- the KPMG review recommended the introduction of two levels of licences, one for residential sales, and the other for non-residential based on a more detailed segmentation of the industry based on five key functions: sale of business, sale of commercial property (including industrial and agricultural; management of commercial property; sale of residential property, and management of residential property
- the KPMG review recommended it was necessary to continue to underwrite minimum standards of competence for residential sales
- the Jaguar consulting review raised for further consideration they question of whether commercial property dealing should continue to be regulated
- while the PSA review considered that real estate salespeople should not be subject to licensing/registration, the Jaguar Consulting review recommended further work be done to determine whether there is a case for continued regulation
- Jaguar Consulting also recommended a further review of the focus of licensing (should it focus on the business, the practitioner or both) and of the appropriate role of any independent regulatory boards or commissions

The public interest

The background paper sets out the principles to be applied when regulation is being considered, as outlined in the Victorian Guide to Regulation.

- 1. Measures taken to improve consumer protection and information generally benefit businesses and the community by enhancing consumer confidence and promoting more efficient market outcomes.***
 - *Government intervention will focus on recognised market failures and measures in the public interest, including information asymmetry, unmanageable risks and consumer safety.*
- 2. Businesses and consumers are largely capable of making informed decisions on their own.***
 - *It is not the role of government to dictate behaviour or limit choice, unless the reasons for doing so can be clearly justified. As far as possible, the Government will not undermine private capacity and networks, or prevent consumers and businesses from willingly taking on risks that they are capable of managing.*
- 3. The Government will not impose regulation on businesses, markets or consumers without establishing that the benefits outweigh the costs.***
 - *Regulation decisions will be made in the public interest and balance economic, social and environmental objectives.*
 - *Robust regulatory impact assessments will be undertaken on all significant regulatory proposals.*
 - *When assessing regulatory changes, the Government will give particular attention to the financial and time costs imposed on businesses, taking into*

account existing regulatory burdens.

4. Regulation of specific activities, industries or professional groups is a last-resort option.

Preference will be given to:

- *promoting industry self-regulation and best practice, including codes of conduct;*
- *assessing whether existing broader legislation (State or Commonwealth) applies to particular cases; and*
- *using other non-legislative methods (e.g. government provision of information) to address concerns.*

The paper advises:

“However, care needs to be taken that regulation with a public interest focus really does have a net benefit overriding the costs of any reduction in competition and overall efficiency of the economy as scarce resources are redirected. As the PSA observed, regulation “may be excessive in terms of achieving the objective of protecting the public interest.”³

A common strand in all the contemporary thinking on regulation is that it is not sufficient to rely on anecdotal evidence that cannot be justified in analytical terms. More than a few examples will be required to develop a case that there are real and substantial failures that require regulatory intervention in the public interest.”

Assessing the costs and benefits of real estate agent regulation

The background paper sets out a detailed lists of issues that need to be taken into account when assessing the arguments for, and the costs and benefits of, using or changing regulations to address any failure in the market of the provision of real estate services. These go essentially to the following points:

- there needs to be substantial evidence of any failure, not just general perceptions and anecdotal evidence.
- any change needs to clearly demonstrate that it is in the public interest (that is, the benefits outweigh the costs)
- there are no alternative solutions
- the risk is great enough to the public to warrant a continuation of the restriction

The background paper goes on to raise issues of a broader scope, including:

- whether or not the Act is outdated or needed or best suited for the needs of the 21st Century.
- whether there should be reform beyond the estate agents industry, including whether or not a separate Act should be developed to deal with trust account issues (not just for real estate agents)

³ PSA Report No. 43, *Inquiry into Real Estate Agents Fees Relating to Residential Property Transactions*, Final Report, Matter Number: PI/92/4, 25 September 1992 at 17.

- whether there should be reduced reliance on an Act and a greater move to self-regulation

Business Licensing Authority

The BLA submission is in the form of a letter from Chairperson, Fiona Smith. While the submission concedes that it raises more questions than it answers, it makes the following key points:

- it would seem important to explore what regulatory consumer protection objectives and general competencies for real estate agents are intended to be achieved by the 12-month practical experience requirement
- should a specific purpose test of practical competencies be established to accommodate lawyers, accountants and others wanting a license (this would include an essential understanding of the regulatory framework around trusts etc)?
- any expansion of licence eligibility criteria should be done in a way that ensures the criteria are objective
- there appear to be inadequate regulatory safeguards to address the trends which see real estate agents becoming increasingly involved in business arrangements and relationships with finance brokers and companies and/or credit providers and to a lesser extent builders and conveyancers
- there would appear to be inherent risks for the protection consumer interests in considering licensing of professionals such as lawyers and accountants as estate agents. However, these could be overcome through clear statutory rules about disclosure and limitations on particular business practices
- whether in the light of new technologies and practices (particularly across state borders, there should be a national review of estate agency regulation.

Individual Real Estate Agents/Auctioneers/Lawyers

Submissions from 22 real estate agents, auctioneers and lawyers were received ranging from short emails to longer letters. Two submissions came via members of parliament (Jacinta Allan, MLA Bendigo East & Dymphna Beard, MLA Kilsyth). While the submissions raised a range of issues, the following key points were common to many:

- there was strong support for the status quo and belief that there was nothing to be gained from greater competition
- there was a strong view the industry was already highly competitive and does not need more competition
- some agents claimed making it easier to enter the industry may lead to reduced competition as margins declined and business became less viable
- there was concern that the entry of lawyers and accountants more easily into the industry could also lead to less competition. The claim was that this would lead to further growth in franchises and 'one-stop-shops'. Making it hard for independent agents to compete
- concerns were raised about standards generally and in particular the conduct of agents representatives
- there was strong agreement that more competition would lead to reduced standards

- there was some support for stricter licensing standards
- there was concern raised about the potential conflict of interest that would be faced by lawyers and accountants if allowed to be real estate agents
- there was strong support for the requirement for 12 months ‘hands on’ experience in the industry. For example, while one agent said they would support the entry of other professionals, it would only be if the experience requirement was increased to two or three years

Many of the issues raised collectively in the submissions from real estate agents are discussed in the background paper provided by CAV mentioned earlier.

Real Estate Institute of Victoria

The REIV provided two submissions.

The first submission was made up of a covering letter, a submission prepared by the Allen Consulting Group and quantitative research conducted by the Australian Research Group Pty Ltd on Attitudes Towards Real Estate Agents in Victoria. The key points of the submission are:

- there is currently a high level of competition (measured by growth in licensed agents)
- appropriate education and training of real estate agents protected consumers and there was little practical need to relax requirements
- Victoria is compliant with National Competition Policy and there are no reasons for change
- there has been a high level of change in previous years and the need for further change is questioned
- broadening of the licensing system could lead to reduced standards and conflicts of interest
- national harmonisation would present consumers greater benefits than regulatory changes in Victoria
- there is little demand from consumers from broadening for broadening the system (According to their research 83% would continue to use licensed real estate agents even if the scope was broadened to make it easier for other professions)
- any issues that arise should be considered as part of a wider national harmonisation process

While the REIV supports ‘no change’, it was happy to further explore the option of the 12-month experience requirement being satisfied through an academic course. (It is also worth noting that the survey results presented could also be used to argue for a change. The research suggests that any changes will have a minimal impact overall, so existing agents therefore have nothing to fear.)

The second submission consisted of a covering letter and a second piece of quantitative research on commercial and industrial real estate agents conducted by the Australian Research Group Pty Ltd. The key points of the submissions are:

- there is no need or demand for a relaxation of the licensing requirements for professions to become estate agents
- the research supports the REIV's position (outlined in the previous submission (see above))

Two points should be noted about this research. First, there is no classification of commercial or industrial agents by either the type or size of the transaction, and that while 94% considered on-the-job training to be as important as an educational qualification, there was little awareness (before being prompted) of this experience being required.

Australian Livestock & Property Agents Association Ltd

The ALPA submission did not support change or any watering down/relaxation of licensing requirements. The key points of their submission are:

- any change would could have detrimental effects in regional and rural areas, causing the demise of established businesses and leading to reduced competition and lower standards;
- any change would raise important ethical issues
- practical experience was vital

CPA Australia

The CPA Australia submission consisted of a two-page letter and appendices that supported a change to make it easier for accountants to become estate agents but only accountants who are members of professional accounting bodies (to protect consumer interests). The CPA believes there is significant merit in enabling suitably qualified accountants to have the opportunity to become estate agents and that a number of CPA qualified accountants were currently employed in the sector as licensed real estate agents. Other key points were:

- the 12-months practical experience requirement was a barrier and consideration needed to be given to alternative pathways
- there was scope for greater collaboration on the necessary training required for real estate agents

National Institute of Accountants

The NIA is one of the three recognised Professional Accounting Bodies in Australia and has 14,000 members (The others being CPA and Institute of Chartered Accountants). The key points of the NIA submission are:

- allowing accountants to do the work of estate agents in certain areas will ease the financial burden on many clients and allow for a more efficient transfer of property, particularly small business;
- the 'certain areas' include: estate with property in probate, the sale of a business or farm that owns the premises through which they operate, and properties that are part of an investment in a self-managed super-fund;
- the opening up of licensing to other professions (which it supports) should only occur when these other professionals have the relevant specific training;
- while there are numerous skills that accountants have which can transfer to being a real estate agent, there are definite gaps;

- there is unlikely to be a massive shift of accountants into real estate agency;
- accountants are trained to high standards, and those who are members of professional bodies also must do continuous professional development and abide by a code of ethics.
- accountants should receive exemptions from study in the prescribed estate agents courses in subject areas that have been covered in their degree (and goes on to list what should be exempted and what should be required to be studied).

The NIA has also drafted an amendment to the Estate Agents (Education) Regulations 2004 to give effect to the points made in its submissions, including a restriction that exemptions should only be given to those who are members of a Professional Accounting Body.

The NIA says it is prepared to work with the REIV to ensure the delivery of appropriate training.

The Shopping Centre Council of Australia

The Shopping Centre Council of Australia submission provides a detailed argument to support its view that 'as large retail property owners do not need consumer protection under the Estate Agents Act, the Act should no longer apply to them.'

The SCCA proposes that:

- agents and property owners would be able to apply for a once-only exemption from the Act in relation to **their management and leasing of retail property** on behalf of nominated property owners;
- this application would have to be accompanied by a statement from the relevant property owner(s) that they waive their consumer protection under the Act and that they consent to the granting of an exemption
- the application could be subject to criteria to ensure the property owner(s) is sophisticated enough not to require consumer protection (along the lines of the Corporations Act)
- (buying and selling would remain under the Act)

The key points of the SCCA submission are:

Summary points:

- the scope of the licensing system under the Estate Agents Act should be reduced rather than widened by removing the unnecessary and costly regulation of retail property agents and managers
- in the non-residential sector the 'consumers' being protected are primarily large national and international institutions who are more than capable of looking after their own interests and do not need or want consumer protection against their agents
- being regulated by the Estate Agents Act only adds complexity and million in dollars of costs that far outweigh the public benefits
- while the Act should continue to regulate residential transactions and smaller commercial property transactions to protect consumers, there is no similar

rationale to regulate leasing and management in the large non-residential sector.

Specific points:

Role and purpose of the Act

- the Act has not kept pace with the enormous changes in Australia's commercial environment and the nature of commercial property ownership
- the Act seeks to protect owners and managers who do not need its protection
- the object of the licensing system is valid for residential and small commercial property transactions where the consumers are households and small businesses with limited knowledge of real estate practices but is not valid in the non-residential sector where the 'consumers' are large national and multinational institutions
- the comprehensive management agreements that underpin the non-residential sector are complex and extend well beyond the matters addressed by the Act
- tenants are not protected by the Act. They are protected by a Residential Tenancies Act or a Retail Leases Act
- large retail property owners would do not need or want a statutory fund to compensate them if their arrangements with an agent fail

Cost of Regulation

- the Act imposes substantial and unnecessary costs on retail property owners, agents, purchasers and tenants
- these costs can be broken up into the organisational restructuring required to meeting licensing requirements, costs of compulsory professional development, administration and audit, banking and cash flow
- the average annual compliance costs for a regional centre could be around \$28,000
- an exemption would deliver substantial costs saving to the Business Licensing Authority

Training and professional development

- shopping centre managers must complete education courses in residential real estate operations even though they are irrelevant to their work
- the skills required for managing and leasing a shopping centre are more akin to managing a department store and the skills required are much more retail than real estate focussed
- people seeking a career in retail property must also waste their time and money on training their prospective employers view as irrelevant
- the ACT exempted commercial property managers in 2003 from training requirements under the ACT Estate Agents Act until June 2006 (pending consideration of a broader exemption).

The SCCA points out that the argument that the current cost of regulation outweighs the benefits was supported by the *National Competition Policy Review of Victorian Legislation relating to the Regulation of Estate Agents* conducted by KPMG for the Department of Justice in 2002.

The Property Council of Australia

The Property Council of Australia submission substantially duplicates and supports the Shopping Centre Council of Australia submission.

Law Institute Victoria (Property and Environment Law Section)

The LIV submission was made by the Property and Environment Law section. The key points are:

- there are clear benefits that a combined legal practice/estate agent can bring to the consumer;
- the duplication for qualification that may exist between legal practitioners and estate agents should be removed, and
- the work experience requirement for estate agents should take into account the work experience of lawyers in practice.

The Tenants Union of Victoria

The Tenants' Union submission focussed strongly on the tenants' experience of real estate agents. While the TUV was not opposed to expanding the range of people able to offer real estate services they were concerned that exempting certain applicants from all or part of the licensing requirements may deliver worse outcomes. The other key points of the submission are:

- the focus should be on protecting tenants from the consequences of poor practice rather than exempting lawyers and accountants from aspects of the licensing regime
- the interests of consumers would be better served by improved training and education programs for real estate agents and by enforcement of relevant laws and standards and the prosecution of unlawful conduct

Neil Dalton Consulting

Neil Dalton Consulting provides auditing and other services to the real estate industry. The submission generally does not support any change to licensing arrangements but believes that more needs to be done on training, particularly in relation to managing the business.

The NDC submission makes the following points:

- both lawyers and accountants have been able to conduct certain real estate activities in Victoria under exemption Clause 5 of the Estate Agents Act 1980 for the past 20 years 'provided that a such activities are in the normal course of their duties as a legal practitioner or for accountants in such duties as executor, administrator, liquidator, trustee or like functions';
- the increase in real estate agent licenses over the past three years from 6096 (30/6/2002) to 7299 at the end of 2005 has created greater competition and has been the result of a range of changes, including changes to the experience criteria and the introduction of competency standards through to deregulation of directorships.

While the changes have increased competition, the NDC submission warns that their experience shows it has led to a growth in real estate businesses which are 'poorly

managed, have extremely loose internal controls, poor management practices and generally have an Officer in Effective Control who has no equity in the estate agency business and is not a Director or Shareholder of the licensed real estate company. This in turn:

- raises concerns about the present licensing curriculum for estate agents ... which provides 'greater risk to the public regarding service delivery and standards by the estate agents and their staff and possibly loss of public trust funds.'

The NDC submissions expresses concern that the growth of fraud cases will continue to grow over the next three years, particularly as the market tightens and the full impact of external ownership of real estate businesses with 'essentially a "dummy" Officer in Effective Control continues to grow...'

The NDC submission recommends:

- strengthening the licensing course, with a greater emphasis on management;
- increasing the experience requirement to 2 years;
- opportunities for lawyers and accountants to become real estate agents have already been expanded and do not need to be expanded any further.

5. Overview and recommendations

Introduction

As mentioned earlier, the first phase of the Review into the Real Estate Agents Licensing System received 34 submissions. There were:

- 22 submissions from individual agents, auctioneers and lawyers
- 5 submissions from the real estate industry representative bodies (the Real Estate Institute of Victoria (2), the Australian Livestock and Property Agents Association Ltd, the Shopping Centre Council of Australia and the Property Council of Australia)
- 3 submissions from other professional associations (the Law Institute of Victoria, the National Institute of Accountants and CPA Australia)
- 1 submission from a consultant specialising in management, audit, accounting and training
- A background paper from Consumer Affairs and letter from the Business Licensing Authority

Despite the terms of reference having a strong consumer focus, the Review disappointingly received no submissions on real estate consumer concerns, except for a submission on tenant concerns from the Tenants' Union of Victoria.

Views of stakeholders

While the submissions are summarised in more detail above, the position of each of the stakeholders can be characterised as follows.

‘Residential’ estate agents: Strong support for the status quo while willing to consider some changes in relation to the 12-month experience qualification. There was a strong view that equated quality, standards and consumer protection to training and the 12-month practical experience requirement.

Property managers/non-residential sector: Strong support for change to allow exemptions for this sector of the industry.

Legal practitioners/Accountants: Barriers to entry (duplications in education and training and the 12-month experience requirement) should be reduced or removed. Exemptions should be allowed. All showed a willingness to work with the REIV in training issues.

Consumers: (from tenants’ perspectives): The focus of the enquiry is misplaced. Should be about greater protection of tenants rights and interests.

CAV/BLA: Need to think more broadly and take a range of other issues into account, particularly the recommendations of previous reviews, the principles than underpin modern regulation and the need for strong evidence. For example, are there better ways to achieve the same ends?

One submission (Neil Dalton Consulting) raises concerns that an unintended consequence of legislative changes has been the growth of poorly managed real estate businesses with poor internal financial controls which could lead to the possible loss of trust funds. (This issue is already being addressed separately by the Estate Agents’ Council.)

Other issues

The submissions have raised a number of important issues that go to the nature of the next phase of the Review.

National Harmonisation

Federal, State and Territory governments have been involved in a program to harmonise laws across all jurisdictions to reduce the complexity, difficulties and costs of operating across borders. A number of submissions emphasise that this Review should be conducted in a way consistent with national harmonisation. The EAC agrees, and believes the Review may provide options to progress the national harmonisation process.

Structure of the industry

It is clear that the real estate industry is not ‘one industry’. The structure, complexity and dynamic nature of the real estate industry are raised directly and indirectly in many submissions. There are a number of segments, each of which could be said to require its own skills and training requirements, consumer protection requirements (or otherwise), levels of competition and therefore differing licensing and regulation considerations.

For example, the following types of ‘agents’ and functions were mentioned in the submissions:

- Residential real estate agents and property managers

- Agents representatives
- Non-residential sector property managers
- Shopping centre managers
- Commercial real agents
- Those providing conveyancing and other services (bidders, brokers, etc)
- Sale of businesses

A segmented view of the industry was also at the heart of the KPMG review mentioned earlier. As the background paper says:

‘KPMG’s approach was to segment the regulated industry into separate markets, based on five distinct functions: sale of businesses; sale of commercial property (including industrial and agricultural property); management of commercial property; sale of residential property; and management of residential property. It then found that it was necessary to continue underwriting minimum standards of competence for residential sales, because vendors of residential property may not be able to differentiate between agents on the basis of quality and may not be aware of financially significant risks from choosing a poor agent, such as the risk of a sale being aborted due to faulty documentation.’⁴

What is not clear is the size of each of these segments, how they interact with each other and where the divisions begin, end or indeed, cross over.

For the Review to proceed and for the EAC to be in a position to provide considered advice, it will be essential to approach this Review in the same way, that is, consider each of the industry’s component parts. This will allow (a) the key principles that underpin regulation and consumer protection to be tested against each segment of the market and (b) the EAC to make recommendations specific to that segment of the industry.

Consumer protection

The different segments of the industry have different ‘consumers’ and different ‘consumer protection’ needs and remedies. Some questions follow from this including:

- Which of these ‘consumers’ need ‘consumer protection’?
- What consumer protection is required or is the most important?
- What is the best way of providing that protection?

The Shopping Centre Council of Australia argues that large property owner(s) do not need or want ‘consumer protection’ and are large enough to look after their own interests. They say that having access to ‘consumer protection’ that they neither want nor need only adds significant costs to business.

A key consumer protection issue mentioned in a number of submissions is the use of real estate agents trust funds. Concerns were raised about poor management of trust funds and a possible increase in the level of fraud in relation to trust funds. A concern was also been raised about the monitoring of trust funds and the communication

⁴ Ibid, page 9

between those who monitor the funds and those who license real estate agents. (This issue is already being dealt with separately by the EAC.)

Skills/Standards

The skills and knowledge required and the standards expected of real estate agents is a key focus of the submissions. While there is a link between skills, knowledge and standards it is important to consider these issues separately. For example, there is a level of knowledge and skill required for a person to be a competent real estate agent. The question here is ‘does this person have the necessary knowledge and skills to be a competent real estate agent?’ Standards on the other hand go to issues of professional conduct and service. The question here is ‘what standards of conduct and service are expected and does this person meet those standards?’ Skills and standards can be ‘regulated’ separately and in different ways via legislation, regulation, co-regulation, self-regulation, codes of ethics etc.

The submissions from real estate agents and from the REIV express concern that any further increases in competition and/or changes to the licensing system will lead to a reduction in standards. Some submissions question whether the current training is sufficiently focussed on, and is the necessary standard for, what is required to be a real estate agent. There is strong support in the residential real estate agents sector for the retention of the 12-month experience requirement although it is not clear what it is intended to achieve by way of consumer protection objectives and general competencies for real estate agents. Others, such as the Shopping Centre Council of Australia argue that the current training is irrelevant for the needs of major property managers.

The knowledge and skills required by real estate agents as well as the standards expected are important issues. However, greater clarity is needed on what knowledge, skills and competencies are required for real estate agents (prior to becoming licensed and for ongoing professional development) and what standards should be expected (and monitored) in a 21st century industry. In addition, further discussion and debate needs to occur within the real estate industry about the different ways of developing, maintaining and regulating for them.

The development of agreed education and training requirements and competencies would allow articulation arrangements to be put in place so that other professions can gain credits and/or get exemptions from aspects of the training based on the education and training they have already done and the competencies they can already demonstrate. This would allow greater flexibility and access while ensuring that all licensees meet the industry’s test of knowledge, skills and competencies.

Another issue raised in a number of submissions is the role and training (or lack of) of **real estate agents’ representatives**. For many consumers, the person they deal with may well be an agent’s representative, yet there does not seem to be a system in place that informs a consumer of this (or the difference between a representative and an agent) nor provides options for a consumer who would prefer to deal with a licensed agent. Some agents believe the use (or overuse) of agents’ representatives is having a detrimental impact on image of the residential real estate industry. The EAC believes that the development of agreed education and training requirements for the industry should include those for agents’ representatives.

The submissions also highlight the role of professional organisations in setting, monitoring and promoting standards in their industry. For example, the professional accounting bodies require compulsory minimum ongoing professional development for its members each year. The issue of standards (both of service and conduct) in the real estate industry might also be addressed by investing in the REIV's ability to play a stronger role in the real estate industry.

Discussions with stakeholders

A number of stakeholders did not respond to the invitation to contribute to the Review. The most concerning aspect of this was the failure to get a strong consumer perspective. In addition, the quality of the submissions varies greatly. There is a strong reliance in many submissions on anecdote and opinion rather than hard evidence. It is clear that the views of consumer and other stakeholders will need to be sought to get a broader picture and that a second round of consultations may be required to further discuss and clarify the issues raised.

Recommendations

For the EAC to properly assess the submissions and provide a considered response to the issues raised by the terms of reference it will need to obtain independent advice to inform its deliberations, particularly on the following issues:

- the most appropriate way to 'structure' or 'segment' the industry
- the most appropriate regulation regimes and consumer protection requirement of each of these segments, including an assessment of benefits and costs
- the most appropriate qualifications and education and training standards for each of these segments (with a particular focus on the need for the training required to protect consumers)
- the scope of any additional training requirements of lawyers, accountants and other suitably qualified professionals compared to those required for each of these segments
- existing licensing regimes under other Acts and Regulations (including interstate) and opportunities for greater national harmonisation

The EAC makes the following recommendations for Phase 2 of the Review.

Real Estate Agents' Trust Funds

Recommendation 1

The Issues raised in submissions dealing with the regulation and monitoring of real estate agents trust funds do not come within the terms of reference for this Review and should be dealt with and acted on separately by the Estate Agents' Council. (This work has already begun.)

Understanding the 21st Century industry

Recommendation 2

That the EAC commission research on the most appropriate way of ‘segmenting’ or ‘structuring’ the real estate industry. This research would build on, extend and update the research previously conducted for Consumer Affairs Victoria by KPMG in 2000. (The new research would require a deeper investigation of the industry, particularly in relation to the structure of the commercial real estate sector). It would include strong engagement with the sector to develop and test the segmentation model.

Recommendation 3

That once a structure is developed and agreed, the EAC systematically apply the Terms of Reference to each segment and make recommendations.

Knowledge, skills and standards

Recommendation 4

That in considering the training and other requirements to obtain a licence (and whether other professions should be being able to gain exemption from elements of them) the EAC should draw on the work being done at a national level to harmonise the regulation of the real estate industry in Australia and reduce the complexity, difficulties and costs of operating across borders and to maintain and promote regulating skills, competencies and standards.

This research will also focus on the issue of the status, standing and qualification of agent's representatives..

Consumer Issues

Recommendation 5

That the EAC engage directly with consumer groups to gain their views on the consumer risks and impacts of current licensing arrangements and any proposed changes.