

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

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

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

- 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' fe

- 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

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 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

- 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 is 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

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

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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 ag

‘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.

- 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 requ

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.