



**THE LAW REFORM COMMISSION  
OF WESTERN AUSTRALIA**

**Project No 37**

**Review of  
The Land Agents Act**

**WORKING PAPER**

**JUNE 1973**

## TABLE OF CONTENTS

	Paragraphs
<b>TERMS OF REFERENCE</b>	1-4
<b>SCHEME OF THE WORKING PAPER</b>	5-7
<b>A. LAND AGENTS</b>	
<b>LAW AND PRACTICE IN WESTERN AUSTRALIA</b>	8-33
Supervising authority	10-13
Licensing and qualifications of agents	14-17
Renewal of licences	18
Registration of salesmen	19
Duties of a land agent	20-26
Financial control	27-32
Other agents not covered by the Act	33
<b>DISCUSSION AND TENTATIVE PROPOSALS</b>	34-90
Supervising authority	36-40
Licensing of agents	41-49
Qualifications of a land agent	50
Incorporation of land agencies	51-52
Renewal of licences	53-55
Registration of salesmen	56-57
Management of land agencies	58-66
Duties of a land agent	67-81
(a) <i>Commission</i>	67-69
(b) <i>Trust accounts</i>	70-71
(c) <i>Rates and taxes</i>	72
(d) <i>Representations as to finance</i>	73-75
(e) <i>Representations on the sale of businesses</i>	76-77
(f) <i>Disclosure of agent's interest</i>	78-79
(g) <i>Forms of offer and acceptance</i>	80
(h) <i>Sole agencies and multiple listings</i>	81
Financial control	82-88
(a) <i>Audit and auditors</i>	82-84
(b) <i>Receivers</i>	85
(c) <i>Fidelity Guarantee Fund</i>	86
(d) <i>Interest on trust accounts</i>	87-88
Other agents not covered by the Act	89-90
(a) <i>Land auctioneers</i>	89
(b) <i>Business agents</i>	90

<b>B. DEVELOPERS</b>	91-94
<b>C. SETTLEMENT AGENTS</b>	
<b>THE PRESENT POSITION IN WESTERN AUSTRALIA</b>	95-105
<b>DISCUSSION AND TENTATIVE PROPOSALS</b>	106-110
<b>APPENDIX I</b>	
<b>APPENDIX II</b>	

## **INTRODUCTION**

The Law Reform Commission has been asked “to investigate the present provisions of the Land Agents Act and report on amendments needed to effectively exercise control over land transactions and whether provisions of the Act should be enlarged to cover other sales by agents or developers”.

The Commission having completed its first consideration of the matter now issues this working paper. The paper does not necessarily represent the final views of the Commission.

Comments and criticisms, on individual issues raised in the working paper, on the paper as a whole or on any other aspects coming within the terms of reference, are invited.

**The Commission has been asked to report as soon as practicable and requests that comments and criticisms be submitted by 27 July 1973.**

Copies of the paper are being sent to the -

Chief Justice and Judges of the Supreme Court

Judges of the District Court

Law Society of W.A.

Magistrates' Institute Law School

Solicitor General

Under Secretary for Law

Land Agents Supervisory Committee

Registrar of Companies

Commissioner of Titles

Commissioner of Police

Urban Development Institute of Australia (W.A. Division)

Housing Industry Association

Master Builders Association of W.A.

Associated Banks in W.A.

Real Estate Institute of W.A.

Estate Agents Association of Australia

W.A. Real Estate Settlement Association

Technical Education Division of the Education Department

Institute of Chartered Accountants in Australia

Australian Society of Accountants

Institute of Chartered Secretaries & Administrators

Law Reform Commissions and Committees with which this Commission is in correspondence.

The Commission may add to this list.

A notice has been placed in *The West Australian* inviting anyone interested to obtain a copy of the paper.

The research material on which the paper is based is at the offices of the Commission and will be made available on request.

## **TERMS OF REFERENCE**

1. “To investigate the present provisions of the Land Agents Act and report on amendments needed to effectively exercise control over land transactions and whether provisions of the Act should be enlarged to cover other sales by agents or developers”.

2. The Commission has been asked to consider specifically the following matters -

- (a) the system of licensing;
- (b) the need for provision for renewal of licenses which have lapsed through unforeseen circumstances;
- (c) the need for further control over agents, as in New South Wales;
- (d) the need to restrain agents from making unconditional sales which may be impossible to complete, as where such a sale is induced by the agent's misrepresentation as to the availability of finance;
- (e) auditing requirements;
- (f) the need for control over salesmen employed by developers;
- (g) the need for control over land settlement agencies.

3. Two further proposals were considered in Part B of the Law Reform Committee's working paper on Protection of Purchasers of Home Units and Sales of Land Through Land Agents (Project No. 1, Parts II & III, 23 June 1972). These proposals were -

- (i) that licensed land agents should be entitled to hold in their trust accounts all money paid to them on account of a purchase of land until the availability of a title to the land is assured;

- (ii) that all sales of land (other than between private persons not engaged in the business of buying and selling land) must be made through a licensed land agent.

For ease of reference, the text of Part B of the working paper is contained in Appendix I to this paper.

4. As these two proposals are directly related to the general terms of reference contained in paragraph 1 above, the Commission intends to consider them further in the context of this present project and to include them in its report.

### **SCHEME OF THE WORKING PAPER**

5. The working paper is divided into three sections –

- A. LAND AGENTS
- B. DEVELOPERS
- C. SETTLEMENT AGENTS

6. A condensed statement of the law and practice in Western Australia with respect to land agents, developers and settlement agents, as compared with other Australian jurisdictions and New Zealand, is set out in tabulated form in Appendix II to this paper.

7. To assist in its enquiries, the Commission has received oral or written submissions of a preliminary nature from the following -

the Real Estate Institute of W.A.

the Estate Agents Association of Australia

Mr. T. K. Macfarlane, Chairman of the Land Agents Supervisory Committee

Mr. C. M. Hansen, member of the Land Agents Supervisory Committee

Mr. F. P. McGrath, former Registrar/Secretary of the Land Agents Supervisory Committee

the W.A. Real Estate Settlement Association

the Law Society of W.A.

the Police Department (Firearms & Inquiries Branch)

the Institute of Chartered Accountants in Australia, in association with the Australian Society of Accountants  
the Technical Education Division of the Education Department.

## **A. LAND AGENTS**

### **THE LAW AND PRACTICE IN WESTERN AUSTRALIA**

8. The law applicable to land agents is the general law of agency, as modified by the *Land Agents Act 1921-1973* and the Regulations pursuant to that Act (in this paper referred to as the "Act" and the "Regulations" respectively). The 1921 Act was based on the New Zealand *Land Agents Act of 1912* (now repealed) and the history of the legislation is traced in the Western Australian *Parliamentary Debates* for 1921-1922, Volume 1 at p.591 and Volume 2 at p.2622.

9. For the purposes of the Act, a land agent is a person whose business is to act as agent for a consideration in respect of the sale, disposal, exchange, purchase or acquisition, except by auction, of any estate or interest in land, including the leasing or letting of tenancy or occupation of the whole or part of houses and other buildings (see the definitions of "land agent" and "land transaction" in s.2 of the Act).

#### **Supervising authority**

10. The Act establishes a Land Agents Supervisory Committee (in this paper referred to as "the Committee") of three persons appointed by the Governor - a chairman, a qualified accountant and auditor, and a licensed land agent nominated by the Real Estate Institute of W.A. (s.14A).

The Committee has general supervisory and administrative functions. In particular -

- (a) It can hold an enquiry into complaints (s.14B) and, for that purpose, may instruct the police to make enquiries (s.14C).
- (b) It can object to the application for a land agent's licence or its renewal, apply for the cancellation of such a licence or prosecute for an offence under the Act (s.14D).

- (c) It registers land salesmen (s.15B). It can cancel their registration, disqualify them from future registration, and fine them up to \$20 (s.15G). There are at present about 1,600 registered land salesmen.
- (d) It also has responsibilities with respect to the auditing of land agents' trust accounts and the management of the Land Agents Fidelity Guarantee Fund (see paragraphs 29 to 31 below).

11. The Committee has no inspectors on its staff, and relies upon the police to investigate complaints (s.14C) and upon an auditor (not being a member of its staff) nominated by the Committee to conduct audits additional to the annual audit (s.14G(22) and see paragraph 29 below).

12. The Committee has no direct disciplinary powers apart from those mentioned in paragraph 10 above. Some disciplinary functions are exercised by two private associations of land agents (the Real Estate Institute of W.A. and the Estate Agents Association of Australia) in respect of their own members. As at 31st May 1972, there were 836 licensed land agents (see *Government Gazette*, 16 June 1972 at p.1902) and currently about 376 licensees are members of or employed by members of the Real Estate Institute of W.A. and about 24 licensees are members of the Estate Agents Association of Australia.

13. The Committee's administrative expenses are met by money appropriated by Parliament (s.14A(6)). These expenses are paid out of Consolidated Revenue, into which are paid the land agents' annual licence fees (\$15 - s.4(3)), the land salesmen's annual registration fees (\$2- Regulation 17(2)) (both fees being in addition to the Fidelity Guarantee Fund contribution - see paragraph 31 below), and an annual amount from the Land Agents Fidelity Guarantee Fund pursuant to s.19(e). The total of these payments into Consolidated Revenue amounts to approximately two thirds of the Committee's administrative expenses.

### **Licensing and qualifications of agents**

14. Land agents' licences (including annual renewals and transfers of licences) are granted by the Court of Petty Sessions (in practice generally constituted by a magistrate) in the district where the applicants reside or carry on business (ss.4, 5A and 6). A licence may only be

cancelled by the Court of Petty Sessions or a court before which the licensee has been convicted of any specified offence (s.10).

15. Pursuant to s.4 of the Act, an applicant -

- (a) must have passed the prescribed examinations (a seven subject course which normally takes two years and is conducted by the Technical Education Division of the Education Department Regulation 5); or
- (b) must have, within the five years immediately preceding his application, held a licence for at least two years and acted as a land agent for at least two years in any other State or Territory of the Commonwealth; or
- (c) must be a deceased licensee's personal representative or trustee, who applies for a licence for the purpose of performing that function; or
- (d) must be approved by the Minister as an applicant (after the Minister has called for and considered a report from the Committee).

The court must be satisfied as to the character, fitness and financial position of the applicant and of his partners. Where the application is on behalf of a company (not being a trustee or pastoral company that is an approved applicant under (d) above), the court must be satisfied as to the financial position of the company and the character and fitness of its directors, general manager and such other responsible officers as the court thinks fit.

16. It is sufficient for one member of a firm to hold a licence on behalf of the firm (s.3(2)). The other partners must be registered salesmen (s.15A(3a)).

17. Whilst the terminology of the Act is not consistent, it appears that a company must nominate some person to hold the licence on its behalf (s.3(3)) and that the nominee must have the same qualifications as an individual applicant, or have been approved as an applicant under paragraph 15(d) above. All directors, other than a nominee-director or a director of a pastoral company or of a company whose land agency business forms a minor part of its business, must be registered salesmen (s.15A (3a), (4)).

### **Renewal of licences**

18. A licence expires on 31 December of each year (s.5) and is renewable annually on application, prior to expiry, to the Court of Petty Sessions (s.5A(1) & Regulation 4). An amendment to the Act passed this year provides that if an application for renewal is made within 12 months after the licence has expired, the court may renew the licence, the renewal taking effect from the day following the expiry (s.5A(2)).

### **Registration of salesmen**

19. Land salesmen are registered by the Committee and the registration is renewable annually (ss.15B & 15C). There are no statutory qualifications for registration. The Committee has power to cancel registration on the grounds of misconduct or bad character set out in s.15G but an appeal lies to the Court of Petty Sessions in Perth whose decision is final (s.15H).

### **Duties of a land agent**

20. The primary duty of a land agent is to act on behalf of his principal in the land transaction for which he is engaged, for a consideration which is usually in the form of a commission (see paragraph 9 above).

21. Before an agent can sue for or recover commission, he must be the holder of a licence and his appointment to act must be in writing signed by or on behalf of the person to be charged with the commission (s.12). It would appear that the appointment must have been made prior to the land agent having found a purchaser (*Gardiner v. Fiannaca* [1967] W.A.R. 35).

22. There are no statutory provisions as to the circumstances under which an agent's entitlement to commission arises. The terms of the agreement between the agent and his client are frequently vague and there is divergence of authority as to entitlement to commission in such cases. In *R. J. Mabarrack Pty. Ltd. v. King* (1971) 1 S.A.S.R. 313, Bray C.J. said at p.318 -

“ According to one set of authorities the *prima facie* rule is that the commission is payable when the agent procures a purchaser approved by the vendor who executes a binding contract to buy the property on the vendor's terms ...

According to the other set the *prima facie* rule is that the commission is payable only on completion unless the failure to complete is due to the fault of the vendor”.

23. There are no statutory rates of commission chargeable by a land agent. However the rates adopted by the Real Estate Institute of W.A. are frequently followed. These rates are published in a handbook issued from time to time by the Institute, the last being in January 1972.

24. Section 8 provides that a land agent is required to apply all money received by him in respect of a land transaction first in payment of expenses, commission and other charges, and then in payment of the balance to the person legally entitled or authorised to receive it. Until payment, such a balance must be paid into a trust account at a bank (refer to paragraphs 20 to 22 of the working paper in Appendix I to this paper).

25. A land agent who receives payment of the purchase money on behalf of a vendor is under a statutory duty to the purchaser to ascertain that statutory charges on the land in the form of rates, taxes and outgoings are paid and apportioned as between vendor and purchaser (s.15). Whilst the section is open to different interpretations, the Committee and some land agents interpret it as imposing an obligation on the agent in all cases to adjust: rates and taxes, and the Real Estate Institute of W.A., in its submissions to the Commission, stated that in fixing the scale of commission, the obligation to perform this service was taken into account.

26. A land agent is prohibited from drawing or preparing any contract of sale or other legal document (other than a transfer), and if he does so for reward, he is liable to a penalty (*Legal Practitioners Act 1893-1971*, ss.77, 78 and 81 and see *In re McCombes and Edwards* (1952) 54 W.A.L.R. 62). In practice land agents and land salesmen commonly complete forms of offer and acceptance, in some cases using the form approved by the Law Society of W.A. and the Real Estate Institute of W.A.

## **Financial control**

27. The Act requires a land agent to have his trust accounts audited annually (s.14G(4)). Section 14G(13) lists the matters which are to be dealt with in the auditor's report. The Institute of Chartered Accountants in Australia and the Australian Society of Accountants, on counsel's opinion, interpret this section as requiring a full and total check of all receipts and payments of trust money during the audit year. The Commission is informed however that in practice such an extensive audit is not always performed.

The audit must be conducted within three months of the end of the statutory audit period and the auditor must deliver the report to the land agent who must forthwith forward it to the Minister (s.14G(4)).

28. Only accountants approved by the Minister may act as auditors under the Act. Any accountant who is a member of the Institute of Chartered Accountants in Australia, the Australian Society of Accountants or is an auditor registered under the Companies Act, and is of good character, must be approved by the Minister as an auditor under the *Land Agents Act* unless there is sufficient reason for refusing approval (s.14G(6)). Any person aggrieved by the decision of the Minister refusing to grant approval, or revoking the approval previously granted, may require the Minister to refer the decision to a Supreme Court judge for review (s.14G(9), (10)).

No person may audit the accounts of a land agent if that person is a land agent or a clerk, servant or partner of any land agent (s.14G(6)).

29. In addition, the Committee may at any time, if of opinion that it is in the public interest to do so, cause the trust accounts of a land agent to be audited by an auditor appointed by the Committee (s.14G(22)). The cost of such audit is paid as directed by the Minister either from the Fidelity Guarantee Fund or by the land agent (s.14G(24)). The Committee's power to inspect trust accounts is limited to situations where it conducts such an audit or where it conducts an enquiry pursuant to s.14B (see paragraph 10(a) above).

30. The Committee may also apply to a Supreme Court judge for an order restraining dealings on a land agent's bank trust accounts (s.14H). There is, however, no power in the Act to appoint a receiver to carry on the land agent's business.

31. The Act establishes a Land Agents Fidelity Guarantee Fund (s.16) administered by the Committee (s.21), to which all licensed land agents and registered land salesmen are required to contribute \$20 and \$11 per annum respectively for the first three years after being licensed or registered. After those three years and until the Fund reaches \$150,000, agents and salesmen are required to contribute \$4 and \$2 per annum respectively (ss.22 and 23). On the 5th June 1973, the Fund stood at \$124,442.

The principal purpose of the Fund is to reimburse persons who suffer pecuniary loss by reason of any "stealing" (as defined in s.371 of the *Criminal Code* - see s.2 of the Act) by a licensee or his partner, servant or agent (s.26(1)). A claim against the Fund must be made in writing to the Committee within one year of the claimant becoming aware of the stealing (s.26(2)). Since the Fund was first introduced in 1969, eleven claims totalling \$11,865.71 have been paid out.

32. Unlike the position of solicitors under the *Legal Contribution Trust Act 1967-1972* and the position of estate agents in New South Wales and Queensland, there are no statutory provisions in this State whereby portion of the trust funds of a land agent must be invested and the interest used for specified purposes, such as the financing of a Fidelity Guarantee Fund.

### **Other agents not covered by the Act**

33. The Act does not apply to a land auction nor to a transaction involving a business except in so far as a lease or tenancy is also involved in that transaction (see paragraph 9 above). Land auctioneers must be licensed under the *Auctioneers Act 1921-1972*. There are no licensing requirements for business agents.

## **DISCUSSION AND TENTATIVE PROPOSALS**

34. Legislation relating to land agents should provide adequate controls to ensure that the business of a land agent is carried on competently and honestly, and, in so far as this is not achieved, that the public is afforded redress where malpractice occurs. Any legislation which achieves these aims would also maintain or improve the professional standing of land agents.

35. It has been suggested to the Commission that the Act is not adequate for these purposes, and that in any case it is in parts ambiguous. Anomalies have arisen as a result of piecemeal amendments. The Commission considers that there is a good case for a complete revision of the Act.

### **Supervising authority**

36. There is general agreement that a special body is necessary to administer the Act. In all Australian jurisdictions other than the Northern Territory such a body has been established.

37. Both the Committee Chairman and the Real Estate Institute of W.A. suggested that the Committee is not sufficiently broadly based. The Commission suggests that a new supervising authority could have five members comprising -

- a legal practitioner as chairman, with a minimum of, say, eight years practice,
- two licensed land agents,
- one accountant/auditor,
- one other person.

38. The members of the supervising authority could be appointed by the Governor (as is the case with the Committee at present) or, alternatively, the land agent members could be appointed after election by the general body of licensed land agents (as in New South Wales and the Australian Capital Territory). Appointment or election could be for an indefinite term (as at present) or for a fixed term of, say, four years, with provision for rotational retirement.

The Commission tentatively favours election of the land agent members for appointment. All members should be appointed for fixed terms, with rotational retirement.

Whether the appointments would be full or part time would depend on the amount of work involved.

39. There are difficulties in the enforcement of the Act because the Committee has no inspectors on its staff. In practice the Committee acts only when complaints are brought to its attention and may then refer investigation to the police. The Commission is of the view that the addition to the staff of the supervising authority of inspectors with knowledge of land agency and accounting practices would result in a greater degree of observance of the Act's provisions and thus reduce the likelihood of defalcations.

40. Additional money would have to be found if the supervising authority is to be given increased functions and additional staff. There is support for the argument that to some extent this should be obtained from general revenue - the public interest is involved and there would be savings in the administration expenses of courts and police if some of their functions under the Act were transferred to the authority. Other possible sources are -

- (a) increases in land agents' annual licence fees, or land salesmen's annual registration fees, or both (see paragraph 13 above);
- (b) licence fees from persons who could be subject to the control of the supervising authority, for example settlement agents (see paragraph 110 below), land auctioneers (see paragraph 89 below) and business agents (see paragraph 90 below);
- (c) increased contribution from the Land Agents Fidelity Guarantee Fund (see paragraph 13 above);
- (d) interest accruing from the suggested investment of portion of licensed agents' trust accounts (see paragraph 87 below).

### **Licensing of agents**

41. Land agents could be licensed -

- (a) by the court (as in this State); or
- (b) by the supervising authority in the absence of objection, and otherwise by the court (as in New South Wales); or
- (c) by the supervising authority in all cases, but subject to an appeal to a superior court (as in Queensland, South Australia and the Australian Capital Territory).

42. The Commission, with the support of the Committee and the Real Estate Institute of W.A., tentatively favours the proposal in subparagraph (c) of the preceding paragraph, the reasons being -

- (a) the function of licensing could be effectively performed by the supervising authority;
- (b) this would avoid difficulties in liaison between the supervising authority and the courts, as exist under the present system;
- (c) this would also avoid differences in approach from court to court.

43. The licensing of land agents who reside some distance from Perth could cause difficulties if the supervising authority was located in Perth. This could largely be overcome by permitting applications on affidavit without the necessity of personal appearance where there are no objections, unless the authority otherwise directs. The authority could also hold sittings in other centres, although the Commission doubts that this would be justified except in unusual circumstances.

44. The right of any person to object to an application for a licence could be retained, or the right to object could be limited to specified persons such as the Minister, the police or the officers of the supervising authority. The Commission favours a general right of objection, and in any event suggests that it is desirable to retain a system of public notification of applications and continue to require an objector to give prior written notice. It would also seem desirable to continue to prescribe the grounds upon which an objection can be made, and to require a public hearing in every case where there is an objection.

45. The power to cancel a land agent's licence could be vested in -

- (a) the court (as in this State); or
- (b) the supervising authority (as in South Australia and the Australian Capital Territory); or
- (c) the supervising authority, and also a court, where it has convicted a land agent of a specified offence (as in Queensland).

The Commission favours the last of these alternatives, provided that the grounds for cancellation by the supervising authority are prescribed.

46. If the supervising authority is to be given the power to grant, renew or cancel licences, the Commission suggests that it could also be given the power to -

- (a) attach conditions to the grant or renewal of a licence;
- (b) hold an enquiry to determine whether the licensee is carrying on business in conformity with the conditions of the licence and the requirements of the Act;
- (c) disqualify a person whose licence has been cancelled from obtaining a licence within a specified time; or
- (d) suspend a licence for a specified time.

In lieu of cancellation or suspension, the supervising authority could -

- (i) impose fines up to a specified amount say, \$200; or
- (ii) reprimand or caution licensees.

47. The supervising authority could also be given power to prescribe a code of professional conduct for land agents, and to take disciplinary action in accordance with the preceding paragraph for any breach of this code.

48. However the Commission is of the view that offences against the Act should continue to be prosecuted in the courts in the normal way.

49. Whatever system of licensing is adopted, it seems desirable to give a right of appeal to a superior court against all decisions at first instance. However a decision to cancel or suspend a licence should take effect immediately, and should it not be deferred until the determination of the appeal unless a court otherwise orders.

### **Qualifications of a land agent**

50. It has been suggested that the standard of qualification for the licensing of an individual land agent should be upgraded in two respects -

- (a) by extending the present course (see paragraph 15 above);
- (b) by requiring the applicant for a licence to satisfy the supervising authority -
  - (i) that he has acted as a land salesman for a specified period (say 2 years);  
or
  - (ii) that he has had sufficient practical experience in land agency or allied business to enable him to carry on the business of a land agent satisfactorily.

The Commission expresses no opinion with respect to (a). It favours the proposal in (b).

### **Incorporation of land agencies**

51. It could be suggested that incorporation of land agencies is in principle undesirable because the liability of members is limited. However since there are more than 120 land agent companies already incorporated, it would seem to be impracticable to require them, as a

condition of carrying on business, to change into an unincorporated firm. Nor does it seem reasonable to limit incorporated agencies to those already in existence. The Commission therefore suggests that special provisions be enacted enabling companies to be licensed as such. The following would seem to be desirable qualifications for a company -

- (a) that it is financially sound;
- (b) that all, or a specified percentage of all of its directors, managers and other principal officers resident in this State, are licensed land agents or licensed managers (see paragraph 64 below);
- (c) that all the directors are jointly and severally liable for the acts and defaults of the company.

52. Special provisions may be necessary in the case of pastoral and trustee companies (see paragraphs 15 & 17 above for the present position in this respect).

### **Renewal of licences**

53. A land agent can only carry on business whilst he is licensed. The licence could be -

- (a) continuous, with the payment of a fee for an annual practice certificate for the right to carry on business; or
- (b) renewable annually, as at present.

54. The Commission favours the proposal in subparagraph (a) of the preceding paragraph. However there may be valid reasons why an agent who has neglected to obtain a practice certificate for, say, five years, should cease to have a right to act as a land agent and why his licence should be terminated. After such a time, he should be required to apply for a new licence on the basis of current qualifications.

55. If the proposal in paragraph 53(b) above is preferred, the supervising authority should have a discretion to grant a retrospective renewal of the licence where the application is out of time, as in the recent amendment to the Act (see paragraph 18 above). However it was suggested during the debates that the period of 12 months allowed for late applications is too long (see *W.A. Parl. Deb.*, 1973, pp.2193-2196).

If the application is made before expiry, but the renewal is not granted until after expiry, the licence should continue in force until renewal or otherwise (as in New South Wales).

It may also be desirable to provide that where a licence has expired and the period for late renewal has passed, the former licensee should be regarded as qualified and be entitled to apply for a new licence on the grounds that he has held a licence for a total of two of the last five years.

### **Registration of salesmen**

56. At present any person, upon proof of identity, can register as a land salesman (see paragraph 19 above). In many cases, it is land salesmen who deal directly with vendors and purchasers of land it seems reasonable that certain minimum standards be required of them. These could include a requirement that all applicants for registration -

- (a) be fit and proper persons;
- (b) be of a specified minimum educational standard;
- (c) pass a prescribed examination.

The Commission is tentatively of the view that a combination of (a) and (b) above is desirable but is not convinced that (c) is necessary.

57. The Commission considers that the supervising authority should have similar licensing and disciplinary functions with respect to land salesmen as does the Committee at present (see paragraphs 10 (c) and 19 above).

### **Management of land agencies**

58. The persons who control land agencies should have adequate knowledge and experience to be able to conduct such businesses. As only one member of a firm need be licensed (see paragraph 16 above) sometimes the partner or partners in control of the business are unqualified, the licensee himself taking little or no active part (this practice is sometimes

referred to as "dummying"). The Commission is of the view that this could to a great extent be remedied by requiring all partners, or at least all active partners, to be licensed. It is appreciated that there may be objections to this proposal, such as the loss of taxation advantages and diminution in the possible sources of outside capital.

59. Most jurisdictions studied require all partners, or all active partners, to be licensed. New Zealand requires all partners to be licensed or qualified to hold a licence.

60. Complementary provisions have already been suggested with respect to licensed companies (see paragraph 51 above) which would overcome the practice of "dummying".

61. In the case of both partnerships and companies, appropriate transitional provisions would be necessary to afford unlicensed partners, directors and others the opportunity of qualifying for a licence.

62. The implementation of the proposals to require partners and company officers to be licensed may not deal adequately with the question of control of branch offices. Although at present a licensee may not habitually absent himself from the registered office for a continuous period of two months without the written permission of the Committee or a magistrate (Regulation 9(3)), there is no statutory requirement that a licensee must supervise his branch offices. It is sufficient for a salesman who has been registered for two years to be in control of a branch office (s.7A(6)).

63. The Commission suggests that the person in actual control of each place of business should be a licensed land agent or licensed manager (see paragraph 64 below). As a corollary, all places of business of a land agent and the persons in actual control of them should be specified in his licence and any change in these places or in the persons in control should require an amendment to the licence.

64. Each place of business must be in the control of a licensed agent in New South Wales, and of a licensed agent or licensed manager in Queensland, South Australia and Tasmania. The licensed manager is an intermediate qualification between agent and salesman.

65. To ensure that unqualified persons are not in control of land agencies, it may also be desirable to prohibit -

- (a) Any person from holding more than one licence. Section 7A(1) of the Act provides that a licence authorises the licensee to carry on only one business of a land agent, but it apparently does not prevent a land agent from obtaining more than one licence.
- (b) A licensed land agent from advertising his licence for sale or use or allowing an unlicensed person to use his licence in any way (as in New South Wales, Victoria, Queensland and Tasmania).
- (c) A licensed land agent from employing an unregistered land salesman (as in all jurisdictions studied where provision is made for salesmen).
- (d) A licensed land agent from sharing commission with any person other than with his employees or another licensed land agent (as in New South Wales and the Australian Capital Territory).
- (e) A land salesman being employed part time (as in Victoria).

The Commission favours the proposals in (a) to (c) above, but queries whether (d) and (e) are necessary.

66. Other matters for consideration in relation to the management of land agencies are whether -

- (a) the suitability and location of land agency offices should be controlled, as suggested by the Real Estate Institute of W.A;
- (b) the use of business names by land agencies should be subject to the approval of the supervising authority (as in New Zealand);

- (c) the licensee should be required to insert his full name and address in all advertisements, as at present (s.13A).

### **Duties of a land agent**

#### *(a) Commission:*

67. The present requirement of a prior written appointment (see paragraph 21 above) could operate unjustly where the agent has not obtained it for some good reason. Although its complete abolition is undesirable, there may be no objection to adopting the South Australian provision, whereby it is sufficient if written authority is obtained before receipt of the commission, or the New Zealand provision whereby written authority can be given at any time. On the other hand, the Commission suggests that a written appointment should be a requirement for the retention of commission out of money held on behalf of a principal, as well as for its recovery.

68. Any doubts that now exist in determining when entitlement to commission arises could be overcome by enacting a *prima facie* rule that commission is payable only on completion of the transaction unless the failure to complete is due to the fault of the agent's principal (see paragraph 22 above). It might be desirable to go even further to protect the principal and make this an absolute rule, notwithstanding anything contained in the agency agreement to the contrary (compare the Queensland *Auctioneers and Agents Act 1971-1972*, s.70(3)).

69. The Committee at present has no jurisdiction with respect to rates of commission. It has been suggested that maximum rates of commission should apply to land agents and that this could be achieved by -

- (a) adopting the rates used by the Real Estate Institute of W.A; or
- (b) giving the Minister or the supervising authority power to prescribe the rates by regulation.

The Commission favours giving the supervising authority power to prescribe the rates. The authority would no doubt have regard to the rates in common use.

(b) *Trust accounts:*

70. The Commission does not add to its comments on the matters raised in the earlier working paper of the Law Reform Committee (see Appendix I) with respect to the retention of purchase money in trust pending the completion of the sale (see paragraph 3 above), but would welcome further comment.

71. In any event the Commission suggests that all money received by the land agent in respect of land transactions should be paid into his trust account as soon as practicable, and that commission and other proper charges be subsequently paid out of that account when they lawfully fall due (compare s.8 of the Act, outlined in paragraph 24 above).

(c) *Rates and taxes:*

72. Although there is a statutory obligation placed upon a land agent who receives payment of the purchase money on behalf of a vendor to ascertain that statutory charges on the land in the form of rates, taxes and outgoings are paid and apportioned as between vendor and purchaser (see paragraph 25 above), in practice the adjustment of rates and taxes is often performed by a settlement agent or a solicitor. The Commission is of the view that the responsibility for the adjustment of rates and taxes should be clarified and tentatively suggests that this could be best achieved by placing the responsibility on the land agent in all cases, although he should be permitted to delegate performance.

(d) *Representations as to finance:*

73. A purchaser of land often enters into a contract as a result of representations by land agents or salesmen as to the availability of finance. If the contract is unconditional and finance cannot be obtained, his deposit could be forfeited.

74. To deal with situations where the representation is not warranted or is untrue, both Victoria and Queensland provide that an agent must give to all intending purchasers a signed

statement containing details of the transaction including particulars of any proposed finance. If the statement is not given, or if the finance is not obtained, the contract is voidable at the instance of the purchaser, within a specified time. The Commission suggests that the enactment of a similar provision in this State warrants consideration.

75. In relation to misrepresentations generally, it is an offence in this State for any person to make a statement which is intended or apparently intended to promote the sale of real property and which, to his knowledge, is false in any material particular (*Trade Descriptions and False Advertisements Act 1936-1969*), s.8). A bill presently before the State Parliament proposes to extend this offence to include statements likely to deceive or mislead. The provisions of this Act and in the bill (if passed) may afford the purchaser some protection.

(e) *Representations on the sale of businesses:*

76. A purchaser who enters into a contract to buy a business may rely upon representations of the agent or salesman as to turnover, profitability and other similar matters. At present such sales are not subject to the controls contained in the *Land Agents Act* except in so far as lease or tenancy is also involved (see paragraphs 9 and 33 above).

77. The Victorian Act has attempted to deal with this question by requiring any person selling a small business (i.e. under \$30,000) to give a prospective purchaser a signed statement giving details of the business, its turnover, profit and other relevant matters. If the statement is not given or is incorrect, the contract is voidable within a specified time. The Commission suggests that the enactment of a similar provision in this State warrants consideration, at least with respect to agents (and see paragraph 90 below).

(f) *Disclosure of agent's interest:*

78. A number of jurisdictions have provisions dealing with non-disclosure by agents of their interests in the subject matter of the sale.

79. Victoria and Queensland provide that it is an offence for any estate agent or specified person associated with him to be directly or indirectly interested in the purchase of land from the principal without the principal's prior written consent. There is a similar provision in New

Zealand except that apparently the consent need not be prior to the purchase. In both Tasmania and the Australian Capital Territory the failure to disclose such an interest is a breach of the prescribed rules of practice or conduct rendering the offender liable to disciplinary action. The Commission regards it as important that an agent makes full disclosure of his interest and suggests the enactment in this State of a provision similar to that in Victoria and Queensland.

(g) *Forms of offer and acceptance:*

80. The Commission suggests the enactment of legislation -

- (a) Empowering the supervising authority to prescribe or approve forms of offer and acceptance for use by land agents (as in Victoria). This would overcome any doubt as to whether the completion of these forms constitutes a breach of the *Legal Practitioners Act 1893-1971* (see paragraph 26 above).
- (b) Obliging the land agent or salesman to give to the person signing an offer or acceptance form or a contract a true copy of the document immediately after he has signed it (as in Victoria).

(h) *Sole agencies and multiple listings:*

81. Provisions to control the unreasonable use of sole agency and multiple listing contracts have been enacted in Victoria and Queensland. The enactment of similar provisions here may warrant consideration although the Commission has received no representations on this point.

### **Financial control**

(a) *Audit and auditors:*

82. The Institute of Chartered Accountants in Australia in association with the Australian Society of Accountants proposed or supported the following -

- (a) That a land agent be required to appoint an auditor either at the time of applying for a licence or at the time of commencing business; that the appointment be continuous; and that any change in auditor be approved by the supervising authority. (Compare the New Zealand *Real Estate Agents Audit Regulations 1967*, reg. 5 which requires the auditor to be appointed at the time of application for the licence, and any change in the appointment to be approved by the Council of the Real Estate Institute; and the Queensland *Auctioneers and Agents Act 1971-1972*, s.87, which requires the auditor to be appointed at the time of the application for the licence and any change in the appointment to be notified to the Committee within one month).
- (b) That only auditors registered under the *Companies Act 1961-1972* be entitled to audit a land agent's accounts, with provision for the appointment of other persons in areas where no registered company auditor is available.
- (c) That a full audit of a land agent's accounts should not be necessary in all cases (see paragraph 27 above) and that instead audits be conducted in accordance with accepted auditing practice (including selective testing where appropriate).
- (d) That the auditor be required to report direct to the supervising authority immediately upon completion of the audit, with a copy of the report to the land agent.
- (e) That the auditor be empowered to make an interim report to the supervising authority at any time if he discovers a material breach.
- (f) That the supervising authority have power to extend the time limit for lodging audit reports.
- (g) That the supervising authority be given power to require an auditor to furnish further information or carry out a further audit at any time.
- (h) That in addition to the annual audit, an audit be required within three months of the commencement of business as a land agent and as well as on every

change in or cessation of the business (including a change or cessation caused by death).

83. The Commission agrees with the suggestions in subparagraphs (a) to (g) of the preceding paragraph, with the qualification that it may be desirable to prescribe the steps to be followed by an auditor in carrying out an audit by selective testing. One requirement could be that part of the audit be carried out during the audit year (compare the Queensland *Auctioneers and Agents Act 1971-1972*, s.89 which requires two unscheduled examinations during the year, and the New Zealand *Real Estate Agents Audit Regulations 1967*, reg. 6 which requires the audit to be carried out on at least three occasions during the year).

The Commission is not convinced that the suggestion in paragraph 82(h) is necessary, particularly if the supervising authorities to have the same power as the Committee now has to carry out surprise audits and the additional power to inspect the accounting records of an agent at any time (see paragraphs 29 and 39 above).

84. The Commission suggests that consideration be given to the adoption of the following proposals -

- (a) that an auditor be disqualified from acting if he is a close relative of the land agent under audit. This could be achieved either by prescribing the class of close relatives, or by giving the supervising authority power to prohibit an auditor from auditing the accounts of a land agent to whom he is related (as in New Zealand).
- (b) That an auditor be disqualified from acting if he is engaged in business dealings with or through the land agent whose accounts he audits. However the Commission appreciates the difficulty of defining the circumstances which would warrant such a disqualification.

(b) *Receivers:*

85. Some jurisdictions provide for the appointment of a receiver to carry on a land agent's business in cases of defalcation, cancellation, insolvency, mental and physical infirmity, death

or abandonment of business (New South Wales, Queensland and the Australian Capital Territory). The Commission favours the inclusion of such a provision in this State.

(c) *Fidelity Guarantee Fund:*

86. Two matters call for consideration in relation to the Fidelity Guarantee Fund -

- (a) It has been suggested that the present ground on which claims may be made against the Fund (i.e. stealing - see paragraph 31 above) is too restrictive and that further grounds should be added.

Queensland has recently extended the grounds for claims against their Fund from stealing, fraudulent misappropriation or misapplication, to include breaches of the trust account provisions of the Act and certain other statutory obligations the Commission favours a similar extension in this State.

- (b) The present limit of \$150,000 on the Fund may be inadequate if further grounds for claims against the Fund are added and if the Fund is made to cover other types of agents. The Commission suggests that the limit to the size of the Fund may have to be increased, although this would necessitate further contribution.

(d) *Interest on trust accounts:*

87. One possible source of additional revenue for the Fund could be interest derived from the investment of a portion of the land agent's trust accounts. Both New South Wales and Queensland already have such requirements and the Commission understands that it is under consideration in South Australia.

88. In addition, a land agent should be given express power to invest any trust money remaining in authorised trustee investments for the benefit of his principal.

## **Other agents not covered by the Act**

(a) *Land auctioneers:*

89. Auctioneers were controlled by statute in this State before land agents and consequently when the *Land Agents Act* was first enacted, auctioneers were excluded from its application. As both land auctioneers and land agents are engaged in selling land on behalf of principals, there would seem to be no logical reason why they should not be under the same statutory controls. In New South Wales, Queensland and Tasmania, land auctioneers are licensed under the same legislation as estate agents, although a separate licence is issued. In South Australia it is proposed to include land auctioneers in the definition of land agents, the one licence covering both activities. The Commission is of the view that provision similar to the South Australian proposal should be adopted in this State.

(b) *Business agents:*

90. At present some persons who are not licensed land agents carry on business as agents for persons buying and selling businesses. In all States other than Western Australia, business agents are licensed either as estate agents or by virtue of a separate business agent's licence. In so far as there are similarities in the activities of land and business agents, the Commission is of the view that they should be subject to the same controls.

## **B. DEVELOPERS**

91. There are no statutory provisions in this State specifically relating to the business of developers, that is persons engaged in the business of buying and selling land other than as agents.

92. The Law Reform Committee's working paper contains a discussion of the proposal that all sales of land (other than between private persons not engaged in the business of buying and selling land) be made through licensed land agents (see Appendix I to this paper). Of those who commented on the paper, most were strongly against the proposal.

93. An alternative to the proposal referred to in the preceding paragraph is to introduce statutory controls over developers and their salesmen in specific areas of their activities only. For example, in Victoria the requirement that a written statement be given by estate agents to all purchasers of land applies equally to builders and subdividers who sell land (see paragraph 74 above). However the Commission has been unable to locate particular areas of concern which have not already been legislated for in the *Sale of Land Act 1970*. The Commission would welcome comment.

94. Whilst it may seem desirable that salesmen employed by developers should be registered and be subject to the control of the supervising authority, it may not be practical to register them unless the developers are themselves subject to some form of statutory control.

## C. SETTLEMENT AGENTS

### PRESENT POSITION IN WESTERN AUSTRALIA

95. Up to a few years ago, in cases where the parties to a land transaction were not represented by solicitors, it was common practice for the land agent to complete the transaction himself on behalf of the parties. No charge other than normal commission was made for this work.

96. With the increase in the volume of land sales over the past decade, a few businesses started which specialised in the settlement of land transactions. Some of these settlement agencies have been formed to take instructions from or to enable clients to be referred from, a particular land agent or a particular legal firm. In some instances there is a relationship between the ownership of the settlement agency and the ownership of the land agency or legal firm.

97. There are at present no statutory provisions in this State specifically relating to the business of settlement agents.

98. Because they do not have to be licensed, it is difficult to ascertain the exact number of settlement agencies in operation. Enquiries made by the Commission indicate the following figures -

(a)	Settlement agencies having some relationship with a particular land agent:	14
(b)	Settlement agencies having some relationship with a particular legal firm:	4
(c)	Other settlement agencies: (of which four are members of the W.A. Real Estate Settlement Association):	7
	TOTAL:	25

99. A survey undertaken by the Commission, based on information supplied by some settlement agencies, as to the number of settlements concerning land sales for the month of March 1973, indicates that five of the agencies in category (c) of the preceding paragraph were involved in 21% of all settlements for that month.

100. Although initially some settlement agencies may have been instructed and paid by land agents, they now usually act in the capacity of independent contractors, the agreement of the clients to engage the settlement agencies generally being contained in offer and acceptance forms. Occasionally they undertake settlements on behalf of legal firms, financial institutions, builders, developers, and other bodies.

101. In a typical transaction, a settlement agent receives a signed offer and acceptance form containing his instructions to act. He searches the title. Then, depending on whether he acts for the purchaser, the vendor, or both, he prepares a transfer of land (which he may do without infringing s.77 of the *Legal Practitioners Act 1893-1971*) and arranges its execution by the parties. He adjusts rates and taxes, advises the appropriate authorities and prepares a settlement statement. He arranges stamping of the documents and then attends at settlement, at which time the purchase money is paid and received. If there is no new mortgage involved in the settlement, he registers the documents. The proceeds of settlement are then paid out in accordance with his client's instructions.

102. Settlement agents have no statutory obligation to maintain a separate trust account. However the Commission has been informed that in practice some settlement agents do pay all money received on behalf of clients into separate accounts.

103. There is no common scale of charges for the services of a settlement agent, although the Commission has received a scale used by some settlement agents. This scale is similar to, but marginally less than the ad valorem scale used by solicitors; (*Conveyancing Remuneration Order 1971*, Government Gazette, 30.11.71) .The differences are -

- (a) The agent's scale includes the cost of adjusting rates and taxes when he does this work. The solicitor adds a further \$15 for this work.

- (b) The agent's scale does not provide for any reduction of his charges when acting for both vendor and purchaser, although reductions may be made in individual cases. A solicitor must reduce his charges by one third when acting for both parties.

The Commission is informed that if a complication arises which requires a settlement agent to obtain the assistance of a solicitor, the solicitor's fee may, depending on the circumstances, be absorbed by the agent or be charged to his principal.

104. The extent of the duty of care owed by a settlement agent to his client or principal has not been judicially determined. But it has been held that landbrokers in South Australia (see paragraph 106 below) are under a duty to use reasonable care and skill. In *Neagle v. Power* [1967] S.A.S.R. 373 at p.376-7, Bray C.J. said -

“The licensed landbroker is licensed as a fit and proper person for transacting business under the provisions of the *Real Property Act, 1886-1963* (s.271) and, as Chamberlain J. points out, that section equates his charges for such business with those of a solicitor. I would not be prepared to assent to the proposition that his duty of care is for all purposes connected with the *Real Property Act, 1886-1963* identical with that of a solicitor, but I think that at least for the purpose of the transaction of routine business it must be so”.

105. Some of the functions now performed by a settlement agent may be in breach of the *Legal Practitioners Act 1893-1971*. Section 77 of that Act prohibits anyone other than a certified legal practitioner from directly or indirectly performing or carrying out or being "engaged in any work in connection with the administration of law". Since the introduction of the new Titles Office procedure, a settlement agent's actions on behalf of a purchaser in satisfying himself that the vendor has a clear title and that the vendor's documents are in order for registration at the time of settlement, may be in breach of the section.

## **DISCUSSION AND TENTATIVE PROPOSALS**

106. The existence of settlement agents appears to be peculiar to Western Australia. South Australia has a system of landbrokers licensed to transact business under the Real Property

Act. However their functions are much more varied than settlement agents and include the preparation of mortgages and other security documents, leases and powers of attorney. New Zealand has a similar provision in its *Land Transfer Act 1952*, authorising the issue of landbroker's licences, but the Commission has been informed that there are no more than three current licensees and that no new licences have been granted in recent years, conveyancing in that country being generally undertaken by solicitors.

107. Settlement agents are performing work that was previously undertaken by either legal practitioners or land agents. The questions that must be considered are whether they are doing the work as efficiently and cheaply and with the same protection to the public as those other groups. The answers to these questions give rise to the further questions of whether settlement agents should be permitted to continue as a separate business, and if so, to what controls they should be subject.

108. The W.A. Real Estate Settlement Association submits that the services of settlement agents are necessary in addition to those provided by the legal profession and that they came into existence because of the inability of that profession to cope with the public's requests. The Association also submits that settlement agencies provide a more efficient and speedy service than many legal firms because they specialise in land settlements and that the interests of their principals are protected because any difficult legal questions are referred to a solicitor. The Association claims that if there are any additional costs because of the use of settlement agents, these are offset by savings resulting from the efficiency of their service.

109. It is not clear which, if any, of the activities of settlement agents are in breach of s.77 of the *Legal Practitioners Act 1893-1971* (see paragraph 105 above). The Law Society of W.A., in its submission to the Commission, has emphasised the complexities sometimes involved in the settlement of a land transaction. For example, questions can arise as to -

- the validity of applications for transmission or survivorship;
- the currency of a liquidator's appointment;
- the correctness of a method of attestation by a corporate body or an attorney;
- the extent of a restricted power of sale;
- whether the conditions of transfer under a Court Order or mortgagee's sale have been complied with;

the acceptability of an application for change of name; whether requisitions should be delivered;

whether requirements for discharge of an annuity charge on the annuitant's death have been met;

where applicable, whether the provisions of the *Strata Titles Act* or the *Mining Act* have been complied with;

the impact of the general law of contract on the offer and acceptance form and on the interpretation of any special conditions endorsed thereon.

In the Society's view, no person other than a solicitor should be allowed to charge fees for what would generally be described as conveyancing work, and the activities of settlement agents should be confined to handling work for land agents, by whom they would be paid. The Society pointed out that settlement agents are untrained and are not subject to any financial control.

110. If settlement agents are to be allowed to continue to function, the Commission is firmly of the view that statutory controls for the protection of the public should be introduced as soon as possible. Settlement agents handle large sums of money on behalf of their principals and the Commission is informed that one firm has held as much as \$1,000,000 at a time in a separate account on behalf of parties or principals.

There would seem to be a good case for implementing the following statutory controls -

- (a) a compulsory contribution to a Fidelity Guarantee Fund;
- (b) trust account and audit provisions;
- (c) a system of licensing;
- (d) the requirement of prescribed qualifications (such as educational and possibly experience);
- (e) the imposition of a system of disciplinary control either by the proposed supervising authority or by some other appropriate authority;

- (f) restrictions on the appointment of settlement agencies in order to prevent situations such as where the appointment does not make it clear that the appointee is not a solicitor, or where the appointment appears to be part of the pre-printed offer and acceptance form;
- (g) conditions for the incorporation of settlement agencies comparable to those suggested for land agencies (see paragraph 61 above);
- (h) a prescribed scale of charges;
- (i) transitional provisions for those settlement agencies already operating.

## APPENDIX I

Extract from the Law Reform Committee's working paper on Protection for Purchasers of Home Units and Sales of Land Through Land Agents.

(Note: Copies of the full text of the working paper can be obtained from the Law Reform Commission).

### PART B

#### THE PRESENT LAW IN WESTERN AUSTRALIA

20. Under the common law a land agent, like any other agent, is accountable to his principal for money received unless he is in the special position of stake holder. If the agent fails to account to his principal on demand, the principal has a right of action against the agent. The action for recovery of money paid to an agent who is not acting as stake holder lies against the principal, not the agent.

21. If an agent receives money as stake holder his obligation is to pay it to the person entitled to it on the happening of a specified event. If the parties have not entered into a contract, then, *prima facie*, the agent holds any money paid by the intending purchaser as stake holder. If the parties have entered into a contract then, generally, the agent holds money paid by the purchaser as agent of the vendor. Usually the contract will expressly indicate in which of these capacities the agent holds the money.

22. The *Land Agents Act 1921* obliges a person whose business it is to act as an agent for a consideration in respect of a land transaction to be licensed as a land agent (s.3), and provides protection in various ways for those who deal with land agents. For example, a land agent must pay into a trust account purchase money received by him pending payment to the person lawfully entitled thereto (s.8); his trust accounts must be audited periodically (s.14G); he must contribute to a fund (s.22) which is available to reimburse those who suffer loss by reason of any "stealing" (as defined in s.371 of the *Criminal Code*) by him of money or other property entrusted to him (s.26); and he must employ only registered land salesmen (s.15A).

The Act does not affect the general principles of agency outlined in paragraphs 20 and 21 above.

23. There is no statutory requirement in this State that a vendor of land who sells as owner must be a licensed land agent, or that an employee engaged in selling his employer's land must be a registered land salesman.

### **THE LAW ELSEWHERE IN AUSTRALIA**

24. All other jurisdictions in Australia have legislation obliging land agents to be licensed. Some States, however, go further.

25. In **South Australia** the *Land Agents Act 1955* includes within the definition of land agent a person whose business is the selling of land as owner. Unless such a person sells his land through a licensed land agent, he must be licensed and comply with the provisions of the Act.

Under s.60 of the South Australian *Land Agents Act* a land agent must not withdraw money paid by him into a trust account except for the purpose of completing the transaction in the course of which the money was received. This section was considered in *Bottroff v. Hillson* [1966] S.A.S.R. 159 (affirmed on appeal [1967] S.A.S.R. 115), where it was held that a land agent must not pay a deposit to a vendor prior to the settlement date for the balance of the purchase price, notwithstanding a provision in the contract to the contrary. On appeal, Chamberlain J., with whose judgment the other Judges concurred, said -

"Land agents most frequently obtain their instructions from vendors, but they also must frequently end up by acting for both parties, and the policy of making them, in effect, stake holders of moneys coming into their hands is an understandable and, in my view, a reasonable one".

26. In **Victoria** under the *Estate Agents Act 1958* a land salesman employed by a person for the purpose of negotiating the sale, purchase, or lease of the employer's property is required to be a licensed estate agent, unless the employer himself holds an estate agent's

licence in which case the land salesman must hold a sub-agent's licence (see s.3, definition of "estate agent" and "sub-agent", and ss.9 and 10).

27. In **Queensland**, s.67 of the *Auctioneers and Agents Act 1971* provides that an estate agent or auctioneer who sells land which is not the whole of the land under an existing certificate of title, or who sells a unit in a building units plan (the equivalent of a strata title plan in this State) must retain the purchase money in his trust account until a separate certificate of title is available or, in the case of a unit, until an architect or building inspector certifies that the building has been completed. A person other than an estate agent or auctioneer who receives money in respect of the sale of such land or unit must pay the money into a trust account with a bank on similar conditions. Presumably this would include a person selling as owner. The purchaser may avoid the contract and recover his money if a separate certificate of title is not ready for delivery or a certificate of completion for the unit has not been given by the time he becomes liable to complete the purchase.

28. In **New South Wales**, Part IV of the *Auctioneers and Agents Act 1941* requires a "real estate dealer" - that is a person whose principal business is the selling as owner of allotments of land - to comply with certain advertising rules, to have a registered office, to keep proper records and employ only registered land salesmen. An allotment of land is defined as land on which there is no building suitable for human occupation, offered for sale for residential or retail commercial trade purposes, and includes a strata title lot and shares in a home unit company.

## **THE COMMITTEE'S COMMENTS ON PART B**

29. A repetition of the Whatley Crescent type of situation ..., which in large measure prompted the Real Estate Institute to put forward its proposals, probably could be prevented by extending Part III of the *Sale of Land Act* to cover the sale of strata title lots. However the Committee has been informed of instances of sales of houses and building lots to which Part III would not apply, where purchasers have suffered loss or appear to be in danger of doing so. Some sales took place through land agents and legislation obliging land agents to hold money in their trust accounts pending assurance of title would possibly prevent losses in such cases. As a last resort the Land Agents Fidelity Guarantee Fund would be available to compensate purchasers.

30. On the other hand, the proposals do appear to raise difficulties.

### **Retention of trust money**

31. Not the least difficulty in the case of the proposal as to retention by land agents of purchase money, is that of definition. Representatives of the Institute acknowledged that it would go too far to require retention until assurance of title in the case of sales of land on terms over a substantial period (though it might be practical to enact a requirement that the purchase money was to be held pending possession). The problem of distinguishing between “cash” and “term” sales would arise and any definition would be arbitrary and may not achieve the precise purpose intended.

32. Inclusion of money representing a deposit within the requirement could also cause undue inconvenience. Often the vendor needs the deposit to enable him to enter into a contract to purchase a property in his turn. Representatives of the Institute suggested that deposits of up to 10% of the purchase price should be outside the restriction, but according to information supplied to the Committee, some purchasers have suffered loss because deposits were paid to the vendor before the completion of the contract. It is to be noted that the legislation in South Australia (see paragraph 25 above) does not exclude deposits.

33. One further difficulty in relation to retention of purchase money should also be mentioned. As the Institute has suggested ... there would seem to be a case for qualifying the proposal to enable a purchaser to approve payment to the vendor before the title is assured. It would then be necessary to ensure that approval is not given as a mere formality. One way of doing this would be to provide that such approval was of no effect unless (a) the purchaser had already paid the money to the land agent, and (b) the purchaser's approval was given in the presence of a solicitor employed independently of the vendor and the solicitor has certified that the purchaser understood the consequences of his act. Section 19 (1) of the *Hire Purchase Act 1959* (relating to contracts of guarantee) has a somewhat similar provision.

### **Sales through land agents only**

34. Requiring all sales of land (other than between private persons not engaged in the business of buying and selling land) to be made through a licensed land agent, would make more effective the proposal as to the retention by land agents of purchase money. It would bring into the scheme sales by those land developers who do not at present sell their land through land agents.

35. Such a requirement is, in substance, already the law in South Australia (see paragraph 25 above). Victoria in effect imposes a similar obligation upon land developers who employ salesmen (see paragraph 26 above).

36. The Institute's representatives suggested that those engaged in the business of buying and selling land could either obtain land agent licences themselves or do their business through a land agent. The institute expects that the rules of fair dealing laid down by the Land Agents Supervisory Committee would apply to transactions by such persons, thus restraining sharp practices.

37. This proposal, if adopted, would probably reduce abuses. It would however involve a substantial interference with the right of persons to deal in the way of business with their own property, although South Australia and Victoria have thought such a step necessary. Legislation along these lines could have broader consequences than the aspects considered in this paper, and the Committee would particularly welcome comments on this point.

**APPENDIX II**

<b>A. Land Agents</b>	<b>Western Australia</b>	<b>New South Wales</b>	<b>Victoria</b>
<p><b><u>Supervising Authority</u></b></p> <p>(a) <b>Name</b></p> <p>(b) <b>Members</b></p> <p>(c) <b>Functions</b></p>	<p>Land Agents Act 1921-1973</p> <p>Lands Agents Supervisory Committee</p> <p>Three: chairman, accountant/auditor, land agent (REIWA). No fixed term.</p> <p>(1) May hold inquiries, order audit.  (2) May object to grant or renewal or apply for cancellation of license, register and cancel or fine salesmen, prosecute for breach of Act.  (3) Administers Fidelity Guarantee Fund.</p>	<p>Auctioneers and Agents Act 1941-1973</p> <p>Council of Auctioneers and Agents.</p> <p>Thirteen: One solicitor appt. by Gov., rest elected by licensees every 3 years.</p> <p>(1) May hold inquiries, inspect accounts.  (2) May license agents and salesmen if no objection; apply for cancellation of license.  (3) Administers Fidelity Guarantee Fund.</p>	<p>Estate Agents Act 1958-1967</p> <p>Estate Agents Committee</p> <p>Six: One lawyer, two other Govt. nominees, two R.E.S.I.V. &amp; one R.E.A.A. rep. Three year term.</p> <p>Generally as in W.A. May discipline agents for breach of rules of conduct.</p>

	<b>Western Australia</b> (cont.)	<b>New South Wales</b> (cont.)	<b>Victoria</b> (cont.)
<b><u>Licensing of Agents</u></b>			
(a) <b>By Whom</b>	Court of Petty Sessions. Appeal lies to Supreme Ct.	Council if no objection, otherwise by Petty Sessions. Cancellation by that court. Appeal to District Ct. & then to Supreme Ct.	Magistrates Court. Appeal lies to Ct of Gen. Sess.
(b) <b>Qualifications</b>	Must – (a) have passed exams; or (b) have held license & practiced as agent elsewhere in Aust. for 2 of past 5 years; or (c) be personal rep. of deceased licensee; or (d) be approved by Minister as applicant.	Must have - (a) passed exams; and (b) held salesman's license for 2 years; and (c) had sufficient experience.  Council may exempt from (a) & (b).	Must – (a) have passed exams & held sub-agent's license for 4 years; or (b) have held agent's license within past 5 years; or (c) be personal rep. of deceased licensee.
(c) <b>Firms &amp; Companies</b>	(a) Firms: one partner licensed; others regd. salesmen. (b) Companies: one nominee licensed, directors regd. salesmen	(a) Firms: all partners licensed. (b) Companies: company itself to be licensed & so must employee in charge.	(a) Firms: all partners licensed. (b) Companies: half directors and officer in control to be licensed unless agency minor part of business.
(d) <b>Renewals</b>	License expires 31 Dec. Must be renewed before expiry but court may accept late application if made within 12 months.	If application made before expiry, license continues for 12 months until renewed. If made after expiry, court can restore license.	License expires 31 Dec but no provision for late renewal.
<b><u>Salesmen</u></b>			
(a) <b>Salesmen registered by</b>	Committee. Appeal against cancellation to Petty Sessions.	As for agents.	As for agents.
(b) <b>Qualifications of Salesmen</b>	None required.	Fit & proper person.	Good character.
(c) <b>Managers</b>	No provision.	No provision.	No provision.

	<b>Western Australia</b> (cont.)	<b>New South Wales</b> (cont.)	<b>Victoria</b> (cont.)
<b><u>Management of Land Agencies</u></b>	Licensed agent or salesman with 2 years registration to be in charge of each branch.	Licensed agent to be in charge of each branch.	Licensed agent must supervise branches.
<b><u>Duties of Agents</u></b>			
(a) <b>Commission</b>	<ol style="list-style-type: none"> <li>1. Cannot sue unless agent gets written appointment before finding purchaser.</li> <li>2. Rates of commission not prescribed.</li> </ol>	No rates of commission prescribed, but Council may review.	<ol style="list-style-type: none"> <li>1. Cannot sue for or retain unless appointment in writing.</li> <li>2. Rates of commission prescribed.</li> </ol>
(b) <b>Trust accounts</b>	To be applied in payment of - (i) expenses, commission & charges; (ii) balance to persons legally entitled, pending payment, balance in bank trust account.	To be paid into trust account pending payment to person entitled.	To be paid into trust account within 3 business days pending payment to person entitled.
(c) <b>Rates &amp; Taxes</b>	Must ensure that – (i) statutory charges on land are paid and (ii) accruing charges are apportioned.	No provision.	No provision.
(d) <b>Representations as to finance</b>	No provision.	No provision.	Statement must be given to purchaser.
(e) <b>Representations on sale of business</b>	No provision.	No provision.	Statement must be given to purchaser.
(f) <b>Disclosure of interest</b>	No provision.	No provision.	Agent or related persons may purchase only with principal's prior consent.
(g) <b>Forms of offer &amp; acceptance</b>			
(i) <b>Whether forms prescribed</b>	No.	No.	Yes.
(ii) <b>Delivery of signed forms to parties</b>	No provision.	No provision.	Required.

	<b>Western Australia</b> (cont.)	<b>New South Wales</b> (cont.)	<b>Victoria</b> (cont.)
<b><u>Financial Control</u></b>			
(a) <b>Statutory audit</b>	Annual. Auditor reports to agent who must send report to Minister.	Annual.	Annual.
(b) <b>Additional audits</b>	Committee may order at any time.	Council may order at any time.	Accounts to be open for inspection at all reasonable times.
(c) <b>Auditors</b>	Must be approved by Minister.	Regd. under Public Accountants Reg. Act, or approved by Council.	Must be practising accountant or approved by Registrar.
(d) <b>Restriction on dealings</b>	Judge may restrain dealings on trust accounts.	Supreme Ct. may appoint receiver.	Treasurer may restrain dealings on trust account.
(e) <b>Guarantee fund or bonding</b>	Guarantee Fund. Reimburses losses due to "stealing".	Guarantee Fund. Reimburses losses due to theft or fraud.	Guarantee Fund. Reimburses losses due to breach of Part V of Act.
(f) <b>Investment of trust funds.</b>	No provision.	Part of trust funds to be deposited with Council. These may be invested and interest paid to Guarantee Fund and for other purposes.	No provision.
<b><u>Other Agents</u></b>			
(a) <b>Land Auctioneers</b>	Separate legislation.	Above Act applies.	Separate legislation.
(b) <b>Business Agents</b>	No licensing requirements.	Above Act applies.	Above Act applies.
<b>B. Developers</b>	No licensing requirements.	Real Estate dealers must be licensed as such, & their salesmen regd.	Persons acting for owner-developer must be licensed as sub-agents. Builders and subdividers must give prescribed statement when selling land.
<b>C. Settlement Agents</b>	Exist but without statutory controls. May prepare transfers, but no other legal document.	Do not exist.	Do not exist.

<b>A. Land Agents</b>	<b>Queensland</b>	<b>South Australia</b>	<b>Tasmania</b>
<p><b><u>Supervising Authority</u></b></p> <p>(a) <b>Name</b></p> <p>(b) <b>Members</b></p> <p>(c) <b>Functions</b></p>	<p>Auctioneers and Agents Act 1971-1972</p> <p>Auctioneers and Agents Committee.</p> <p>Six: One lawyer, three other Govt. nominees, one R.E.I.Q. rep, Registrar ex officio. Three year term.</p> <p>(1) May hold inquiries, order audit.  (2) Licenses agents, managers &amp; salesmen.  (3) May discipline agents for breach of rules of conduct.  (4) Administers Fidelity Guarantee Fund.</p>	<p>Land Agents Act 1955-1964</p> <p>Land Agents Board</p> <p>Four: One lawyer, two other Govt. nominees, one R.E.I.S.A. rep. Three year term.</p> <p>(1) May hold inquiries.  (2) Licenses agents, managers &amp; salesmen.</p>	<p>Auctioneers and Agents Act 1959-1968</p> <p>Auctioneers and Estate Agents Council</p> <p>Seven: Chairman, three estate agents, &amp; three auctioneers. Three year term.</p> <p>(1) May inspect accounts.  (2) Licenses salesmen.  (3) May object to grant or renewal or apply for cancellation of license for agents and managers.</p>

	<b>Queensland</b> (cont.)	<b>South Australia</b> (cont.)	<b>Tasmania</b> (cont.)
<b><u>Licensing of Agents</u></b>			
(a) <b>By Whom</b>	Committee. Appeal lies to Mags. Ct. & then to District Ct. Ct may also cancel license.	Board. Appeal lies to Supreme Ct.	Magistrate in Petty Sessions.
(b) <b>Qualifications</b>	Must have passed exams, unless exempted by Committee.	Must - (a) have passed exams; and (b) have been employed by land agent for 2 years; and (c) have sufficient knowledge.  Board may exempt from (b)	Must have – (a) passed exams and held a license within 4 years and employed as such for 2 years; or (b) held agent's or manager's license within last 5 years; or (c) been manager or salesman for 10 of last 15 years.
(c) <b>Firms &amp; Companies</b>	(a) Firms: all partners licensed. (b) Companies: working directors to hold real estate or manager's license.	(a) Firms: all partners licensed. (b) Companies: directors & persons in control to be fit & proper persons	(a) Firms: all partners licensed, but license may be held jointly. (b) Companies: half directors to be licensed as agents or managers unless agency only minor part of business. Directors & persons in control to be suitable.
(d) <b>Renewals</b>	If application made before expiry, license continues until renewed. If made after expiry, Committee may renew.	If application made before expiry, license continues until renewed. If made after expiry, Board may renew.	License expires 31 Dec but no provision for late renewal.
<b><u>Salesmen</u></b>			
(a) <b>Salesmen registered by</b>	As for agents.	As for agents.	Licensing by Council with appeal to Ct. of Petty Sessions. Cancellation by Ct. of Petty Sessions.
(b) <b>Qualifications of Salesmen</b>	Prescribed educational qualifications & be fit & proper person.	Fit & proper person.	Fit & proper person with sufficient knowledge.
(c) <b>Managers</b>	Licensed by Committee. Prescribed educational qualifications.	Licensed by Board. Prescribed educational qualifications.	Licensed by Magistrate in Petty Sessions. Qualifications as for agents.

	<b>Queensland</b> (cont.)	<b>South Australia</b> (cont.)	<b>Tasmania</b> (cont.)
<b><u>Management of Land Agencies</u></b>	Licensed agent or manager to be in charge of each branch.	Licensed agent or manager to be in charge of each branch.	Licensed agent or manager to be in charge of each branch.
<b><u>Duties of Agents</u></b>			
(a) <b>Commission</b>	<ol style="list-style-type: none"> <li>Cannot sue for or retain unless appointment in writing</li> <li>Rates of commission prescribed.</li> </ol>	<ol style="list-style-type: none"> <li>Cannot sue for or retain unless appointment in writing &amp; agent gives detailed statement.</li> <li>Power to prescribe rates of commission.</li> </ol>	<ol style="list-style-type: none"> <li>Cannot sue for or retain unless appointment in writing &amp; agent gives detailed statement.</li> <li>Rates of commission prescribed.</li> </ol>
(b) <b>Trust accounts</b>	To be paid into trust account forthwith. To be paid out within 42 days unless notice of dispute.	To be paid into trust account next bank day. Not to be withdrawn except to complete transaction.	To be paid into trust account pending payment to principal.
(c) <b>Rates &amp; Taxes</b>	No provision.	No provision.	No provision.
(d) <b>Representations as to finance</b>	Statement must be given to purchaser.	No provision.	No provision.
(e) <b>Representations on sale of business</b>	No provision	No provision.	No provision.
(f) <b>Disclosure of interest</b>	Agent or related persons may purchase only with principal's prior consent.	No provision.	Failure to disclose is breach of rules.
(g) <b>Forms of offer &amp; acceptance</b>			
(i) <b>Whether forms prescribed</b>	No.	No.	No.
(ii) <b>Delivery of signed forms to parties</b>	No provision.	No provision.	No provision.

	<b>Queensland</b> (cont.)	<b>South Australia</b> (cont.)	<b>Tasmania</b> (cont.)
<b><u>Financial Control</u></b>			
<b>(a) Statutory audit</b>	Annual, including 2 unscheduled examinations.	As in W.A., with power to make interim report if breach discovered.	Annual.
<b>(b) Additional audits</b>	Required on cessation of license or business. Minister may order inspection or audit at any time.	Person authorised by A.G. may inspect books at any reasonable time.	Person ceasing to be licensee must arrange audit within 3 months. Officer of Council may inspect books at any reasonable time.
<b>(c) Auditors</b>	Must be regd. under Public Accountants Reg. Act or approved by Minister. Changes of auditor must be notified to Registrar.	As in W.A.	Must be company auditor.
<b>(d) Restriction on dealings</b>	Registrar may restrain dealings on trust account. Committee may appoint receiver.	No provision.	No provision.
<b>(e) Guarantee fund or bonding</b>	Guarantee Fund. Reimburses losses due to theft, fraud, breach of trust account provisions and certain other obligations.	Bond.	Bond.
<b>(f) Investment of trust funds.</b>	Part of trust funds to be deposited with Registrar. These may be invested and interest paid to Guarantee Fund.	No provision.	No provision.

	<b>Queensland</b> (cont.)	<b>South Australia</b> (cont.)	<b>Tasmania</b> (cont.)
<b><u>Other Agents</u></b>			
(a) <b>Land Auctioneers</b>	Above Act applies.	Separate legislation.	Above Act applies.
(b) <b>Business Agents</b>	Above Act applies.	Separate legislation.	Above Act applies.
<b>B. Developers</b>	No licensing requirements.	Owner selling land as business must be licensed agent, & his salesman registered.	No licensing requirements.
<b>C. Settlement Agents</b>	Do not exist.	Landbrokers licensed under Real Property Act. May prepare wide range of documents.	Do not exist.

<b>A. Land Agents</b>	<b>Australian Capital Territory</b> Agents Ordinance 1968-1971	<b>New Zealand</b> Real Estate Agents Act 1963-1968	
<p><b><u>Supervising Authority</u></b></p> <p>(a) <b>Name</b></p> <p>(b) <b>Members</b></p> <p>(c) <b>Functions</b></p>	<p>Agents Board</p> <p>Five: One Govt. nominee, one solicitor, three agents. Agents to be elected for three year term.</p> <p>(1) May conduct inquiries, &amp; inspect accounts. (2) Licenses and registers agents. (3) May discipline agents for breach of rules of conduct.</p>	<p>Real Estate Institute of N.Z.</p> <p>(Private body of which all agents must be members).</p> <p>Institute may discipline agents for breach of rules of conduct and it also administers Fidelity Guarantee Fund.</p>	

	<b>Australian Capital Territory (cont.)</b>	<b>New Zealand (cont.)</b>	
<b><u>Licensing of Agents</u></b>			
(a) <b>By Whom</b>	Board. Appeal lies to Supreme Ct.	Magistrates Ct. Appeal lies to Supreme Ct.	
(b) <b>Qualifications</b>	Must have educational qualifications & be competent.	Must - (a) have passed exams; and  (b) have 2 years experience (court may dispense with this if applicant has sufficient knowledge).	
(c) <b>Firms &amp; Companies</b>	(a) Firms: one partner licensed, remainder regd. agents.  (b) Companies: one director and all director employees to be regd. Directors to be of good character.	(a) Firms: one partner licensed, rest have qualifications for license.  (b) Companies: court may require directors & other responsible officers to be qualified for license.	
(d) <b>Renewals</b>	Licenses have no fixed duration.	If application made before expiry, license continues until renewed. Otherwise must apply for new license but Ct. may dispense with academic qualification.	
<b><u>Salesmen</u></b>			
(a) <b>Salesmen registered by</b>	No provision.	As for agents.	
(b) <b>Qualifications of Salesmen</b>	-	Fit & proper person.	
(c) <b>Managers</b>	No provision.	No provision.	

	<b>Australian Capital Territory (cont.)</b>	<b>New Zealand (cont.)</b>	
<b><u>Management of Land Agencies</u></b>	No provision	Licensed agent or director to be in charge of each branch.	
<b><u>Duties of Agents</u></b>			
(a) <b>Commission</b>	<ol style="list-style-type: none"> <li>1. Not recoverable unless agent is licensed at time of engagement &amp; acting.</li> <li>2. Rates of commission not prescribed.</li> </ol>	<ol style="list-style-type: none"> <li>1. Cannot sue unless appointment in writing.</li> <li>2. R.E.I.N.Z. may prescribe rates of commission.</li> </ol>	
(b) <b>Trust accounts</b>	To be paid into bank account next business day, pending payment to person entitled.	To be paid into trust account & held for 10 days pending payment to person entitled.	
(c) <b>Rates &amp; Taxes</b>	No provision.	No provision.	
(d) <b>Representations as to finance</b>	No provision.	No provision.	
(e) <b>Representations on sale of business</b>	No provision	No provision.	
(f) <b>Disclosure of interest</b>	Failure to disclose is breach of rules.	Agent or related persons may purchase only with principal's consent.	
(g) <b>Forms of offer &amp; acceptance</b>			
(i) <b>Whether forms prescribed</b>	No.	No.	
(ii) <b>Delivery of signed forms to parties</b>	No provision.	No provision.	

	<b>Australian Capital Territory (cont.)</b>	<b>New Zealand (cont.)</b>	
<b><u>Financial Control</u></b>			
(a) <b>Statutory audit</b>	Annual. Auditor reports to agent & Registrar.	Annual, including 3 examinations during year. Auditor reports to agent and inst.	
(b) <b>Additional audits</b>	Registrar or inspector may inspect books at any reasonable time.	On cessation of business or change of partnership. Council of Inst. may inspect books at any time or Minister may direct audit.	
(c) <b>Auditors</b>	Must be company auditor.	Public accountants approved by Council of Inst. Appointment to be notified to Inst. by agent on application for license, change of business or opening of branch. Services not terminable without approval of Inst.	
(d) <b>Restriction on dealings</b>	Board may appoint receiver.	No provision.	
(e) <b>Guarantee fund or bonding</b>	No provision.	Guarantee Fund. Reimburses losses due to theft.	
(f) <b>Investment of trust funds.</b>	No provision.	No provision.	
<b><u>Other Agents</u></b>			
(b) <b>Land Auctioneers</b>	Separate legislation.	Separate legislation.	
(d) <b>Business Agents</b>	Above Act applies.	Above Act applies.	
<b>B. Developers</b>	No licensing requirements.	No licensing requirements.	
<b>C. Settlement Agents</b>	Do not exist.	Landbrokers licensed under <i>Land Transfer Act</i> . May prepare certain documents. Only 3 licenses presently in force.	