



# Report into Practices in the Real Estate Industry in South Australia

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December 2002

By  
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Presented to  
The Hon. Michael Atkinson MP  
Minister for Consumer Affairs

# **Report into Practices in the Real Estate Industry in South Australia**

## **Brief Synopsis**

The report addresses key areas of concern within the industry.

It describes the significance of real estate transactions to individual consumers, and outlines the roles and relationships of the various participants in the industry.

It gives an overview of industry regulation in other states (QLD, NT, Tas, NSW, and Vic).

It examines in detail real estate agents and sales representatives, and their contractual relationship to the vendor. Training, qualification, discipline, conduct and the potential conflict of interest for agents and salespeople is also considered.

The different methods of sale are described, as well as examining the advantages and disadvantages of the different methods to purchasers and vendors.

Sales agency agreements and their bias in favour of agents are examined.

There are 50 recommendations. These include measures to:

- Establishment a Real Estate Board responsible for the training, qualification, registration, investigation, and discipline of agents. The Board would also advise the Minister for Consumer Affairs on matters including sales agency agreements, codes of ethics, and consumer information.
- Introduce criminal sanctions against agents/salespeople and other professionals in the industry, addressing specific practices in the industry.
- Regulate the auction process to make it more transparent and less vulnerable to abuse by agents and auctioneers.
- Introduce standards within sales agency agreements to give more protection to the vendor.
- Reduce the potential for incompetent, misleading, or “bait” pricing.
- Decrease the opportunity for unethical agents to “buy” listings by over-quoting property valuations to vendors.

Further detail can be found in the report.

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## *Foreword*



This Inquiry began with a complaint to me from a concerned father.

He was helping his daughter search for her first home. She found a property that she liked advertised as being “for sale”. She inquired about the price and was advised that it was in a range of between \$100,000 and \$150,000. She and her father made repeated requests to the agent to find out what the actual **price** was. Instead of being given a figure, they were told by the agent that they should make an offer.

Negotiations commenced and a number of verbal offers were made to the agent. On each occasion, the agent stated that the offer, although within the range given, would be unlikely to be accepted as there was “a lot of interest in the property”. This process continued until eventually a formal offer in writing was submitted for in excess of \$120,000. This offer was accepted.

The father’s concerns revolved around two points. First, the property was advertised as being “for sale” and yet there was no price at which the property could be “purchased”. Second, the negotiation process within a “price range” lacked transparency: there may well have been nobody else interested in the property, and the father may have been bidding against himself. If indeed there were others interested, there was no way of knowing at what price they were interested.

Interested people were being required to make offers to purchase a property without being told the price the vendor was asking. In addition, this was without knowing the amount of other offers against which they were being asked to compete. This lack of transparency and the potential for abuse associated with such a process concerned me greatly.

I raised this matter in Parliament in August 2002. Shortly after, the matter was reported in *The Advertiser* and taken up by the media. People began contacting me with concerns about the industry. As a result of the numerous representations made to me, I decided to conduct a Private Member’s Inquiry into the Real Estate Industry in South Australia.

Advertisements were placed in *The Advertiser* in September 2002, seeking written submissions from interested parties. Over 50 were received, and I have personally spoken to dozens of individuals, a majority of whom have been real estate agents.

As I have received more information, I have come to believe that there are several deficiencies in the regulation of the real estate industry in South Australia.

In this report, I seek to identify these deficiencies and suggest how they might be addressed.

John Rau  
December 2002

# **1 Overview**

## **1.1 Object of the Report**

The object of this report is to present the Attorney-General and Minister for Consumer Affairs, the Hon. Michael Atkinson MP, with a comprehensive overview of the real estate industry at the present time; and to make recommendations to him as to how industry standards might be improved and consumers protected from sharp practices.

## **1.2 Background**

The Common Law has long recognised the unique features of real property. In the Australian context land, and more particularly a quarter-acre of land with a home attached, has been a central part of the “Australian Dream”.

These days, a quarter-acre block with a three-bedroom home by no means suits everyone’s real estate needs. However home ownership in whatever form remains a central aspiration for most Australians.

In spite of the increasing costs associated with the purchase and maintenance of properties, the level of home ownership in Australia continues to be very high.

The Australian taxation system also recognises a unique place for the domestic home. Concessional Capital Gains Tax treatment applies to the “principle place of residence”, in effect creating a tax shelter.

Also, purchasers of real estate often borrow a substantial proportion of the purchase price from a lending institution, to which they pay fees and interest during the term of a loan. From the owner’s perspective, their property is almost certainly their largest single asset.

Home ownership therefore represents many things: a cornerstone of the “Australian Dream”, the intangible benefit of living in one’s own home, a form of compulsory savings through the strictures of a mortgage, an opportunity to secure capital growth through increasing capital values, a CGT-free investment, and a long-term high-value asset.

Most people are infrequent players in the real estate market. There are those who frequently enter the market as investors or speculators, but they are in the minority.

Most individuals then are not familiar with the legal and financial details surrounding the purchase of real estate. Those entering the market, whether as vendors or purchasers, rely to a substantial degree on agents.

The vendor in a real estate transaction usually secures the services of an agent to sell their property, for which they pay a fee to an agent. This inquiry has been told that these fees generally range between 2 to 5% of the sale price. The vendor also typically pays additional amounts for searches, advertising and other incidental costs (“disbursements”).

In the process of promoting a sale, agents necessarily speak with and provide information to prospective purchasers - they effectively operate as intermediaries between the two parties.

At present, it appears that the South Australian real estate market is experiencing a similar “boom” to most other parts of the country. This is characterised by large volumes of properties changing hands at increased prices. Along with this, there has been an increase in the number of real estate agents or sales representatives practising in the industry.

This inquiry has been advised that the “boom” causes difficulties for agents, experienced or otherwise, in assessing the market price a property will fetch. The “valuation” of a property may be, and often is, considerably less than the price that the property may command in the current market.

It is possible that when the market cools down or declines, this same divergence between value and market price may reverse.

By definition real estate agents are not accredited valuers. No doubt with experience there comes a “feel” for what the market will pay for a property. This however does nothing to change the fact that an agent’s role remains primarily **marketing** a property to sell it. Assessing price is incidental to this role.

By way of contrast, price is a central priority for both vendors and purchasers. Vendors are invariably looking to secure the highest possible price for their property. Purchasers are usually hoping to purchase a property at the lowest possible price. This obvious tension between the aims of vendors and purchasers is the central feature of the real estate industry.

Given the significance of real estate transactions to ordinary citizens, it enjoys very limited protection for consumers. It is ironic to contrast the significant level of consumer protection associated with, for example, second-hand motor vehicles, hire-purchase transactions, and the provision of financial services, and the limited protection in the real estate industry.

### **1.3 The Relationship-Contract**

The relationships at the centre of real estate transactions are contractual.

The relationship between vendor and agent is contractual. This contract is normally described as a “sales agency agreement”. In South Australia there are at least two commonly used forms of agreement. One is prepared by the Society of Auctioneers and Appraisers Inc., another is prepared by the Real Estate Institute of South Australia (REISA).

These sales agency agreements are extremely important for vendors. They set out the rights and obligations of vendors and their agents.

Generally, a prospective vendor is provided with a sales agency agreement prepared by the agent. This pro forma document will require a number of minor details to be

included such as the vendor's name, address, the details of the property being sold, and so on.

These documents are discussed in more detail in Chapter 5.

The relationship between the vendor and the purchaser is also a relationship in contract. An arrangement to sell a property is a contract. Section 26 (1) of the Law of Property Act, 1936 (SA) requires that any such agreement is unenforceable unless the agreement "or some memorandum or note thereof, is in writing".

#### **1.4 Agents in South Australia**

As agents are the focal point of real estate transactions, much of the legislative and regulatory supervision of the real estate industry concentrates upon them.

The activities of land agents and their sales representatives are primarily governed by the Land Agents Act, 1994 (SA). This legislation provides for a system of registration of agents.

A person must not carry on a business or hold themselves out as an agent unless they are registered under the Act. (See Section 6 [1]).

A person required under the Act to be registered as an agent is not entitled to commission or other consideration for any services as an agent unless the person is at the time of rendering those services registered an agent and, authorised in writing to act as an agent by the person for whom the services are rendered or a person authorised to act on behalf of that person. (See Section 6 [2]).

A natural person is entitled to be registered as an agent if they have the qualifications required by regulations under the Act and are not otherwise disqualified. (See Section 8 [1]).

A body corporate is entitled to be registered as an agent. (See Section 8 [2] of the Act).

It is the practice in South Australia for incorporated registered agents to employ sales people. These individuals are not necessarily agents in their own right, but they are employed by an agent.

A sales representative must comply with the provisions of Section 11 (2) of the Act and must be employed by a person, (including an incorporated body) which is qualified to do so in terms of Section 11 (1) of the Act.

The Land Agents Act deals with issues relating to trust accounts, and an indemnity fund. Part 4 of the Act deals with discipline.

Section 43 sets out the causes for disciplinary action. Complaints are made to the District Court in its Administrative and Disciplinary Division.

The Court has certain powers in relation to the imposition of penalties set out in Section 47 of the Act. It also has the power to punish for contravention of any condition imposed under Section 47. (See section 48).

An act or default of an officer, employee or agent of a person carrying on a business will be taken to be an act or default of that person in most circumstances. (See Section 58).

Where a body corporate is guilty of an offence against the Act, each director of the body corporate is, subject to the certain defences, guilty of an offence and liable to a penalty. (See Section 59).

This means that considerable risk attaches to corporate agents employing sales people.

The Land and Business (Sales and Conveyancing) Act provides a penalty for agents who have a direct or indirect interest in a property that the agent is commissioned to sell. (See Section 23).

## **1.5 Role of the Office of Consumer and Business Affairs**

The Office of Consumer and Business Affairs (OCBA) has an important statutory role in relation to the supervision of this industry. At present, OCBA polices the industry. OCBA is reactive, essentially being an organisation directed by complaints.

Information provided to this Inquiry suggests that there is little, if anything, in the way of resources devoted to placing inspectors in the field to randomly audit behaviour in the Real Estate Industry.

OCBA also largely discharges the disciplinary function of Real Estate Boards constituted by statute in other States. Some argue that our system is better than the establishment of a board to deal with matters of registration and discipline. It is suggested that these boards have a tendency to become “captured” by the industry, thereby becoming ineffective and contributing to a public perception that there largely no supervision of the industry and its members’ behaviour.

OCBA has advised this Inquiry that its resources are considered adequate for dealing with the number of complaints presently being brought before it. The numbers of complaints being brought before OCBA are significantly at odds with this Inquiry’s understanding of the level of dissatisfaction in the community with the way the industry operates.

By way of example, the concerned father referred to in the *Foreword* of this report telephoned OCBA to express concern about the practice of not identifying a price for a property on sale. He advised this Inquiry that his complaint was met with a response effectively stating that he should take the matter up with the Real Estate Institute of South Australia.

There may be many explanations for the light demand on OCBA’s services aside from simple apathy on the part of consumers.

## **2 Review in Other States**

### **2.1 Queensland**

Queensland has recently introduced legislation dealing with the activities of real estate agents and auctioneers.

The Property Agents and Motor Dealers Act, 2000 provides for a system of regulation of property agents and motor dealers.

Significantly, the first schedule to the Act provides for a maximum commission on the purchase or sale of residential property.

A maximum commission is also set out for the letting of residential property, and the collection of rents on residential property.

The second schedule sets out the educational qualifications required for a real estate agent's licence and an auctioneer's licence. The educational qualifications required for registration as a real estate sales person and a trainee auctioneer are also set out in the second schedule.

An extensive code of conduct is also given legislative effect. There is a specific and quite detailed code of conduct applicable to real estate agents.

Another extensive code of conduct is specifically for auctioneers.

### **2.2 The Northern Territory**

The Northern Territory governs the operations of land agents through the Agents Licensing Act 2001.

This Act provides for the establishment of a board known as the Agents Licensing Board of the Northern Territory. (See Section 6).

The members of the board include a public servant, a legal practitioner, two persons who are members of the Real Estate Institute of The Northern Territory and a person nominated by the Minister to represent the interests of consumers. (See Section 7).

The board considers applications for licences.

The Minister may also appoint a person to be the Registrar of Land, Business and Conveyancing Agents and a Deputy Registrar. The Minister may also appoint Inspectors of Land, Business and Conveyancing Agents. (See Section 8).

Licences are granted to persons who comply with certain educational criteria set out in the Act and Regulations.

The board is empowered to take disciplinary action against an agent or an agent's representative. (See Sections 44 and 67). Significantly, the grounds upon which disciplinary action might be taken against an agent or an agent's representative, are

set out in the Act and include amongst other things, a breach of the rules of conduct which are set out in Section 65 of the Act.

The Act also regulates the nature of agreements between licensed agents and their clients. The Minister must publish a notice in the Gazette which prescribes the terms, conditions and provisions of an agreement between a licensed agent and a client, that the Minister considers necessary to be included in the agreement for the purpose of protecting the interests of the clients, or a class of client.

The Minister is also empowered to prescribe by way of notice in the Gazette, the form of an agreement which a licensed agent may choose to use when entering into an agreement with a client, or class of client. (See Section 65A).

The mechanism by which an application for disciplinary action is advanced is set out in Section 68 of the Act.

The board has extensive powers including the power to suspend a licence pending an enquiry. (See Section 68A).

The board also has power to require an agent to pay over any profit in relation to a transaction to which there has been a breach. (See Section 69A).

Sections 77 through to 84B deal with the powers of the board of enquiry including within those provisions the power to summons witnesses, and other powers normally attendant upon judicial proceedings.

A mechanism for appeal is provided by Section 85 to the local court on specific grounds set out in that section.

Significantly, false or misleading advertisements in connection to the business of a licensed agent are prohibited, and breaches of this prohibition may result in a penalty of \$500.00 or three months imprisonment. (See Section 115).

The regulations under the Act, and particularly the fourth schedule, set out quite detailed rules of conduct in relation to the activities of agents.

The fifth schedule to the Act sets out in very clear terms the educational requirements in relation to each classification of licence which may be sought under the provisions of the Act.

### **2.3 Tasmania**

The activities of auctioneers and real estate agents in Tasmania are governed by the provisions of the Auctioneers & Real Estate Agents Act 1991.

The scheme of the Tasmanian Act is to establish a body entitled the “Real Estate Agents Council of Tasmania”. This body is charged with various functions including the administration and granting of licences, and the taking of disciplinary actions. See Sections 5, 6 and 7 of the Act.

The conduct of auctions is specifically regulated. It is an offence for an owner of a property to knowingly misrepresent, or cause or allow to be misrepresented, the value, composition, structure, character, quality or origin or manufacture of a property. An auctioneer is likewise similarly enjoined (see Section 11).

Bids by or on behalf of an owner at an auction are prohibited except in a circumstances where it is:

- (a) clearly stated to the people assembled for the auction that the owner or a person acting on behalf of that person may bid, and
- (b) the owner or person acting for the owner is specifically identified to the people assembled at the auction. (See Section 12).

The usual provisions in relation to persons carrying on the business of a real estate agent or auctioneer in the absence of a licence are contained within the Act.

There is also the common requirement for the appointment of an agent to be in writing (See Section 24).

Section 25 of the Act enables the prescription of a maximum amount that might be charged by an agent in respect to his or her services.

Sections 45 and 46 deal with the matters of discipline relating to the activities of a licensee.

Section 48 sets out a series of conduct rules. These are produced below:

“Section 48(2)

A licensee who does any of the following is guilty of a breach of a rule of conduct:

- (a) contravenes or fails to comply with a provision of this Act or of a regulation made under this Act;
- (b) without a client’s consent, discloses, except if required to do so by law, information relating to the affairs of the client obtained by the licensee while acting for the client;
- (c) without a client’s consent uses, in a manner prejudicial to the client’s interests, information obtained by the licensee while acting for the client;
- (d) fails to perform the licensee’s duties to a client;
- (e) fails to carry out a client’s lawful instructions;
- (f) fails to exercise due skill, care or diligence in carrying out the licensee’s duties for a client;

- (g) having an interest in, or being likely to obtain an interest in, a transaction -
  - (i) entered into on behalf of a client; or
  - (ii) negotiated on behalf of a client fails to disclose to the client the exact nature of that interest;
- (h) if, in the licensee's opinion, the consideration that a client is prepared to accept on the sale of property is less than the fair market value of that property, fails to inform the client;
- (i) fails to ascertain all pertinent facts concerning a transaction which the licensee undertakes for a client so as to avoid error or misrepresentation;
- (j) in the course of providing a service for a client, by the licensee's conduct, knowingly conveys or allows to be conveyed a false or misleading impression or knowingly makes a statement or representation that is false, misleading or likely to deceive;
- (k) accepts or demands payment from a person other than a client in respect of work undertaken or to be undertaken by the licensee, being work in respect of which the licensee has received payment, or is entitled to receive payment, from a client;
- (l) accepts or demands or negotiates or attempts to negotiate payment for work undertaken or to be undertaken for a client that is excessive;
- (m) without a client's written consent, publishes, or causes to be published, an advertisement or any other mode of public notification which indicates that the licensee is authorized to sell property at a price higher than, or lower than, the price authorized by the client;
- (n) fails to comply with, or contravenes a rule made by the Trust in accordance with Section 107 (Trust may make rules);
- (o) fails to comply with a rule of conduct prescribed under section 123(2)(e).

A series of provisions relating to conflicts of interest are also enacted in Section 64 of the Act.

There is a general prohibition on false advertising. (See Section 69)

## 2.4 New South Wales

Pursuant to the provisions of the Property, Stock and Business Agents Act 2002, a person must be licensed in order to carry on the business of a real estate agent. (See Section 8 [1]).

A person is not entitled to recover any fee, commission, gain or reward for any service unless that person is a real estate agent. (See Section 8 [2]).

Any registered sales person must be employed by the holder of a licence under the Act. (See Section 11).

Certain requirements as to qualifications in order to be eligible for a licence or certificate of registration are also required. (See Section 14). These qualifications are as may be approved from time to time by the Minister by order published in the Government Gazette. (See Section 15 [1]).

Auctioneers require special additional accreditation. (See Section 21).

The Act also provides for disclosure to a client and prospective buyer of land, if there is any sort of relationship with the agent. "Relationship" is broadly defined. (See Section 47).

There is a duty not to act for both the buyer and seller of land. (See Section 48).

It is also an offence for an agent to obtain an interest in property in which the agent is engaged. (See Section 49).

There are also offences provided for the publication of false or misleading advertisements. (See Section 51).

Misrepresentations are also prohibited under Section 52.

Part four of the Act deals with particular requirements of sales agency agreements. These include:

- No payment without a sales agency agreement (Section 55)
- An approved guide must be provided before the sales agency agreement is signed (Section 56)
- The sales agency agreement must disclose discounts, rebates and commissions (Section 57)

Division two of part four of the Act provides for a cooling-off period for residential or rural agency agreements. (See Section 59). Contracting out of provisions is prohibited. (See Section 62).

Part five, division one, provides strict rules in relation to the role of an agent in the completion of a contract for the sale of residential property.

Part five, division two, provides a series of rules in relation to bidding at an auction, of residential or rural property. These include:

- Restrictions on bidding by or on behalf of a seller at auction (Section 66).
- Bids may only be taken from registered bidders (Section 67).
- A bidders record must be kept (Section 68).
- Proof of identity must be provided (Section 69).
- An approved consumer education guide must be provided for bidders at auctions (Section 71).

Division three, of part five, deals with representations as to the selling price of residential property.

- False representations are prohibited (Section 72).
- False representations to a prospective buyer are prohibited (Section 73).
- There is a requirement for agents to substantiate selling price estimates when required to do so by the office of the Director General (Section 74).
- This provision also deals with “price ranging” (Section 75).

## **2.5 Victoria**

The Victorian Government has recently announced a number of changes in relation to laws in that State relating to real estate.

- A prohibition on “dummy bidding” (Section 36B). Note: there are still some permissible “vendor bids” (Section 36E).
- Auctioneers must declare when land has come “onto the market” (Section 36H).
- The agent is required to give an estimated selling price (Note: not a price range) (Section 47A).
- It is an offence to make a false representation to a potential vendor of a price estimate (Section 47B).
- It is an offence to make a false representation to a prospective buyer in relation to the selling price of a property (Section 47C).
- The office of the “Director” may need evidence of the reasonableness of an estimated selling price (Section 47D).
- It is prohibited for an agent to retain any rebate (Section 48A).

## **2.6 Discussion**

It is apparent from this brief summary of legislation around the country, the various State jurisdictions have adopted a number of similar practices, and also diverged in others.

The practices which appear common to all jurisdictions are the requirement for registration of agents or licensing of agents, and some form of criminal sanction attached to certain conduct on the part of agents.

The majority of jurisdictions have a model in which there is a board or other specific body created for the purpose of at least supervising matters of registration or licensing, and usually also matters relating to discipline.

It is also apparent that as one looks at the most recent legislative attempts by State jurisdictions to regulate the real estate industry (eg Queensland, New South Wales and most recently Victoria), a more explicit attempt is made to impose standards and regulation upon the industry.

Compared with other jurisdictions, the South Australian legislation is probably the most deregulated model currently in existence within the Commonwealth.

In terms of the provision of an effective code of conduct, the South Australian legislation is amongst the weakest in the Commonwealth.

In terms of the provisions in relation to what might be generally described as fraudulent or dishonest conduct on the part of agents, again South Australia has the most unsophisticated legislative framework.

### **3 Structure of the Industry**

#### **3.1 Principals and Agents**

The industry in South Australia is dominated by a number of large corporate agents and franchise holders.

Some franchises are, in the pursuit of rapid expansion, opening offices under the supervision of employers who are not licensed agents or managers. This Inquiry has been advised that there are serious concerns in relation to the terms and conditions of employment offered to individuals employed in these offices, and the risk to members of the general public in dealing with these offices.

This Inquiry has also been advised that there are a number of employees who consistently fail to complete “traineeships”. This Inquiry has been advised that there are employers with numerous trainees at any one time who have not completed their traineeships.

It appears to this Inquiry that there is strong evidence of abuse of the system whereby “trainees” and “personal assistants” assume the role of salespersons and agents.

It is evident from perusal of the Act that there is a substantial difference in the level of qualification and experience one would expect to find in a registered agent and a person who is a novice salesperson.

Whilst this degree of difference is relatively plain in theory, it may be completely invisible to a prospective vendor who is approached by a salesperson for a listing, or a prospective purchaser who speaks to a salesperson in the course of an inspection.

There appears to be no particular distinction between many activities which are routinely performed by qualified agents and those conducted by far less qualified salespeople. This only serves to underline the considerable range of skills and experience in the industry.

This Inquiry has been advised that agents should be required to provide annual returns; if not to renew a licence annually, then in order to provide statistical information on the public record in relation to who is employed, by whom, and in what capacity.

#### **3.2 Agent Pay Structures**

As a general rule, agents are paid by way of commission on sales. Some agents are paid exclusively on the basis of commissions. More common is an arrangement whereby a low “retainer” is paid to an agent, which is supplemented by earnings from commissions.

This simply means that in order to earn more, they have to sell more, not necessarily to sell at the best price. Turnover is the key to financial renewal. Getting a “listing” is the first crucial step in this process.

In South Australia, agents are able to charge whatever rate of commission they see fit. That said, there does appear to be a substantial degree of conformity amongst agents in rates of commission charged, and the way in which these are levied.

Some agents will charge a lower rate of commission (eg 2.5%) but require the vendor to make additional payments in relation to disbursements.

Other agents, typically charging higher rates of commission (eg 4%+), will do so on an all inclusive or “no sale no fee” basis.

**It is important to understand the financial imperatives driving agents, in order to understand where they perceive their self-interest to be.** With the best intentions in the world, any agent seeking to earn a living through their business activities would need to be mindful of the need to turnover properties.

To quote the words of a submission from an industry source:

“In an environment where a comparative advantage is sought, good employers are often forced to employ unscrupulous practices just to survive. These practices promote a culture of dishonesty and disregard for the law which flows onto the agent’s dealings with the public. The public interest is not served by this culture.”

Any meaningful change in the industry must address the economic incentives at work. Behaviour will change if it is in the agents best interests to change. Such a change will be substantially self regulating rather than penalty driven. There is much to be said for “moving the carrots” rather than simply “wielding more sticks”.

### 3.2.1 Commissions

#### 3.2.1.1 Fixed Commission

Fixed commission seems to be the main mode of charging agent fees in South Australia. This may vary slightly from agency to agency, but substantially flat fixed commission seems to be the norm.

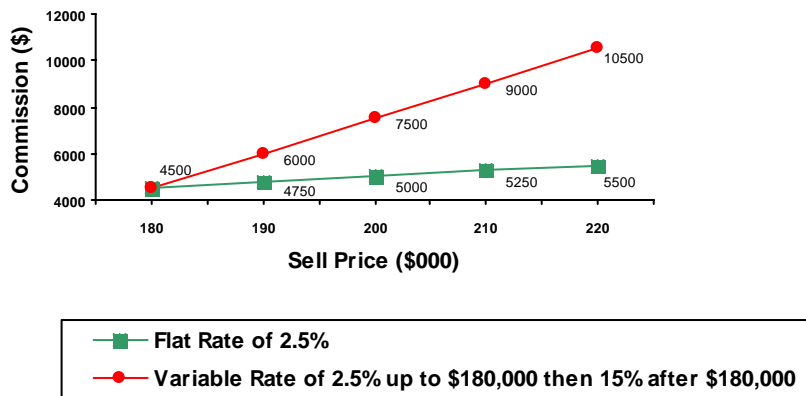
There is therefore little incentive to secure the **best price** for the vendor, as compared with the incentive to **secure a sale**.

#### 3.2.1.2 Stepped Commissions

Information provided to this inquiry suggests that there is little in the way of “stepped fee” commissions charged in South Australia.

A “stepped” fee arrangement for commissions may be a valuable tool for a vendor seeking to place incentive on an agent to earn commission by maximising a sale price, rather than earn a commission by simply turning the property over (See example below and graph).

### STEPPED FEE COMMISSION



In this diagram the vendor expects a minimum price of \$180,000. On a flat rate of commission of 2.5%, the agent would receive \$4500. Instead the vendor will pay the flat rate of 2.5% for the first \$180,000, and 15% for the amount which exceeds \$180,000.

The agent has a substantial incentive to obtain the maximum sale price. At a sale price of \$200,000, the flat rate gives a commission of \$5000, but with a stepped fee the agent commission is \$7500.

A much higher sale price of \$220,000 gives the agent a commission of \$10,500. The difference in commission under the flat 2.5% between sale prices of \$190,000 and \$220,000 is \$750, whereas under the stepped fee the difference is \$4500.

Whatever gain is made by the agent, it can be argued that the vendor gains more by this system if properly used. It is not a system recommended for novices.

#### 3.2.1.3 Commission by Negotiation

The capacity of individual agents to negotiate fees other than those set out by the principle or franchisee appear to be very limited. This has important implications in relation to any sale. For example, the difference in commission payable to an agent on a sale of a property at \$180,000 as opposed to \$200,000 is relatively minor.

Commission by negotiation is something which may or may not be offered by agents. Obviously an individual vendor seeking to arrange for changes in what might otherwise be a standard rate of commission, would need to do their homework. They would need to understand what the approximate market value of their property was and to negotiate with an agent so as to maximise percentage returns to the agent, at or above the market value.

#### 3.2.1.4 “All in” Commissions

“All in” commissions are offered, but are relatively uncommon. An “all in” commission works on the basis that all costs, inclusive of advertising, signage and so on are contained within the commission fee charged.

Information provided to this Inquiry suggests that these commissions are often in the order of 4 to 5%, and that in practice there is very little by way of advertising associated with this type of offering; particularly when compared with the more common forms.

### **3.3 Interstate based agents**

The activities of interstate agents have come in for some attention in recent times. For example, a certain person has been accused in the media of offering Qld. properties to buyers in other States at grossly over inflated prices.

The regulation of these activities may present certain jurisdictional problems for the State Parliament. The Commonwealth could usefully consider amendments to the Trade Practices Act 1987.

## **4 Methods of Sale**

### **4.1 Tender**

Sale by tender is quite unusual in the domestic property market. This is a process whereby potential purchasers are invited to submit a tender. There is potential for sale by tender in domestic property to become more prevalent, if it is properly structured.

For example, a vendor could state that a property would be offered for sale by tender and advise that certain tender conditions apply. For example these conditions might include the setting of a minimum price, a maximum settlement period, and any other necessary conditions which the vendor might require.

On the understanding that tenders would close at a particular date and time, written tenders submitted by potential purchasers could then be considered by the vendor.

### **4.2 Private Treaty**

Sale by private treaty is the traditional means by which domestic real estate has been offered for sale. Sale by private treaty traditionally involves a price being advertised for a property. Potential purchasers know that in order to secure the property they need to pay that price, or make an offer to the vendor below that price, which the vendor is free to accept or reject.

This method of sale has the advantage of giving some security to both the vendor and the purchaser. The vendor knows that the property will be sold if their nominated sale price is accepted by a prospective purchaser. They are publicly nominating the price at which they will sell.

This Inquiry has been advised that the vendor's normal tendency to inflate the value of the property for fear of selling too cheaply, has the unintended consequence of "burning off" potential buyers.

Prospective purchasers know that if they really wish to secure the property, they need to offer the advertised sale price. There is less opportunity in these circumstances for "Dutch auctions", or other manipulation of price by vendors or their agents.

This also removes concerns about "bait pricing" from the perspective of prospective purchasers.

A perusal of any Saturday's real estate section of *The Advertiser* will reveal that this type of offer is increasingly uncommon.

### **4.3 Auction**

Sale by public auction is an increasingly common means of offering domestic real estate to the market.

Sale by public auction is described by many agents as a “marketing strategy”. This may well be the case, but it is also a means of sale which has important legal and practical consequences for vendors and purchasers alike.

From the vendor’s point of view, sale by auction usually involves the setting of a reserve price, and invariably the expense of an advertising campaign leading up to the auction itself. These campaigns typically run for 3 or 4 weeks and involve the expenditure of thousands of dollars.

All of the concerns regarding “bait pricing” referred to earlier are very much in play with this type of sales offer.

By the day of the auction, the vendor has gone through something of an emotional and financial rollercoaster. They have expended money on advertising, time and effort on open inspections, and can see a deadline approaching at which time their property will be offered to those who attend the public auction.

In South Australia, vendor bids are permitted up to the reserve price. Vendor bids are otherwise referred to as “dummy bids”. However they are described, these bids are not genuine. The individual making the bid (or the auctioneer purportedly recognising the bid) has no intention of ever actually purchasing the property at the price “bid”. Indeed, they have no intention of purchasing the property at all. Whether this is fraudulent in popular parlance is a moot point. It is certainly deceptive – it is designed and intended to deceive.

An auction proceeds through various stages. Generally, the auctioneer seeks an opening bid and will probably suggest one. This bid is generally considerably shy of the reserve price.

Bidders are not required to register or have a numbered paddle, as is the case at antique auctions, for example.

Once the bidding has commenced, the bidding usually proceeds towards the reserve price, often with the assistance of “dummy bids”. There are some auctions where there are sufficient genuine bidders to take the property up to, and indeed beyond the reserve price, without vendor bids being required. Anecdotally, these seem to be exception rather than the rule.

If the bidding concludes below the reserve price, the auctioneer will not knock down the property. The highest bid may or may not be a “genuine bid”. The auctioneer at this point generally seeks instructions from the vendor. The vendor is then placed in a position of having to make a decision on the spot. Will the vendor reduce their reserve price? Will the vendor stick with the current reserve price and see what the auction brings (if anything)? Will the vendor simply negotiate with the highest bidder?

Whatever the vendor may be inclined to do, this is the point at which they are “crunched” by agents/auctioneers. A vendor needs to be very strong indeed to be able to say to the auctioneer, “no, I will not reduce my reserve price. I am quite content to

see this property not sold, and wear the several thousands of dollars I have already committed to advertising on the chin”.

If they have purchased another property, or must sell for some other reason, they have no option. They must sell either there and then, or soon afterwards, in the marketing and emotional shadow of a failed auction.

Assuming the property does exceed the reserve price, as either bids have surpassed it, or because this has been adjusted downwards by the vendor, the auction proceeds to establish the highest bidder. It is both foolish and illegal for “dummy bids” to be offered at this stage. This process works best where there are a number of keen, “cashed up” purchasers. Obviously this is not always the case.

From the purchaser’s point of view, the auction is also a harrowing experience.

Purchasers preparing for an auction need to spend time ensuring that they have adequate finance. A prudent purchaser would probably also arrange for a property inspection in order to ascertain whether there are any expensive repair or maintenance issues associated with the property. Once they have bought the property at auction, they have no opportunity to “cool-off”.

A great deal has been said and written about the dangers and risks associated with people participating in auctions. Any prospective purchaser or vendor would be well advised to read some of this material and be informed.

#### **4.4 Price Ranging**

Price ranging falls into three broad categories.

The first type of price ranging is a relatively tight price range which has the agent’s assessment of the true value of the property within it. It is significant that this type of price ranging does actually provide a range within which the agent expects the property to sell.

This Inquiry has been advised that price ranging of this type is often accompanied by an agent’s suggestion to a potential vendor that they first obtain a market valuation from an independent valuer.

A second type of price ranging ploy is to advertise a property for “\$X plus”.

This method of price ranging is particularly unhelpful. As there is no upper limit to the price range, it is of limited, if any value to a prospective purchaser. It may also indicate a lack of credibility in the actual price range quoted by the agent to the vendor in the first place.

A third type of price ranging commonly used is to quote a property as being expected to sell in the “mid-high \$200s”.

Again, whilst this may appear to be marginally better than the practice of saying that a property is expected to sell for “\$200,000 plus”, it is only a modest improvement.

Again, prospective purchasers have no real idea what the actual value of the property is, nor do they have any idea what the vendor is looking for.

#### 4.4.1 Discussion

Obviously, only the first of the price ranging methods referred to is of any value to prospective purchasers.

Even this type of price ranging is only as reasonable as the agent providing the price range. Agents may be incompetent, or deliberately present a lower price range in the belief that this will act as a lure to unsuspecting potential purchasers.

Price range “sales” are the currently prevalent practice of offering a property “for sale”.

This method of offer for sale is not really an offer for sale as such at all. It has more in common with a tender process. It effectively invites people to make offers in, or indeed above, a range stated by the agent as being acceptable to the vendor. At best, it is an invitation to negotiate.

The big problem with this process is of course its complete lack of transparency.

This Inquiry has been told that an ethical real estate agent would conduct the process in a way which offers any interested purchaser the opportunity of submitting an offer at their best price. Each prospective purchaser would be given one opportunity and one opportunity only to make such an offer. All offers would be submitted simultaneously to the vendor. Presumably the vendor would agree to enter into a contract for the sale of the property with the most attractive offer.

The problem is that there is no way of knowing that the agent with whom any purchaser is dealing is one of these ethical agents.

For example what is a purchaser to do if in fact there are no other purchasers?

How is the purchaser to know if the agent’s assurance that there are “lots of other people very keen on this property”, or that there are people prepared to offer “a lot more than the offer you are suggesting”, is anything more than a deceitful representation offered to a prospective purchaser in order to extract from them a price above that which they are obliged to pay by the market?

What if the agent is informing a “friendly” developer how much to offer to beat the competition?

This particular form of “sale” of property is one which favours the unscrupulous agent over the purchaser. It enables such agents to see purchasers “bidding against themselves”.

Price ranging is an essential element of this method. All of the concerns about “bait pricing” apply here as well. (See Chapter 6)

Whilst a higher price is very welcome for a vendor, it is questionable whether this practice across the market is good for the community as a whole. It certainly has the effect of inflating the market, and may indeed contribute to a more severe contraction in the market should interest rates rise, or demand fall.

Irrespective of these economic considerations, it is wide open to abuse and dishonest conduct.

## 5 Sales Agency Agreements

Sales agency agreements are almost universally presented to a vendor in a prepared form. A person wishing to sell a property is generally asked by an agent to complete one of these forms. The completed form constitutes a contract between the agent and the vendor. The terms of that contract are binding, and they are very important.

The contract contains many provisions. Reading the provisions as a whole, there is a strong weighting of power in favour of the agent.

For example:

- Sales agency agreements are often for a lengthy fixed period. This enquiry has heard of sales agency agreements purporting to bind a vendor for periods of up to 12 months.
- Agents are permitted to receive rebates on total advertising expenses without having to either provide notice of these rebates or account to the vendor for them.
- Agents are not liable in any way for any loss or damage to a vendor's property resulting from an open inspection.
- The vendor's authority to sign a Contract of Sale of a property offered by public auction is delegated to an agent.
- An agent may deduct their fees and disbursements from any monies payable before paying the balance to a vendor.
- At the conclusion of the specified term of the sales agency agreement it carries over unless otherwise specified as a "general agency".
- Professional fees are payable to an agent even if the actual sale occurs some months after the termination of the sales agency agreement in certain circumstances.
- Certain events constitute a "deemed sale" for the purposes of the agreement thereby triggering the agreement's provisions in relation to payment of commissions to an agent.
- Agents can secure their claims in respect of disbursements or commissions by way of a caveat over a vendor's property.

As can be seen from this very quick summary of some of the provisions of commonly used sales agency agreements, the agent is always in a very strong position as against the vendor.

## 6 Pricing

### 6.1 The role of Price

A vendor may take an inflated estimate on his/her home as a guide when signing a contract for another property. This places such a vendor under huge pressure to sell, ultimately at any price.

Price is probably the most important single element in real estate transactions. It is the critical element for purchasers. It is the critical element for vendors.

This Inquiry has been advised that it is the norm for vendors to have an inflated view of the value of their property. On average, this inflated view exceeds what might be the actual market price of the property by something in the order of 15%. This fact is well known to agents for whom it is both a blessing and a curse.

It is a blessing because they know how much to inflate their appraisal of a property in order to induce a vendor to list with them. It is a curse, because unlike the agent, the vendor takes the inflated appraisal seriously.

Anecdotal information provided to this Inquiry suggests that most purchasers enter negotiations willing to pay something in the order of 15% below the actual market price of the property.

It must be remembered that these are generalisations. There are some vendors who are very realistic in their views as to what their property should fetch. There are some purchasers who fall in love with a property and will pay virtually anything to secure it.

### 6.2 “Value” versus “Price”

In the present boom conditions, a “market valuation” obtained from professional valuer might typically be 5% less than the actual market price of the property.

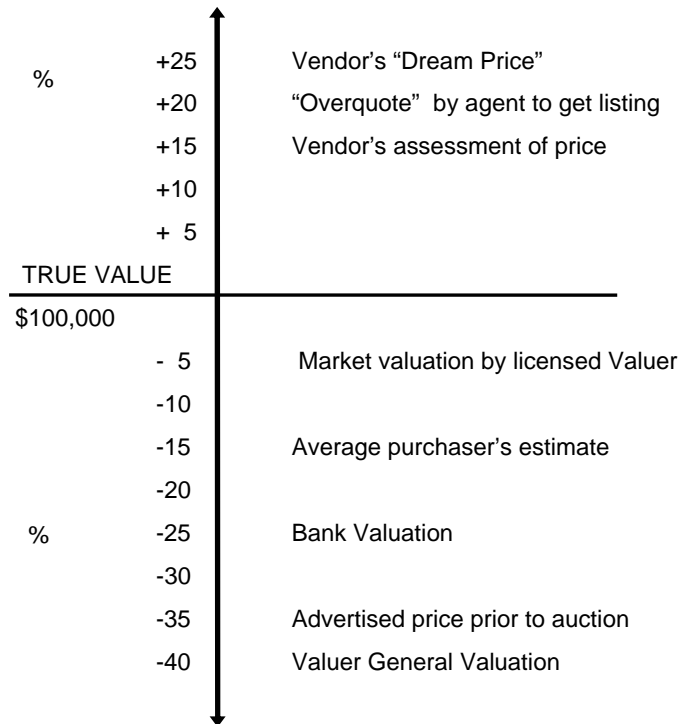
A bank valuation on the same property might be as much as 25% less than the actual market price of the property.

The Valuer-General’s assessment of the value of the property might be as much as 40% below the actual market price of the property.

An unscrupulous agent, seeking to secure a listing from a vendor, might overestimate the value of the property by something in the order of 20% in order to secure a listing.

As can be seen from the graph below, there is no such thing as a single concept of “price” when it comes to real estate.

### THE DIFFERING CONCEPTS OF PRICE



### 6.3 Bait Pricing/Over-quoting

This Inquiry has been advised that "bait pricing" is a practice endemic in the real estate industry in South Australia.

This Inquiry has been told that vendors are routinely lured into signing sales agency agreements on the basis of inflated estimates of price, rather than any factor relevant to an agent's intrinsic merit.

From a vendor's point of view, this practice is unacceptable. A vendor's natural tendency is to want to secure the best possible price for a property. This is often exploited by agents whose interests are primarily in securing a "listing".

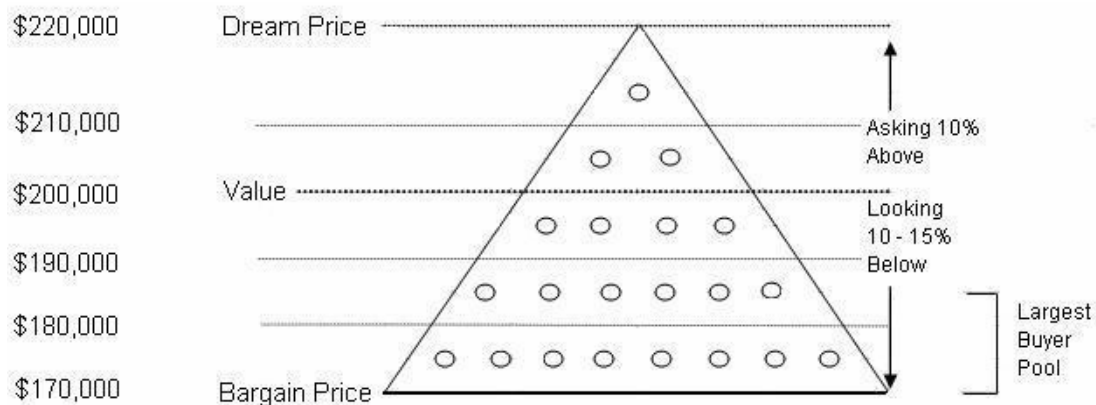
Potential purchasers are lured into inspections on the basis of prices which are transparently below market value. What appears to be a "bargain" often turns out to be a frustrating and, if they bother to obtain building inspection reports, an expensive experience.

A property valued at \$250,000 plus, which is offered for auction in the "low \$200,000s" and sells at auction for \$260,000, is bound to be a considerable disappointment to a purchaser who was lured into an interest in the property by the advertised "price range" and is unable to afford any more than \$240,000.

Bait pricing also disadvantages the vendor, who may have many people traipsing through open inspections and attending an auction, only to discover that they are mainly “tyre kickers”, or people looking to spend less than the reserve price.

A vendor may also rely on an inflated estimate of their property’s value when signing a contract for another property. This places such a vendor under huge pressure to sell, ultimately, at any price.

The diagram below illustrates the proportions of purchasers interested in a property at various prices:



[This diagram is reproduced with the permission of Mr David Pilling]

The greatest proportion of potential purchasers are interested at well below the value of the property. These purchasers are susceptible to bait pricing. An agent knows that once these purchasers are interested, some can be convinced to pay more than they had originally planned, or perhaps more than they can afford.

On the other hand, an agent can use the quantity of purchasers interested at a price well below the property’s value to convince the vendor that they market will only pay a lesser price. Once the agent convinces the vendor to accept a price below the value of the property, the sale is achieved easily.

The vendor is deceived into believing that the property could only fetch a lesser price than the actual value.

Agency relationships which commence with deception often end in disappointment.

## 6.4 Advertising

Advertising is a very important feature of the real estate industry. Any examination of the Saturday edition of *The Advertiser* reveals a considerable investment in advertising space by real estate agents.

The advertisements themselves are often quite expensive, not only in terms of the amount of space devoted to the advertisement, but also the preparation of sketches and so on.

The advertisement is usually the first point of contact between a prospective purchaser and a vendor's agent. Details contained within the advertisement are examined by a prospective purchaser with a view to deciding whether they will bother to make further inquiries about a property.

Most significant among the details contained in any advertisement are details relating to price and the manner by which the property is to be offered. As has already been discussed, a property might be offered by tender, sale at a nominated price, sale by auction, or sale within a "price range".

The advertisement therefore contains important representations about the property made on behalf of the vendor to prospective purchasers at large. To the extent that these representations are inaccurate, they are at best misleading and at worst fraudulent.

Somebody is also paying for this advertising. As things presently stand, that somebody is almost always the vendor. There are a minority of agents who offer a service which includes advertising for a single commission fee. Naturally, this fee is higher. They also tend to advertise less than other agents.

Generally a sales agency agreement contains an advertising budget. This typically includes perhaps artwork, signage, sketches and the purchase of a certain number of advertisements over the projected period of the advertising campaign.

It has been made clear to this Inquiry that agents receive concessional rates for their advertising, or rebates, depending on the particular circumstances of their arrangements with the publication in which the advertising is placed.

Inquires suggest that it is the norm for vendors to pay the full price of advertising rather than the discounted price which is actually paid by the agent to the advertising journal. Whether this fact is disclosed to vendors seems to vary from agent to agent.

## 7 Code of Conduct

Since 1994, the real estate industry has been essentially self-regulating.

The Real Estate Institute of South Australia Inc. (REISA) has established a code entitled the “*REISA Code of Conduct for Members*” and recently (October 2001) “*Rules of Practice for Sale of Property at Auction*”.

Pursuant to its rules REISA has been investigating complaints from members of the public against member real estate professionals since 1994. It is important to note that the Institute only has authority to deal with its members. Not all individuals engaged in the industry as either agents or sales people are in fact members of REISA.

On September 30<sup>th</sup> 2002, the REISA ceased to accept and investigate complaints from members of the public. Since that date these have been dealt with by OCBA.

At present there is no legislatively enforceable code of conduct. This obviously means that there are a number of complaints that might be made against an agent which will fall essentially in the category of ethical rather than criminal conduct. There is therefore a gap in the protection of the public in relation to real estate related issues.

This difficulty is acknowledged by individuals engaged in the industry who have contacted this Inquiry and REISA as well. These complaints at present have no effective remedy.

## **8 Training/Qualification**

This Inquiry has been advised that the current level of qualifications required for individuals to obtain registration as a Land Agent or Salesperson should not be reduced. Indeed there are grounds for strengthening them to address issues relating to ethical conduct and professional standards.

There may be merit in returning to a system of licensing rather than the current registration model.

This Inquiry has been told by a number of individuals and written submissions that the present system whereby auctioneers are not required to be separately qualified and registered is unsatisfactory.

This Inquiry has also been advised that under the current legislative provisions there are no formal qualification requirements for property managers other than to be employed by a land agent. This Inquiry has been advised that there would be benefit in prescribing some formal training requirements in order for an individual to be able to secure employment as a property manager. Similar remarks have been made in relation to Strata/Community Title agents.

Another matter of considerable current debate in the community has been the question of professional indemnity insurance.

Professional indemnity insurance is not mandatory for real estate related professionals in South Australia at the present time.

From a consumer protection point of view, this is obviously inadequate. Submissions have been made to this Inquiry to the effect that this should be the subject of regulation and that Professional Indemnity insurance should become mandatory for real estate professionals. Clearly, cost issues would flow from any such changes.

## 9 Discipline

This Inquiry has been advised that the current disciplinary provisions of the Land Agents Act 1994 are inadequate. For a start, there is no disciplinary procedure whatsoever in relation to what are essentially professional standards matters.

In relation to the particular offences set out under Section 43 of the Act, this Inquiry has been advised that the current provisions are too narrow and in particular that the words “*improperly*” and “*unfairly*” have attracted a very narrow interpretation.

This Inquiry has also been advised that the processes set out under the Act, and in particular the Section 44 process whereby proceedings are to be initiated by the Commissioner through the District Court of South Australia, act as an effective barrier to the initiation and processing of what otherwise might be perfectly legitimate complaints.

This Inquiry has been advised that since the introduction of the Land Agents Act 1994 no action under Section 44 has been commenced in the District Court of South Australia by any member of the public.

It is difficult to accept that since 1994 no member of the public has been in a position where they feel themselves sufficiently aggrieved by the activities of an agent or salesperson that such proceedings should not have been brought.

## 10 Enforcement

Enforcement is a very confusing picture in the real estate industry.

This conceivably falls into two broad categories. First of all, there is enforcement of the criminal law in its general terms, and the particular provisions of the law attaching criminal penalties to activities peculiar to real estate agents. Some of these provisions are discussed elsewhere in this report.

The mechanism by which a member of the public might launch such a prosecution is not straightforward.

It seems to this Inquiry that the only effective means by which a prosecution might be launched is for a complaint to be made to OCBA and for OCBA to become sufficiently interested in a complaint to take the matter forward.

Some consideration might usefully be given to a more streamlined approach either through a complaint to the police or even private prosecutions. In any event, a simplified more accessible system for enforcement of the criminal law, as it applies to real estate transactions, should be facilitated.

The second area of enforcement falls into the category of “ethical” issues. These are issues which although not necessarily constituting breaches of the criminal law, might be deemed to be inappropriate conduct from an ethical point of view, and might indeed be contrary to provisions of the existing REISA Code of Ethics. It is in this area that there is a particular absence of accessibility and transparency about the process of enforcement.

This Inquiry has been advised that this area needs to be substantially improved so that consumer complaints about unethical conduct on the part of agents can be promptly and efficiently processed, and appropriate penalties (where deemed necessary), can be administered.

## 11 Conflicts of interest

This Inquiry has been advised that the most significant, single cause of all irregular or improper behaviour in the real estate industry can be traced back to a single cause: conflicts of interest.

Issues such as bait pricing, non-disclosure of advertising rebates, underselling properties to “friendly” developers, or any of a number of other complaints, find their root in a conflict of interest between the real estate agent’s interest in securing turnover of properties, and the interest of the vendor for whom that agent is retained to work.

For example, this Inquiry has been advised that an agent who is able to secure the sale of a large residential site suitable for development purposes to a “friendly” developer, will not only secure a commission on the original sale of the property, but will as a matter of custom and practice in the industry, invariably be retained by that developer to sell the units in the ensuing development.

Assuming for these purposes that a large residential property was able to be redeveloped to produce four units, an agent selling to a “friendly” developer would pick up not one commission on the sale of that property, but five: the initial commission, plus the next four arising from the development.

Transparently, there is a significant conflict of interest between the working to obtain the best price for the vendor, if that best price is not in fact the one offered by the “friendly” developer.

This Inquiry has been advised that current legislation relating to these matters is inadequate, being far too narrow to capture the broad range of activities and relationships that might conceivably be involved in these conflict of interest situations.

This Inquiry has also been advised that several issues of a conflict of interest nature arise in the context of the relationship between some real estate agents and conveyancers.

In particular, many conveyancers are wholly or largely dependent upon particular agents for referral of business, and their independence as professionals is to some degree at risk as a result.

## **12 Regulation of Industry**

The industry presently follows a very deregulated model.

It is has been reported to this Inquiry that OCBA is not geared for, nor armed legislatively, with the resources to be able to effectively police and audit the industry in its present format.

Ethical considerations are largely unregulated.

The public has very little effective recourse except in the case of particularly serious criminal behaviour.

## **13 Recommendations**

### **13.1 Sales agency agreements**

- 13.1.1 Sales agency agreements should be written in plain English.
- 13.1.2 The Real Estate Board should have an ongoing role of advising the government in relation to continuing improvement in a mandatory, gazetted, standard form sales agency agreement.
- 13.1.3 Sales agency agreements should contain a minimum estimated market value of the property, provided by the agent, a reserve price, and a desired price provided by the vendor.
- 13.1.4 Sales agency agreements should specify how the property is to be offered for sale (eg sale, auction etc.)
- 13.1.5 Sales agency agreements should provide for a maximum term of 45 days, and a termination clause whereby the agreement can be terminated by the vendor at any stage upon the provision of 72 hours notice in writing (and payment of any outstanding costs).
- 13.1.6 Sales agency agreements should expire unless explicitly renewed.
- 13.1.7 Sales agency agreements should provide that only 50% of disbursements and commission can be recovered by the agent if the property is sold for less than the agent's estimated minimum price.
- 13.1.8 The sales agency agreement must contain an agreed detailed advertising program specifying the actual costs to the agent, and setting out the charges for services such as advertising.
- 13.1.9 The sales agency agreement must nominate a price below which the vendor will not be obliged to pay either commission or disbursements.
- 13.1.10 Sales agency agreements should be in the form proscribed in the Act, as should any variation to such an agreement.
- 13.1.11 Sales agency agreements should be more balanced between the rights of vendor and agent. Attending to the matters set out in Chapter 6 is a first step.

### **13.2 Bait Pricing/Over-quoting**

- 13.2.1 Provision of a minimum estimated market value of the property in the sales agency agreement should be used as a starting point for the regulation of bait pricing.
- 13.2.2 It should be illegal to advertise a property at a price, or in a price range **below** the minimum estimated market value of the property.

- 13.2.3 A price range can only be used in advertising a property for auction.
- 13.2.4 An agent who is only able to achieve a sale below the estimated minimum market value should be penalised to the extent of receiving only 50% of his/her fees or commission in relation to that sale.
- 13.2.5 In considering the above recommendation, regard should also be had to Section 72 through to 76 inclusive of the New South Wales Property, Stock and Business Agents Act 2002.

### **13.3 Auctions**

- 13.3.1 Auctioneers should be separately licensed and pay a modest licensing fee.
- 13.3.2 It should be compulsory for persons bidding at an auction to register and to bid by way of numbered “paddles”.
- 13.3.3 Taking a false or “dummy” bid at an auction should be made an offence.
- 13.3.4 Auctioneers should be obliged to recognise bids by reference to a particular paddle number.
- 13.3.5 Auctioneers should commence an auction by indicating that the first stage of the auction is to establish the highest bidder, who will then have the first right to negotiate with the vendor.
- 13.3.6 After the reserve price has been reached, the auctioneer should then advise the auction that the property is now “on the market” and will be sold to the highest bidder at the auction.
- 13.3.7 The Auctioneer must have a sales agency agreement or variation agreement specifying the reserve price (if any), signed by the vendor prior to the commencement of auction.
- 13.3.8 The Auctioneer should have to declare that he has a document specifying a reserve price (if any), and all this must be shown to any purchaser.
- 13.3.9 Records relevant to the auction must be kept for a reasonable period to ensure that proper scrutiny of the process is possible.

### **13.4 Conflicts of interest**

This Inquiry has been advised that there is a real concern in the industry with conflicts of interest. It is recommended that:

- 13.4.1 Provisions based on Sections 48A-48E inclusive of the Estate Agents and Sale of Lands Act Amendment Bill (Victoria) be considered.
- 13.4.2 A broadly drawn new provision relating to conflicts of interest be introduced to impose a severe criminal penalty in cases of an agent acting in a way

which is not consistent with their duty to their vendor client (see suggested draft provisions annexed).

### **13.5 Administrative Structure**

It is recommended that a Real Estate Board be established with the following characteristics:

- 13.5.1 Positions on the board to be nominated by the Minister for Consumer Affairs.
- 13.5.2 That the nominees include individuals selected for their knowledge and experience in the real estate industry, but not necessarily be nominees of REISA.
- 13.5.2 That other relevant professionals such as accountants, lawyers and consumer representatives be also members of the board. (Note: consider NT Model)
- 13.5.3 That the board be responsible to the Minister for recommending appropriate training regimes for agents, and other associated professionals, which the Minister may vary by notice in the Gazette from time to time.
- 13.5.4 That recommended training requirements should be complied with in order for an agent, or associated professional, to secure or maintain registration.
- 13.5.5 That ethics and professional conduct education form a major part of any training requirement.
- 13.5.6 That separate classifications be established for auctioneers, real estate property managers and strata/community titles agents, requiring separate registration and particular training requirements.
- 13.5.7 That the Board be responsible for the registration of agents (and others) and certification that they have the necessary qualifications required under the Act.
- 13.5.8 That the Board have the responsibility to advise the Minister from time to time in relation to a standard form Agency Agreement and Variation of Agency Agreement, which shall be mandated by the Act and be in a form compliant with the regulations.
- 13.5.9 That the Board make recommendations from time to time to the Minister in relation to a code of ethics which shall be published either in the Gazette, or proclaimed by way of regulation.
- 13.5.10 That the Board recommend to the Minister procedures for the dissemination of consumer information to vendors and purchasers of real estate, with the Minister having the power to proscribe the form and method of distribution of such material from time to time.

- 13.5.11 That the Board receive and consider complaints against real estate agents for breaches of the Act (not including the hearing of any criminal charge arising from any breach of the Act) and breaches of the code of ethics.
- 13.5.12 That the Board be empowered to impose penalties in relation to breaches of the Act and or code of conduct ranging from an admonition, to a withdrawal of registration, and orders for restitution.
- 13.5.13 That the Board receive from each agent an annual return which supplies statistical information for the public record in relation to who is employed, by whom, and in what capacity.
- 13.5.14 That the Board supply to OCBA details of proven complaints, and details of agents' annual returns, for publication on its web site.
- 13.5.15 That the Board be authorised to conduct enquiries of its own motion or upon complaint in relation to the activities of any registered agent or sales person.
- 13.5.16 In relation to any such enquiries by the Board reasonable resources should be made available to it from OCBA.

### **13.6 Criminal Sanctions**

- 13.6.1 It is recommended that certain criminal sanctions in support of these measures be introduced, or in the case of those existing in the present legislation, be expanded or developed.
- 13.6.2 These sanctions would apply to specified conduct and might be pursued independently of, and in addition to, any matter brought before the Board arising from the same circumstances.
- 13.6.3 An easy procedure for complaints and hearings be developed.
- 13.6.4 The recommendations above, referring to the Victorian Bill and New South Wales Act, include criminal sanctions that should be considered.
- 13.6.5 Particular attention should be paid to sanctions relating to conflicts of interests.

An example of how some of these offences might be structured is attached to this report (See Appendix).

### **13.7 Misrepresentations**

It is recommended that a new broad criminal sanction for misrepresentation in connection with the sale of a property be introduced.  
(See Recommendations in 13.2)

**13.8 Employment**

- 13.8.1 A letter of appointment in a form compatible with the “*Real Estate Award*” should be required in relation to each employee engaged in the industry.

**13.9 Insurance**

- 13.9.1 All real estate agents should be required to carry suitable professional indemnity insurance.

## 15 Appendix

### DRAFT LAND AGENTS ACT 1994 AMENDMENT BILL

1. Section 6 sub-sections (2) and (3) are repealed.
2. The following Parts and Sections are enacted and inserted immediately following Section 65

#### PART 6

#### OFFENCES BY AGENTS AND SALES REPRESENTATIVES

##### *The Standard Land Agent Retainer Contract*

66. An agent or sales representative must not act or purport to act for a vendor in relation to a sale of property otherwise than in accordance with the terms of *The Standard Land Agent Retainer Contract*.

Penalty \$x fine

67. An agent or sales representative must not act or purport to act for a vendor in relation to a sale of property without having first

- (i) accurately completed each section of *The Standard Land Agent Retainer Contract* and
- (ii) had such completed contract signed by both the Agent and the vendor and
- (iii) supplied a copy of the signed completed contract to the vendor forthwith

Penalty \$x fine

68. The *Standard Land Agent Retainer Contract* may only be varied in relation to the terms declared in the *Standard Land Agent Retainer Contract* to be capable of variation.

69. The *Standard Land Agent Retainer Contract* as originally executed by the agent and the vendor may only be subsequently varied by the agent and the vendor completing and signing a *Supplementary Land Agent Retainer Contract* a copy of which is to be delivered by the agent to the vendor forthwith.

70. An agent or sales representative must not receive payment or request payment of commission, fees, charges or expenses from a vendor in relation to a sale of property unless Sections 66, 67, 68 and 69 have been complied with

Penalty \$x fine

### **Consequences Of Overstating Expected Sale Price On Listing**

71. If the property can not be sold for the minimum expected sale price stated in the original *Standard Land Agent Retainer Contract* and the vendor agrees to sell for a lesser price then, despite any variation by a *Supplementary Land Agent Retainer Contract*, an agent or sales representative must not receive payment or request payment of any commission, fees, charges or expenses from the vendor exceeding a maximum of fifty percent of the commission, fees, charges or expenses originally agreed in the *Standard Land Agent Retainer Contract*

Penalty \$x fine

### **Overstating expenses**

72. (1) An agent or sales representative must not receive payment or request payment from a vendor of an amount for an expense in relation to a sale of property that is greater than the amount charged by the provider of the service to which the expense relates.

(2) An agent or sales representative will not be in breach of subsection (1) if the following matters appear in the *Standard Land Agent Retainer Contract* or in a *Supplementary Land Agent Retainer Contract* executed in accordance with Section 69 before an amount is paid or requested

(i) all discounts, rebates or other benefits or potential benefits to the agent or sales representative associated with the provision of the service to which the expense relates are fully disclosed and

(ii) an agreement by the vendor to pay a specified gross amount for the service notwithstanding that such amount is greater than the net price of the service if the discounts, rebates or other benefits or potential benefits to the agent or sales representative were quantified and taken into account.

Penalty \$x fine

***Recovery Of Commission, fees, charges or expenses***

73. Any commission, fees, charges or expenses paid or given to any person who is, under this Act, not entitled to it, may be recovered from the person as a debt.

74. Upon a finding of guilt of an offence by an agent contrary to Section 6, 66, 67, 70, 71 or 72 (whether or not a conviction is recorded) the Court must order the agent to refund to the vendor all commission, fees, charges or expenses received in relation to that property within a time to be fixed by the Court but not exceeding 3 months from the date of the finding of guilt.

75. The order prescribed by Section 74 cannot be reduced or mitigated in any way unless, in the case of a first offence against the relevant section, the Court is satisfied, by evidence given on oath or affirmation, that the offence is trifling, in which case it may order the agent to refund to the vendor an amount not less than 25% of all commission, fees, charges or expenses received in relation to that property.

76. Upon a finding of guilt of an offence by a sales representative contrary to Section 66, 67, 70, 71 or 72 (whether or not a conviction is recorded) the Court

(1) must order the agent by whom the sales representative was employed to refund to the vendor all commission, fees, charges or expenses received in relation to that property within a time to be fixed by the Court but not exceeding 3 months from the date of the finding of guilt and

(2) may order the sales representative to refund to the agent all or any portion of the commission, fees, charges or expenses received from the agent in relation to that property within a time to be fixed by the Court but not exceeding 3 months from the date of the finding of guilt.

77. The order prescribed by Section 76 (1) cannot be reduced or mitigated in any way unless, in the case of a first offence against the relevant section, the Court is satisfied, by evidence given on oath or affirmation, that the offence is trifling, in which case it may order the agent to refund to the vendor an amount not less than 25% of all

commission, fees, charges or expenses received in relation to that property.

***Duty Of Disclosure By An Agent And Sales Representative To A Vendor***

78. An agent or sales representative acting for a vendor in relation to a sale of property must disclose in writing to the vendor prior to the acceptance by the vendor of an offer to purchase that property all of the following matters:

- (i) that he or she has, or has previously had, a relationship with the prospective purchaser
- (ii) that he or she has received or been offered a benefit from a person other than the present vendor in connection with the property
- (iii) that he or she believes, or has knowledge of facts which would cause a reasonable person to believe, that he or she may in the future be offered a benefit from a person other than the present vendor in connection with the property
- (iv) that he or she has conferred or offered to confer a benefit to a person other than the present vendor in connection with the sale of the property
- (v) any other fact of which he or she has knowledge which would cause a reasonable person to believe that he or she has or may have a conflict of interest in connection with the sale of the property

Penalty \$x fine

79. Any disclosure required by Section 78 must be made by the agent and sales representative in the appropriate sections of *The Standard Land Agent Retainer Contract* before the vendor signs it. However, if the agent or sales representative becomes aware of facts required to be disclosed only after the completion and signing of *The Standard Land Agent Retainer Contract* then the relevant sections of a *Supplementary Land Agent Retainer Contract* must be completed and supplied to the vendor forthwith upon becoming aware of those facts.

80. (1) An agent or sales representative who has acted for a vendor in relation to the sale of property, the settlement of which sale has been completed, must not within a period of twelve months from

the date of that completed settlement act or agree to act in relation to a further sale of that property or any portion thereof without the written consent of the original vendor, or the Board.

(2) The written consent must be in the form of Schedule 7 and copies of such consent must be given to the original vendor and to any person for whom the agent or sales representative wishes to act within the twelve months period

Penalty \$x fine

***Dishonestly obtaining or endeavouring to obtain a benefit***

81. An agent or sales representative acting, or seeking to act, for a vendor in relation to a sale of property must not dishonestly obtain or dishonestly endeavour to obtain a benefit for himself or herself or for any person other than the vendor in connection with the sale of that property.

Penalty \$x fine and/or x years imprisonment

***Aid To Proof Of Section 81 Offence***

82. If an agent or sales representative acting, or seeking to act, for a vendor in relation to a sale of property fails to disclose to the vendor in writing any matter as required by Section 78, then allegations in a charge of a contravention of Section 81 to the effect that the defendant:

- (1) obtained a benefit for himself or herself in connection with the sale of that property and
- (2) obtained a benefit for a person other than the vendor in connection with the sale of that property and
- (3) endeavoured to obtain a benefit for himself or herself in connection with the sale of that property and
- (4) endeavoured to obtain a benefit for a person other than the vendor in connection with the sale of that property and
- (5) acted dishonestly

will be presumed to be respectively proven in the absence of proof to the contrary of the respective allegations.

### ***Bait Advertising***

83. (1) Subject to subsection (3), an Agent or sales representative must ensure that any price, or any part of a price range, included in an advertisement for the sale of the property (whether by auction or any other method of sale) is not below the minimum expected sale price as stated in the original *Standard Land Agent Retainer Contract*.

(2) Subject to subsection (3), an Agent or sales representative must not directly or indirectly state to any person that the property will or may sell for a price that is below, or will or may sell within a price range any part of which is below, the minimum expected sale price as stated in the original *Standard Land Agent Retainer Contract*.

(3) An Agent or sales representative may only advertise or make a statement referring to an expected price that is below, or to a price range any part of which is below, the minimum expected sale price as stated in the original *Standard Land Agent Retainer Contract* if

- (i) the vendor agrees in a *Supplementary Land Agent Retainer Contract* to reduce the minimum expected sale stated in the original *Standard Land Agent Retainer Contract* and
- (ii) the requirements of Section 69 have been fully complied with before the advertisement is published or the statement is made and
- (iii) the price advertised or stated is not below the minimum expected sale price as varied in the *Supplementary Land Agent Retainer Contract* and
- (iv) no part of a price range advertised or stated is below the minimum expected sale price as varied in the *Supplementary Land Agent Retainer Contract*
- (v) price ranges can only be used in the case of a sale by public auction

Penalty \$x fine

84. An agent must retain copies of the following documents for a period of two years following the execution of a *Standard Land Agent Retainer Contract* or the completed settlement of the sale of the property to which it relates, whichever is the greater:

- (i) the *Standard Land Agent Retainer Contract*
- (ii) all *Supplementary Land Agent Retainer Contracts*
- (iii) all auction registers relating to the property
- (iv) a statement signed by the agent at the time of the completion of the listing setting out all payments of commission, fees, charges or expenses received from the vendor and the respective dates of receipt in the form of Schedule 6

Penalty \$x fine

***Definitions in this part***

85. (work in progress)

“benefit” means any benefit or potential benefit but does not include the commission, fees and charges in relation to the sale of the property lawfully payable to the agent or sales representative

“minimum expected sale price” means

“person other than the present vendor” means

“property” means

“prospective purchaser” means

“relationship with the prospective purchaser” means

“Standard Land Agent Retainer Contract” means

“Supplementary Land Agent Retainer Contract” means

“vendor” includes an agent or representative of the vendor

**PART 7**

**PUBLIC AUCTIONS**

**Bidding to be by numbered paddles**

85 An auctioneer must not commence an auction unless he or

she has first

- (1) issued a numbered paddle to each person who wishes to bid at the auction and
- (2) recorded in an auction register the name and address of each person assigned each numbered paddle

Penalty \$x fine

86. An auctioneer must not issue a numbered paddle to a person who the auctioneer knows, or has reasonable cause to believe

- (i) is not a *bone fide* bidder for the property, or
- (ii) is not prepared to furnish his or her correct name and address

Penalty \$x fine

87. An auctioneer must acknowledge each bid at auction by calling out sufficiently loudly to be heard by the assembled bidders

- (i) the amount of the bid and
- (ii) the number of the paddle assigned to the bidder

Penalty \$x fine

### ***Dummy Bidding At Auctions***

88. (1) A vendor of property must not make a bid at a public auction of that property.

(2) A vendor of property must not procure or endeavour to procure another person to make a bid at a public auction of that property.

Penalty \$x fine

89. (1) A person must not make a bid at a public auction of property if he or she believes that the bid is being made for the vendor.

(2) A person must not make a bid at a public auction of property other than for the genuine purpose of purchasing that property.

Penalty \$x fine

90. (1) An auctioneer must not accept or pretend to accept a bid at a public auction if he or she believes that the bid is being made for the vendor.

(2) An auctioneer must not accept or pretend to accept a bid at a public auction if he or she believes that the bid is made other than for the genuine purpose of purchasing the property.

Penalty \$x fine

***Definitions in this part***

91. (work in progress)

“numbered paddle” means

“property” means

3. The following Schedules are enacted and inserted after Schedule 3.

**Schedule 4** ***Standard Land Agent Retainer Contract***

**Schedule 5** ***Supplementary Standard Land Agent Retainer Contract***

**Schedule 6** **Statement of all payments of commission, fees, charges or expenses received from the vendor**

**Schedule 7** **Written consent by vendor.**

**Schedule 8** **Auction Register**

## **16 Acknowledgments**

The assistance of all people who made the effort to make written or verbal submissions to this inquiry is gratefully acknowledged.

The assistance of Mr David Peek QC and Mr Brian Hayes QC is gratefully acknowledged.

The efforts of my staff, Paul Sykes, Stephen Mullighan and Sarah Cocking are also greatly appreciated.

# News Release

John Rau MP  
Member for Enfield

**Embargoed until 12am  
Tuesday, December 10, 2002**

Monday, December 9, 2002

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## **Sweeping reforms recommended in real estate report**

Labor Member for Enfield Mr John Rau has released the Report into Practices in the Real Estate Industry in South Australia.

The report contains 50 recommendations, including suggested changes to sales agency agreements, the auction process, estimated pricing of property, regulatory structures, and criminal sanctions.

“This report highlights many of the issues which were raised with me during the Inquiry,” Mr Rau said. “I received over 50 submissions from both members of the public, and professionals attached to the industry.

The report was written from information gathered during Mr Rau’s Private Member’s Inquiry into Practices in the Real Estate Industry in South Australia. It contains an overview of many of the practices which are prevalent within the domestic real estate industry, and includes recommendations aimed at protecting consumers from unethical or illegal practices.

“Those who contacted me from a consumer’s perspective felt that there was far too much potential for an agent or salesperson to take advantage of a vendor or purchaser. Members of the industry generally felt that much could be done to regulate practices to ensure that relationships between buyers, sellers and agents are as transparent as possible.”

“It is my hope that after reading this report, the Attorney-General and Minister for Consumer Affairs, the Hon. Michael Atkinson MP, will be supportive of change to the industry. I hope to have a draft Bill ready for consultation prior to introduction in the Parliament early in the New Year.”

“Consumers need to be protected from any illegal or unethical practices.”

John can be contacted on 08 8260 7733.