Project No 37

Review of
The Land Agents Act

REPORT

JANUARY 1974
The Law Reform Commission of Western Australia was established by the *Law Reform Commission Act 1972*.

The Commissioners are -

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# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Paragraphs</th>
</tr>
</thead>
<tbody>
<tr>
<td>TERMS OF REFERENCE</td>
<td>1-4</td>
</tr>
<tr>
<td>THE WORKING PAPER</td>
<td>5-6</td>
</tr>
<tr>
<td>PLAN OF THE REPORT</td>
<td>7</td>
</tr>
<tr>
<td>A. LAND AGENTS</td>
<td>8-78</td>
</tr>
<tr>
<td>Supervising authority</td>
<td>9-13</td>
</tr>
<tr>
<td>Licensing of agents</td>
<td>14-22</td>
</tr>
<tr>
<td>Qualifications of a land agent</td>
<td>23</td>
</tr>
<tr>
<td>Incorporation of land agencies</td>
<td>24-28</td>
</tr>
<tr>
<td>Renewal of licenses</td>
<td>29</td>
</tr>
<tr>
<td>Registration of salesmen</td>
<td>30-31</td>
</tr>
<tr>
<td>Management of land agencies</td>
<td>32-41</td>
</tr>
<tr>
<td>Duties of a land agent</td>
<td>42-56</td>
</tr>
<tr>
<td>(a) Commission</td>
<td>42-44</td>
</tr>
<tr>
<td>(b) Trust accounts</td>
<td>45-46</td>
</tr>
<tr>
<td>(c) Rates and taxes</td>
<td>47-48</td>
</tr>
<tr>
<td>(d) Representations as to finance</td>
<td>49-51</td>
</tr>
<tr>
<td>(e) Representations on the sale of businesses</td>
<td>52</td>
</tr>
<tr>
<td>(f) Disclosure of agent's interest</td>
<td>53</td>
</tr>
<tr>
<td>(g) Forms of offer and acceptance</td>
<td>54-55</td>
</tr>
<tr>
<td>(h) Sole agencies and multiple listings</td>
<td>56</td>
</tr>
<tr>
<td>Financial control</td>
<td>57-72</td>
</tr>
<tr>
<td>(a) Audit and auditors</td>
<td>57-67</td>
</tr>
<tr>
<td>(b) Receivers</td>
<td>68</td>
</tr>
<tr>
<td>(c) Fidelity Guarantee Fund</td>
<td>69-70</td>
</tr>
<tr>
<td>(d) Interest on trust accounts</td>
<td>71-72</td>
</tr>
<tr>
<td>Other agents not covered by the Act</td>
<td>73-75</td>
</tr>
<tr>
<td>(a) Land auctioneers</td>
<td>73</td>
</tr>
<tr>
<td>(b) Business agents</td>
<td>74</td>
</tr>
<tr>
<td>(c) Mortgage brokers</td>
<td>75</td>
</tr>
<tr>
<td>Other matters</td>
<td>76-78</td>
</tr>
<tr>
<td>SUMMARY OF RECOMMENDATIONS WITH RESPECT TO AGENTS</td>
<td>79</td>
</tr>
<tr>
<td>B. DEVELOPERS</td>
<td>80-84</td>
</tr>
<tr>
<td>SUMMARY OF RECOMMENDATIONS WITH RESPECT TO DEVELOPERS</td>
<td>85</td>
</tr>
</tbody>
</table>
C. SETTLEMENT AGENTS
   Comments received  86-89
   Discussion  90-104

APPENDIX I

APPENDIX II

WORKING PAPER
TO: THE HON. T.D. EVANS, M.L.A.

ATTORNEY GENERAL

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 was 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 arranging 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) the need for improved auditing requirements;
   (f) the need for control over salesmen employed by developers;
   (g) the need for control over the activities of land settlement agencies.

3. The following additional proposals, which were originally discussed in a working paper issued in June 1972 (Project No. 1 Parts II & III) have also been considered in the course of this project -

   (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. (See paragraphs 45 & 80-81 below).
4. Commentators on the working paper, including the Mortgage Brokers Association of W.A., expressed a desire that mortgage brokers be controlled by statute. Consequently the Commission sought and was given your approval to include in this project a consideration of whether they should be so controlled. The Commission decided not to hold up the present report and will at a later date issue a separate working paper on mortgage brokers.

THE WORKING PAPER

5. On 18 June 1973, the Commission issued a working paper which was divided into three sections -
   A. LAND AGENT
   B. DEVELOPERS
   C. SETTLEMENT AGENTS

A copy of the working paper is attached at the end of this report.

6. Appendix I to this report lists those to whom the working paper was sent for comment (Part I) and those who commented (Part II). All comments have been taken into account, even if not specifically referred to in this report.

PLAN OF THE REPORT

7. This report follows the working paper in discussing separately land agents, developers and settlement agents. It also follows the sub-headings of the working paper.

A summary of the recommendations with respect to land agents is to be A, paragraph 79, and with respect to developers at the end of Section B, paragraph 85.

The view of the members of the Commission on settlement agents will be found in Section C.
A. LAND AGENTS

8. In this report, the Commission makes a number of recommendations for amending the law relating to land agents. In areas where no recommendation is made, the Commission should be taken as accepting the present law as satisfactory.

Supervising authority

9. The Commission proposed in paragraphs 36-38 of the working paper that the existing Land Agents Supervisory Committee should be replaced by a more broadly based body of five members appointed by the Governor - a legal practitioner to act as a chairman, with a minimum of, say, eight years practice; two licensed land agents; one accountant/auditor and one other person. The paper proposed that the land agent members should be appointed after election by the general body of licensed land agents and that all members should be appointed for fixed terms of, say, four years, with rotational retirement.

10. There was general agreement with the proposals outlined in paragraph 9 above with the following qualifications -

(a) The Real Estate Institute of Western Australia (in this report called "R.E.I.W.A.") and the Land Agents Supervisory Committee suggested that the "other person", and not the proposed legal practitioner member, should be the chairman.

(b) The Law Society proposed that the "other person" be a surveyor or person specially qualified in Titles Office procedures.

(c) R.E.I.W.A. and the Land Agents Supervisory Committee proposed that one land agent should be nominated by R.E.I.W.A. and the other elected by the general body of licensed land agents.

11. The Commission remains of the view that the chairman should be a legal practitioner with a minimum of eight years practice, particularly if the supervising authority is to have wider judicial functions than the Land Agents Supervisory Committee now has. It agrees,
however, that one of the land agent members should be appointed on the nomination of R.E.I.W.A.

It is now also of the view that no member should be appointed for more than two consecutive terms. (see paragraph 79, Recommendation No. 1).

12. The view was expressed in paragraph 39 of the working paper that difficulties in the enforcement of the Land Agents Act would be overcome if the Land Agents Supervisory Committee had inspectors on its staff. The Commission's proposal that suitable qualified inspectors be appointed to the supervising authority's staff was supported by all who commented on this aspect and the Commission recommends accordingly. (see Recommendation No. 2).

13. If the recommendations in paragraphs 11 and 12 above are adopted, additional sources of finance would be required. Paragraph 40 of the working paper listed the possible sources as being -

   (a) increases in land agents’ annual license fees, or land salesmen's annual registration fees, or both;

   (b) new license fees from persons who could be brought under the control of the supervising authority, such as settlement agents, land auctioneers and business agents;

   (c) increased contribution from the Land Agents Fidelity Guarantee Fund; and

   (d) interest accruing from the investment of a portion of licensed agents’ trust accounts (see also paragraph 71 of this report).

R.E.I.W.A. opposed the use of interest on the investment of a portion of licensed land agents' trust accounts, being of the view that any additional administrative costs met exclusively by contribution from licensees.
The Commission on the other hand, does not consider any of these sources of income to be objectionable, but considers that no specific recommendation can be made until the functions and duties of the supervising authority are settled.

Licensing of agents

14. The Commission suggested in paragraphs 41, 42, 45, 46 & 49 of the working paper that -

   (a) The supervising authority should be the licensing authority for land agents, as this is a function which it could effectively perform. In addition, if this was done, it would avoid difficulties of liaison with the court and differences in approach from court to court.

   (b) The supervising authority should have power to cancel licenses on prescribed grounds, attach conditions to the issue of licenses, hold inquiries, disqualify or suspend licensees and in lieu of cancellation or suspension, fine licensees up to a maximum of $200, reprimand or caution them.

   (c) There should be a right of appeal to a superior court from all decisions of the supervising authority.

15. These suggestions were supported by R.E.I.W.A., the Land Agents Supervisory Committee and other commentators except that the Land Agents Supervisory Committee proposed that the maximum fine should be $750.

16. The Law Society and the Police Department, however, were of the view that the supervising authority should only issue licenses in the absence of objection and that contentious applications be dealt with by the courts. The Law Society suggested that this would overcome difficulties that may otherwise arise if the licensing authority was located in Perth.

17. The Law Society also submitted that the power to cancel licenses should remain with the courts and said -
"The power to cancel a license is tantamount in many cases to cancelling a person's ability to earn his income. Such proceedings are therefore of a very serious character and must in all respects be done in accordance with the best ideals of our system of justice. The best system of justice which has arisen to date is through the court system, involving the oral examination and cross-examination of witnesses according to the normal rules of evidence. We believe such a procedure is not an administrative function and should be dealt with as at present by a stipendiary magistrate, with the parties having a right to representation by a Counsel”.

The Law Society further submitted that the other disciplinary powers outlined in the working paper (see paragraph 14 (b) of this report) should also be exercised by the courts and that only conditions created by the Act should be attached to licenses.

18. One member of the Commission Mr. B.R. Rowland agrees with the views expressed by the Law Society as to licensing and cancellation. He considers that this would obviate the necessity of what is primarily an administrative tribunal having to exercise judicial functions. In his view, a court is more competent to evaluate factual evidence than a body such as the supervising authority with its varied composition. He believes however, that there would be no real objection to giving the supervising authority power to hold inquiries, suspend licenses for up to a specified period, say 2 years, and, in lieu of suspension, to fine, reprimand and caution.

19. All members of the Commission agree that whatever system of licensing is adopted, there should be a right of appeal to the Supreme Court against all decisions at first instance. However the majority of the Commission, having regard to such a right of appeal, and having regard to its recommendation that the chairman should be an experienced legal practitioner (see paragraph 11 above), adhere to the views expressed in the working paper that the supervising authority is the appropriate body to exercise the functions of licensing and cancellation. In so far as it may be suggested that the proposed supervising authority would not have time to attend to those extra functions, inquiries made as to the number of objections to licensing applications and applications for cancellation of licenses over the last four years indicate that this would not give rise to difficulties. Any other difficulties arising from the location of the supervising authority in Perth would be mitigated by allowing evidence on affidavit in appropriate cases in the absence of objections. The supervising authority could also of course sit in other centres. (see Recommendation 3).
20. It was suggested in paragraph 44 of the working paper that the grounds for objection should be prescribed, that any person should be able to object upon prior notice, that applications should be advertised and that there should be a public hearing whenever there was an objection.

The Police Department suggested that the interests of the public would be better served by not limiting the grounds for objection. The Commission however is of the view that objections should be limited to an applicant’s suitability as a land agent and that the best way of doing this is to prescribe those grounds. It recommends accordingly. (see Recommendation 4).

21. The Commission also suggested in paragraph 47 of the working paper that the supervising authority should have power to prescribe a code of professional conduct for land agents, and to take disciplinary action for any breach of such code. All commentators on this suggestion agreed with it, although the Law Society suggested that an agent should have a right to elect to be dealt with by a court instead of the supervising authority.

While the Commission considers that ethics are primarily a matter for professional associations, it notes that supervising authorities in a number of Australian States have power to prescribe such a code. There would seem on balance to be no objection to giving a similar power in this State to the proposed supervising authority. (see Recommendation 5).

22. The Commission suggested in the working paper that offences against the Act should continue to be prosecuted in the courts in the normal way (paragraph 48). The Land Agents Supervisory Committee considered that the supervising authority should have power to hear such offences, with a discretion to direct some of them to the courts.

The Commission considers that, as a matter of principle, the hearing of criminal matters should be left to the courts. (see Recommendation 6).

**Qualifications of a land agent**

23. The Commission while not expressing any opinion, stated in paragraph 50 (a) of the working paper that the qualifications of an applicant for a license could be upgraded by extending the present academic course.
Some commentators suggested a less comprehensive academic course than at present. Other suggested a more comprehensive course, such as the Diploma of Real Estate Management. Two pastoral companies advocated the issue of restricted licenses whereby land agents would only be able to operate in those fields where they had shown that they possessed adequate knowledge - for example, in the fields of urban, rural or commercial property or of property development. Some commentators who operate as business agents suggested that the qualifications required of business agents should differ from those required of land agents.

The Commission notes that the present land agents' course was recently upgraded (1971) and suggests that it may be better not to extend the course until its effectiveness has been assessed. The Commission does not consider that the establishment of categories of land agents licenses is justified at this stage.

The Commission also suggested in paragraph 50(b) of the working paper that some practical experience was desirable as a qualification. This met with general approval although there was a difference of opinion as to the extent of experience required.

On reviewing the matter the Commission considers that, in addition to other requirements, applicants for a license should be required to satisfy the licensing authority that they have had adequate practical experience. Two years in the employment of a land agent as a full time land salesman would normally be sufficient experience, although the licensing authority should be able to accept other equivalent forms of experience. (see Recommendation 7).

**Incorporation of land agencies**

24. The Commission suggested in paragraph 51 of the working paper that a company itself could be licensed, instead of the present practice of a nominee holding a license on its behalf (see also paragraph 17 of the working paper). The Commission suggested that the qualifications for the licensing of a company should be that the company was financially sound, that all, or a specified percentage of all directors, managers and other principal officers resident in this State were licensed land agents or licensed managers, and that the directors were jointly and severally liable for the acts and defaults of the company. The following comments were made on those suggestions -
The Law Society considered that all resident directors and other principal officers of a licensed company should be required to be licensed land agents. The Land Agents Supervisory Committee and R.E.I.W.A. considered that the percentage of such officers to be so licensed should be determined by the supervising authority.

The Law Society suggested that a limit should be placed on the liability of directors for the acts and defaults of a licensed company.

25. The Commission, having reconsidered the matter raised in paragraph 24 above is now of the view that it is too onerous to require all the directors and other officers to be licensed, and agrees with the view expressed at the 7th Annual Conference of Land Agent Licensing Authorities, held in November 1973 at Perth, that it would be adequate if at least 50% of all directors resident in this State were required to be licensed land agents. If there are no directors resident in this State then the Commission considers that the officer in control of the business of the company in this State should be required to be a licensed land agent.

In any event, the Commission believes that the officers in control of each place of business should also be required to be licensed land agents. A discussion of this matter is to be found in paragraph 33 below.

The Commission is still of the view expressed in the working paper that directors should be jointly and severally liable for the acts and defaults of the company. (see Recommendation 8).

26. In paragraph 52 of the working paper, the Commission suggested that special provisions might be necessary for trustee and pastoral companies. At present, trustee and pastoral companies and others may be certified by the Minister as being "approved applicants" (s.4(2b)). The effect of such approval is -

(a) the applicant's nominee does not need academic qualifications; and

(b) when a license is granted the persons in charge of the licensee's places of business do not have to be registered land salesmen (s.7A(8)).
Under the existing Act, pastoral companies and companies whose land agency business is a minor part of their activities (such as a trustee company), are not required to have their directors and salesmen registered as land salesmen (s.15A(4)). Because they are not so registered, they make no contribution to the Fidelity Guarantee Fund, even though the Fund covers theft by such persons (s. 26).

27. R.E.I.W.A. expressed the view that the concessions referred to in the preceding paragraph should not be available to pastoral companies when they are dealing in other than pastoral or agricultural land.

The 7th Annual Conference of Land Agent Licensing Authorities resolved that it was opposed in principle to statutory provisions enabling the Minister to certify an applicant as being an "approved applicant" when such applicant did not have the qualifications required by s.4(3)(a) of the *Land Agents Act*.

The two trustee companies and the three pastoral companies which commented on the working paper advocated the retention of the present privileges referred to in paragraph 26 above.

The two trustee companies argued that, for reasons of economy, expedition and convenience, it was to the benefit of the estates and trusts that they administered that real estate matters be dealt with in their offices. The private Acts relating to these two companies already enable them to charge for inspections and reports on real estate. The salesmen they employ are mainly involved in limited areas only of real estate, such as letting houses and collecting rents.

The three pastoral companies that commented said that it was impractical to apply to them the proposals in paragraphs 51 & 56 of the working paper (incorporation of land agencies and registration of land salesmen). They stated that they train their officers to be specialists in rural sales and exercise adequate supervision over them and that they had not received any complaints concerning the service they provide. The Commission was informed that these three pastoral companies favoured control of branch offices by either licensed land agents or licensed managers.
28. The Commission considers that the existence of exceptions to the general requirements of the Act, applicable only to a few licensees, is undesirable. However the Commission recognises that a number of companies have enjoyed the concessions referred to in paragraph 26 above for some time and that their withdrawal could cause difficulties.

The Commission is of the view that the best method of dealing with this matter would be to specify in any new legislation the trustee and pastoral companies which are presently licensed, as being licensed land agents from the commencement of that legislation. Such companies would be subject to all the provisions of the legislation, except that -

(a) the proposals in paragraphs 24-25 above as to incorporation of land agencies would not apply; and

(b) the separate places of business of such licensees would not need to be under the control of a licensed land agent (see paragraph 33 below).

However, the Commission sees no reason why the land salesmen of such licensees should not be registered, thereby bringing them under the control of the supervising authority and requiring them to contribute to the Fidelity Guarantee Fund.

The Commission does not consider that the reasons advanced by the pastoral companies are sufficient to justify any concessions when they are operating in urban areas in competition with other land agents, and accordingly it recommends that the provisions outlined in this paragraph should be limited to pastoral companies operating in rural areas only. (see Recommendation 9).

**Renewal of licenses**

29. The Commission put forward the proposal in paragraphs 53 and 54 of the working paper that a license should be continuous, with the payment of a fee for an annual certificate for the right to carry on business. The Police Department, the Land Agents Supervisory Committee, R.E.I.W.A., the Law Society and the 7th Annual Conference of Land Agent Licensing
Authorities did not agree and favoured a continuation of the present system of annual renewals.

The Commission has reconsidered the matter but sees no reason why a land agent should be required to apply for a license each year. The Commission believes that the power of the supervising authority to conduct an inquiry into a land agent's license at any time provides adequate protection. The Commission adheres to its view that if a licensee neglects to obtain a practising certificate for a consecutive period of 5 years the license should expire and he should then be required to apply for a new license in accordance with the provisions of the Act then in force if he wishes to recommence business. (see Recommendation 10).

**Registration of salesman**

30. All but two of the commentators on this subject agreed with the suggestion in paragraph 56 of the working paper that applicants for registration as land salesmen should be required to be fit and proper persons and of a specified minimum educational standard. A number of commentators went further and suggested that land salesmen be required to undertake an academic course. Mr. T.K. Macfarlane, the chairman of the Land Agents Supervisory Committee, considered the present practice under which anyone could register as a land salesman was preferable since there could be difficulty in prescribing minimum educational standards and in any event the disciplinary powers of the Committee would act as a safeguard.

The Commission considers it preferable to investigate the suitability of applicants before registration, and adheres to its view in the working paper. (see Recommendation 11).

31. The majority of the Commission favour the adoption of the further proposal in paragraph 57 of the working paper, namely that the supervising authority should have similar licensing and disciplinary functions with respect to land salesmen as does the Land Agents Supervisory Committee at present, except that the maximum penalty in lieu of cancellation should be raised from $20 to the more realistic figure of $100. (see Recommendation 12).

For the same reasons as have been mentioned earlier (see paragraph 18 above) the other member of the Commission, Mr. Rowland, considers that the supervising authority should
register salesmen only in the absence of objection and that otherwise the application should be
dealt with by a court. He is also of the view that only a court should have power to cancel a
land salesman's registration and that the supervising authority should have limited disciplinary
functions only, similar to those suggested by him for land agents.

**Management of land agencies**

32. In paragraphs 58 to 65 of the working paper the Commission discussed the necessity
of ensuring that the persons who direct the operations of land agencies have adequate
knowledge and experience, and the desirability of preventing the widespread practice of
"dummying" whereby persons who are not licensed land agents exercise control over land
agencies, the licensee himself taking little or no active part. This practice can occur in a land
agency partnership where only one partner need be licensed, or in a company, where one
person appointed by the company may hold the license on behalf of the company. It can also
occur where a licensee has land salesmen in control of a branch office since any land
salesman who has been registered for two years can be in control of such a place. *(Land
Agents Act s.7A).*

At the time the working paper was prepared, the Commission considered that the problem was
greatest in the case of partnerships, and suggested that all partners, or at least all active
partners, should be licensed land agents. (paragraph 58). After considering the comments
received, the Commission believes that the problem arises principally because of the
inadequate control exercised by some licensees over their places of business.

33. Consequently, the Commission is now of the view that the practice of "dummying"
could largely be controlled by requiring a licensed land agent to be in actual control of each
place of business, so that no licensee would be in actual control of more than one place of
business. This was proposed in paragraph 63 of the working paper and was supported by the
Land Agents Supervisory Committee, R.E.I.W.A. and several other commentators. (see
Recommendation 13).

34. In the case of land agency partnerships, the Commission, after considering the
comments received, now believes that it would be too onerous to require all partners to be
licensed land agents. There would seem to be no good reason for distinguishing between
partnerships and companies (see paragraph 25 above), particularly if the suggestion in the previous paragraph is adopted. Accordingly the Commission recommends that at least 50% of all partners should be required to be licensed land agents. (see Recommendation 14).

Complementary provisions have already been suggested with respect to licensed companies which would assist in controlling the practice of "dummying" (see paragraphs 24 and 25 above).

35. The Commission also confirms the suggestion in paragraph 63 of the working paper that all places of business and the name of the licensee in actual control and any changes thereto should be notified to the supervising authority from time to time and specified on his license. (see Recommendation 13.)

36. Transitional provisions would be necessary, to afford unlicensed partners, directors and persons in control of places of business the opportunity where necessary of qualifying for a license. The Commission therefore suggests a three year period before the proposals in paragraphs 25, 33 and 34 above become operative. (see Recommendation 15).

37. No commentator disagreed with the proposals in paragraph 65(a), (b), (c) and (d) of the working paper, which were to prohibit -

(a) Any person from holding more than one license.

(b) A licensed land agent from advertising his license for sale or use or allowing an unlicensed person to use his license in any way.

(c) A licensed land agent from employing an unregistered land salesman.

(d) A licensed land agent from sharing commission with any person other than with his employees or another licensed land agent.

The Commission recommends legislation accordingly, except that, in view of the Commission's recommendations in paragraphs 34 and 73 of this report, it would also be
necessary to permit a licensed land agent to share commission with his unlicensed partner or with an auctioneer. (see Recommendation 16).

38. The Commission in paragraph 65(e) of the working paper raised the question of whether it was desirable to prohibit the employment of land salesmen part-time. R.E.I.W.A. and the Land Agents Supervisory Committee stated that such a prohibition was desirable. The Law Society was of the view that there should be no such prohibition.

The Commission considers that the real risk of abuse arises where land salesmen are simultaneously employed by different land agents or developers and accordingly recommends that this practice be prohibited. It would not however go so far as to prohibit a land salesman from working part-time with one land agent only or one developer only. (see Recommendation 17 and paragraph 83 below).

39. The Commission, in paragraph 66(a) of the working paper, also raised for consideration the question whether the suitability and location of land agency offices should be controlled. R.E.I.W.A. advocated that a land agent should only be permitted to operate from premises zoned for commercial, office or retail purposes.

Some commentators supported control of the suitability and location of offices, although the Law Society did not. The Commission considers that this is primarily a matter of town planning and does not consider that control should be imposed in legislation dealing with land agents. (see Recommendation 18).

40. The proposal in paragraph 66(b) of the working paper that the use of business names by land agencies should be subject to the approval of the supervising authority was opposed by the Law Society. The Land Agent Supervisory Committee suggested that where the name of a licensee is not included in the business name, his initials and surname should appear under the business name whenever the latter is used.

The Commission does not recommend control of business names by the supervising authority, although it is of the view that a licensee should be entitled to carry on one business as a land agent under one business name, and that this name should be recorded on his license. This in part is the present law (The Land Agents Act s.7).
In addition, where the business of a land agent is carried on under a name other than the surname of the licensee, his name should appear in all correspondence, and a notice containing it should be exhibited at every place of business (see Recommendation 19). The special problem of advertisements is dealt with in the next paragraph.

41. Several commentators, including the Land Agents Supervisory Committee and R.E.I.W.A., advocated that a licensee should not be required to put his full address in any advertisement, as he is at present (Section 13A). They were of the view that this was an unnecessary expense, and that it would be sufficient to require the inclusion of the name of the city, suburb or town where the relevant office is located. Several other commentators advocated less restrictive provisions than at present. The Law Society said that the advertisement should be specific enough to enable a reader to identify the agent responsible. The Commission agrees with the Law Society. In some cases the name of the agent should be sufficient to identify the agent, whilst in others, an address may also be necessary. (see Recommendation 20).

Duties of a land agent

(a) Commission

42. In paragraph 67 of the working paper the Commission suggested that a written appointment of an agent should be necessary to support the recovery (as at present) and retention of commission, although it suggested that it should not be necessary for the appointment to have been given prior to the agent finding a purchaser. Mr. T. Macfarlane and Professor Sackville considered that a prior written appointment should be required. Mr. Macfarlane pointed to the risk of a conflict of interest that could arise where an agent already acts for a prospective buyer before he is appointed by the vendor, and Professor Sackville pointed to the desirability of avoiding disputes and of preventing an agent putting pressure on a vendor to sign an appointment after the sale. However, the Land Agents Supervisory, Committee and R.E.I.W.A. both favoured the South Australian position, whereby the written appointment need only be obtained before receipt of the commission.
The Commission believes that the legitimate interests of both the agent and the principal would be sufficiently protected if the written appointment is given at any time. A written appointment should, however, be a requirement for retention of commission out of money held by or under the direction of the agent, as well as for its recovery. (see Recommendation 21).

43. The Commission in paragraph 68 of the working paper suggested a *prima facie* rule, subject to any agreement to the contrary, making commission payable only on the completion of a transaction, unless the failure to complete was due to the fault of the land agent's principal. The Commission in the same paragraph thought it might be desirable to go even further and make this an absolute rule notwithstanding any agreement to the contrary. Both the Land Agents Supervisory Committee and R.E.I.W.A. were in favour of a *prima facie* rule.

The Commission is divided on the question as to whether an absolute rule should be enacted. Such a rule would protect a person from liability to pay commission arising out of an undertaking contained in small print which the person did not read or did not fully understand. On the other hand such a rule would interfere with freedom of contract.

The Commission is unanimously of the view that at least a *prima facie* rule should be enacted in order to remove doubts as to the correct law presently applicable in this State. Completion should be defined as occurring at the time of settlement for cash sales, and at the time when possession is given for terms sales. (see Recommendation 22).

44. In paragraph 69 of the working paper the Commission favoured giving the supervising authority power to prescribe rates of commission. At present R.E.I.W.A. fixes rates for its own members, but land agents who are not members of R.E.I.W.A. are free to enter into any contract as to the rates of commission to be charged. R.E.I.W.A. opposed any statutory fixation of rates, claiming that its rates were satisfactory and readily ascertainable by the public. The Land Agents Supervisory Committee has from time to time received complaints alleging that excessive commission had been charged, and in its submission, the Committee suggested the adoption of the R.E.I.W.A. rates for all land agents, whilst the Law Society suggested that the rates should be fixed either by the Minister or the supervising authority.
The Commission considers that the rates should be prescribed, and that power to do this should be given to the supervising authority, subject to disallowance by Parliament. (see Recommendation 23).

(b) **Trust accounts**

45. The proposal in paragraph 70 of the working paper (which in turn was the subject of an earlier working paper, see paragraph 3 above) was that purchase money should be retained in trust pending completion of any sale. This view was supported by R.E.I.W.A., The Institute of Legal Executives and the Police Department. On the other hand the Law Society considered that in any conditional contract, the agent should act as a stakeholder and hold the purchase money received until the condition was fulfilled. A number of commentators on the earlier working paper, including the Housing Industry Association, the Master Builders' Association of Western Australia, the Developers Institute of Australia, Western Australian Division and A.V. Jennings Industries (Australia) Limited, were strongly opposed to the proposal.

After reconsideration, the Commission is of the view that the proposal should not be adopted. The matter should be left to agreement between the parties. (see Recommendation 24).

46. The Commission also proposed that all money received by an agent in respect of a land transaction should first be paid into his trust account (working paper, paragraph 71). At present only the balance after payment of expenses, commission and other charges must be paid into trust. There was no disagreement with this proposal, and the Commission recommends its adoption. (see Recommendation 25).

(c) **Rates and taxes**

47. The Commission's suggestion in paragraph 72 of the working paper that the adjustment of rates and taxes should be the responsibility of the land agent in all cases was supported by the Land Agents Supervisory Committee, R.E.I.W.A. and the Law Society. It was opposed by one commentator only.
The Commission adheres to the view expressed in the working paper and, in addition, recommends that the agent should be liable for the cost of such adjustment unless the principal instructs the agent to obtain legal assistance in respect of that adjustment. (see Recommendation 26).

48. The Land Agents Supervisory Committee queried whether land tax should be apportioned as this tax is payable on the aggregated value of all the land held by one owner at the commencement of a financial year \(\text{(Land Tax Assessment Act 1907 s.8 and Land Tax Act 1948 s.7)}\), and as there is no specific statutory power to apportion land tax between successive owners.

The Commission is of the view that this is a matter for agreement between parties, and if the parties elect to adjust land tax and agree upon the method of adjustment to be employed, then the agent should be responsible for this adjustment in the same way as he is responsible for the adjustment of any other charges upon the land.

\[(d)\] **Representations as to finance**

49. The Commission's proposal in paragraph 74 of the working paper requiring agents to give to all intending purchasers of land a statement signed by the agent and containing particulars of any proposed finance promised by the agent, was supported by all who commented on it. The Land Agents Supervisory Committee and R.E.I.W.A. suggested that it should be sufficient if these particulars were contained in the offer and acceptance.

The Commission considers that the enactment of its proposal would assist in avoiding disputes arising from representations as to finance and recommends that such a statement should be given, and that it should be in a separate document rather than in the body of the offer and acceptance. (see Recommendation 27).

50. The Commission's attention was also drawn to cases where contracts of sale, conditional upon the obtaining of finance within a specified period, had lapsed because the purchaser believed that it was the agent's responsibility to arrange finance. The Commission considers that this problem could be overcome by requiring a written provision signed by the
agent, specifying who is responsible for arranging finance. Such a provision could be included in the statement referred to in the preceding paragraph. (see Recommendation 27).

51. In paragraph 75 of the working paper the Commission referred to a bill before State Parliament to amend the *Trade Descriptions and False Advertisements Act 1936*. This bill has now been passed and by Section 9 of the amending Act it is now an offence to make a false or misleading statement that is intended or apparently intended to promote the sale of land.

(e) *Representations on the sale of businesses*

52. The working paper, in paragraph 77, proposed that a signed statement should be given to every prospective purchaser of a small business, giving details of the business, its turnover, profit and other relevant matters. The Law Society and the Police Department supported the proposal. The Land Agents Supervisory Committee and R.E.I.W.A. also agreed, but considered that the statement should only be required in respect of sales effected through land agents.

The Commission considers that such a statement should be given but that it should only apply to sales through land agents and it should be limited to businesses the purchase price of which does not exceed $50,000 (see Recommendation 28). The extension of licensing provisions to business agents is dealt with in paragraph 74 below.

(f) *Disclosure of agent's interest*

53. It was suggested in paragraph 79 of the working paper that it should be an offence for a land 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. All commentators agreed that the principal's consent should be obtained, although opinions varied as to when this consent should be required. Some commentators agreed with the view expressed in the working paper. R.E.I.W.A. considered that the consent need not be obtained prior to the purchase. The Land Agents Supervisory Committee suggested it should be obtained before finalisation of the sale.
The Commission adheres to the views expressed in the working paper, and would extend the requirement to include any land transaction (including leases and options) in which the land agent is directly or indirectly interested and in which he also acts or purports to act as an agent. (see Recommendation 29).

(g) **Forms of offer and acceptance**

54. The Commission suggested that the supervising authority should have power to prescribe or approve forms of offer and acceptance for use by land agents without infringing the *Legal Practitioners Act, 1893* (paragraph 80(a) of the working paper). This proposal was supported by the Land Agents Supervisory Committee, the Associated Banks in Western Australia and the Police Department. The Law Society did not consider that the supervising authority should have power to approve forms of offer and acceptance for use by land agents. It believed that the present practice of co-operation between the Law Society and R.E.I.W.A., whereby a form is jointly approved for use by R.E.I.W.A. members, is the best method.

The Commission has been informed that most land agents now use the Law Society-R.E.I.W.A. approved form. It considers that it would be most unlikely for a court to hold that the completion of such a form by a land agent would be in breach of the *Legal Practitioners Act*.

The Commission does not consider that it is either necessary or desirable to give the supervising authority power to determine which forms of offer and acceptance may be used by land agents.

55. The Commission proposed in paragraph 80(b) of the working paper that a land agent or salesman should give to a person signing an offer and acceptance form or other form of contract a true copy of the document immediately after he has signed it. No commentator disagreed and the Commission recommends the enactment of such a provision. (see Recommendation 30).
(h) **Sole agencies and multiple listings**

56. In paragraph 81 of the working paper, the Commission expressed the view that control of the use of sole agencies and multiple listing contracts may warrant consideration. A number of commentators made suggestions for control of sole agencies although R.E.I.W.A. and the Law Society considered legislation unnecessary.

The Commission notes that statutory controls have been introduced in Queensland and Victoria, but in the absence of any specific complaints in this State, it makes no recommendation for such control. In any event, the improper use of such contracts could be grounds for disciplinary action.

**Financial control**

(a) **Audit and auditors**

57. The Commission, in paragraph 82(a) of the working paper, proposed that a land agent should be required to appoint an auditor at the time of applying for a license or at the time of commencing business, that the appointment be continuous, and that any change in auditor be approved by the supervising authority. No commentator opposed these proposals although the Institute of Chartered Accountants in Australia (Western Australian Branch) (in this report called "I.C.A.A."), in association with the Australian Society of Accountants (Western Australian Branch) (in this report called "A.S.A."), which made joint submissions, suggested that the appointment need only be made at the commencement of business.

The Commission considers it would be more convenient to require the notification of the auditor's appointment to accompany the application for a license, thus avoiding difficulties in ascertaining when a licensee had commenced business. In other respects the Commission affirms its views as expressed in the working paper. (see Recommendation 31).

58. The Commission further proposed in paragraph 82(b) of the working paper that only auditors registered under the *Companies Act 1961-1973* be entitled to audit a land agent's accounts, with provision for the appointment of other persons in districts where no such auditor is available.
No commentator opposed this proposal, although the Land Agents Supervisory Committee suggested that auditors already approved prior to any new Act should be entitled to continue. However the Commission thinks it preferable that a uniform scheme should operate and recommends the adoption of the view expressed in the working paper. (see Recommendation 32).

59. In subparagraphs (c) (d) and (f) of paragraph 82 of the working paper it was suggested that a full audit of a land agent's accounts should not be necessary in all cases, that the auditor should 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, and that the supervising authority should have power to extend the time limit for lodging audit reports.

These proposals were supported by all who commented on them and the Commission recommends their adoption. (see Recommendation 33).

60. The Commission proposed in paragraph 82(e) of the working paper that an auditor be empowered to make an interim report to the supervising authority at any time, if he discovers a material breach by the agent. I.C.A.A. and A.S.A. suggested that the term "material breach" should be defined and gave examples.

On reconsideration, the Commission thinks that it should be left to the judgment of the auditor as to which irregularity or other matter should be reported, and recommends that an auditor should have power to make an interim report in these circumstances. (see Recommendation 34).

61. The proposal in paragraph 82(g) of the working paper that the supervising authority be given power to require an auditor to furnish further information or carry out a further audit at any time, was not opposed by anyone who commented upon it. I.C.A.A. and A.S.A. suggested that it may be necessary to settle who should pay the auditor's fee.

The Commission adopts this suggestion and recommends that the fee should be paid as directed by the supervising authority, either from the Fidelity Guarantee Fund or by the
licensee concerned. (compare s.14G(24) of the *Land Agents Act* and see Recommendation 35).

62. In paragraph 83 of the working paper, the Commission expressed doubt as to whether, in addition to the annual audit, an audit should be required within 3 months of a land agent commencing business as well as on every change in or cessation of business (including a change or cessation caused by death).

Neither the Land Agents Supervisory Committee nor R.E.I.W.A. considered an audit within 3 months of commencement of business to be necessary. I.C.A.A. and A.S.A. suggested that an audit should be required after the expiration of 3 months of commencement of business, the report to be completed within a further 2 months.

After reconsideration, the Commission supports the views of I.C.A.A. and A.S.A., although it suggests that provision should be made for the supervising authority to be able to waive this requirement where it does not think an audit necessary. (see Recommendation 36).

63. I.C.A.A. and A.S.A. supported the proposal for an additional audit on every change in or cessation of business whilst R.E.I.W.A. considered it unnecessary. The Land Agents Supervisory Committee suggested that an additional audit should only be required on the cessation of business.

After considering all these views, the Commission does not recommend that compulsory audits should be necessary in the circumstances described particularly if the supervising authority is to retain the power the Committee now has to carry out surprise audits, and to have the additional power to inspect the accounting records of an agent at any time.

64. In paragraph 83 of the working paper the Commission suggested that it might be desirable to prescribe the steps to be followed by an auditor in carrying out an audit. This was supported by the Land Agents Supervisory Committee, but was opposed by I.C.A.A. and A.S.A. who stated that an auditor should be free to decide how to conduct each audit.

However the Commission considers that because of the special nature of a land agent's business, it would be desirable to prescribe certain minimum steps to be observed by all
auditors in carrying out an audit and recommends accordingly. The Commission notes that steps have been prescribed for the audit of legal practitioners' trust accounts in the Rules of the Barristers' Board made in 1972 pursuant to the Legal Practitioners Act 1893. (see Recommendation 37).

65. It was proposed in subparagraphs (a) and (b) of paragraph 84 of the working paper that an auditor should be disqualified from acting if he is a close relative of the land agent under audit or if he is engaged in business dealings with or through that land agent.

I.C.A.A. and A.S.A. suggested that these matters should be left to the determination of the auditor in each case. R.E.I.W.A., was also opposed to the proposals. The Land Agents Supervisory Committee suggested, with respect to the first proposal, that an auditor should be disqualified unless approved by the supervising authority. The Committee did not favour the second proposal.

66. A number of approved auditors are not members of either the I.C.A.A. or the A.S.A. The Commission is therefore of the view that, in these circumstances, in the absence of professional associations which can exercise adequate control over all auditors of land agents, some safeguards should exist. The Commission recommends that auditors be required to disclose to the supervising authority any personal or business relationships they have with the land agent under audit, and the authority should have power to disqualify the auditor from acting in any particular case. A right of appeal to a court from the authority's decision would apply (see paragraphs l4(c) and 19 above and see Recommendation 38).

67. The Land Agents Supervisory Committee made the additional suggestion that the supervising authority should have power to suspend any auditor, thus preventing him auditing any land agent's accounts. This power under the Land Agents Act is presently vested in the Minister (see paragraph 28 of the working paper). The Commission agrees with the suggestion and recommends its adoption. A right of appeal to a court would also apply. (see Recommendation 39).
68. In paragraph 85 of the working paper the Commission proposed that provision be made for the appointment of a receiver in certain situations to carry on a land agent's business. The Law Society and the Associated Banks agreed with this proposal. The Land Agents Supervisory Committee considered that the present power to make an order restraining dealings on a land agent's trust account was adequate (see paragraph 30 of the working paper). The Committee also stated that the supervising authority (instead of the Supreme Court) should have power to make a restraining order, to be made absolute by a Judge.

After considering these comments, the Commission considers that the power to appoint a receiver could be a useful supplement to a restraining order. At the same time the Commission considers that both the appointment of a receiver and the issue of a restraining order should only be made by the Supreme Court. (see Recommendation 40).

69. The Commission suggested in paragraph 86(a) of the working paper that the present ground for claims against the Fidelity Guarantee Fund was too restrictive and that further grounds should be added, similar to those in Queensland. Several commentators agreed that the grounds should be expanded. The Police Department suggested that they should include any established malpractice. The Commission considers that the Police Department's suggestion may be too broad a definition and that the ground should cover any loss of property arising out of the criminal or fraudulent conduct of a licensee, or of the servant, agent, director or officer of a licensee. (see Recommendation 41).

70. In paragraph 86(b) of the working paper the Commission suggested that the present limit on the Fund of $150,000 should be increased. The Land Agents Supervisory Committee suggested that the limit be increased to $350,000 and R.E.I.W.A. suggested $250,000. The Commission accepts the statement that the present limit is inadequate in view of the depreciation in the value of money, but does not consider that it is in a position to recommend what the proper limit should be. In any event, the limit cannot be fixed until it has been decided whether agents other than land agents are to be covered by the Fund. Whatever the proper limit may eventually be the Commission is of the view that it should be set by statute.
Interest on trust accounts

71. In paragraph 87 of the working paper the Commission suggested that one possible source of additional revenue for the Fidelity Guarantee Fund could be interest derived from the investment of a portion of land agents’ trust accounts. The Law Society agreed with this, whilst R.E.I.W.A. disagreed. The Land Agents Supervisory Committee expressed the view that the funds available for investment may not be adequate to make the suggestion practicable, although no figures were in fact available.

The Commission continues to favour this source of additional revenue and suggests that if the Fund still requires additional revenue, this should be made up by contributions from licensees. (see Recommendation 42).

72. It was advocated in paragraph 88 of the working paper that a land agent should have express power to invest any trust money held on behalf of his principal in authorised trustee investments for the benefit of his principal. Subject to its comments with respect to paragraph 71 of this report, R.E.I.W.A. agreed, although the Law Society did not see the necessity for such powers.

As it would appear that a land agent may at present invest trust money at the direction of his principal providing that he has complied with section 8 of the Land Agents Act, the Commission considers that no further statutory power is necessary. The Commission does not believe that an agent should have express power to invest trust money without the consent of his principal.

Other agents not covered by the Act

(a) Land Auctioneers

73. In paragraph 89 of the working paper, the Commission expressed the view that land auctioneers should be subject to the same statutory controls as land agents, the one license covering both activities. At present auctioneers need have no qualifications, apart from being fit and proper persons (Auctioneers Act, 1921 s.6(2)), and they are not subject to trust account and audit provisions and other statutory controls applying to land agents.
All who commented on this proposal agreed that statutory controls similar to those applying to land agents were desirable, although opinions differed as to whether a separate land auctioneer's license should issue.

The Commission now considers that land auctions should only be held under the control of a licensed land agent. The auction should be actually conducted by a person licensed as an auctioneer but such person need not also be a licensed land agent. (see Recommendation 43).

(b) Business agents

74. The Commission also proposed, in paragraph 90 of the working paper, that business agents should be subject to the same statutory controls as land agents. There was general agreement amongst commentators with this proposal, although some commentators suggested that a separate business agent's license should issue with different qualification requirements. It was also suggested that there should be transitional provisions for the licensing of those unlicensed persons who are presently operating as full time business brokers. The Commission considers that only licensed land agents should be entitled to operate as business agents, the one license covering both activities. The Commission also recommends a transitional provision of three years before this requirement is introduced, thus giving unqualified persons presently operating as business brokers the opportunity of qualifying for a license, with credit to be given for any practical experience they may have had. (see Recommendation 44).

(c) Mortgage brokers

75. The Commission is presently considering whether mortgage brokers should be subject to statutory controls. (see paragraph 4 above).

Other matters

76. The Commission considers that it should be an offence for a person to act or hold himself out as acting as a land agent in Western Australia if he is not licensed under the Western Australian Act, irrespective of whether the land is situated inside or outside of
Western Australia, and recommends legislation accordingly. A similar provision to that proposed is in the legislation of the Australian Capital Territory (Agents Ordinance 1968, s.5(2) and s.18(1)). The Commission's proposal also gives effect to the submission by R.E.I.W.A. which expressed concern at the growing practice of unlicensed persons offering land situated outside of Western Australia for sale in this State. (see Recommendation 45).

77. The Land Agents Supervisory Committee and R.E.I.W.A. proposed that the title of any new legislation should use the words "real estate agent" in preference to the words "land agent". The Commission sees no objection to this proposal.

78. The 7th Annual Conference of the Land Agent Licensing Authorities resolved that where a licensee dies, the person whom the supervising authority approves as the personal representative of the deceased licensee should be deemed to be a licensed land agent and that he should be entitled to carry on the business of the deceased licensee for a maximum of 6 months. At present the personal representative may apply for a license under section 4(3) (a) (v) of the Land Agents Act, which provides no time limit on the period for which it can be used.

The Commission favours the present system whereby the personal representative must apply for a license. Under the Commission's proposals, the licensing authority could grant a license subject to such conditions as to time and other matters as it thinks fit (see paragraph 14(b) above). The Commission does not favour a fixed time limit, as the administration of some estates takes longer than others and consequently there is a need for flexibility.

79. **SUMMARY OF RECOMMENDATIONS WITH RESPECT TO LAND AGENTS**

1. That -

   (a) The Land Agents Supervisory Committee be replaced by an authority of five members comprising -

   a legal practitioner as chairman, with a minimum of eight years practice;

   two licensed land agents;
one accountant/auditor;
one other person.

(b) All members should be appointed by the Governor.

(c) One land agent member should be appointed after nomination by R.E.I.W.A. and one land agent member should be appointed after election by the general body of licensed land agents.

(d) Members should be appointed for fixed terms of four years each with rotational retirement. No member should hold office for more than two consecutive terms.

(Paragraphs 9-11 above).

2. That the supervising authority should have inspectors on its staff.

(Paragraph 12 above).

3. **Majority recommendation**: That the supervising authority should be empowered to -

(a) license land agents;

(b) attach conditions to the issue of licenses;

(c) cancel land agents' licenses (this would be concurrent to powers of court to do so for certain prescribed offences);

(d) hold inquiries to determine whether licensees are carrying on business in conformity with the conditions of the license and the requirements of the Act;

(e) disqualify from obtaining a license within a specified time persons whose licenses have been cancelled;
(f) suspend licenses for a specified time.

In lieu of cancellation or suspension, the supervising authority should be able to -

(i) impose fines up to a maximum of $200; or
(ii) reprimand or caution licensees.

All decisions of the supervising authority should be subject to a right of appeal to the Supreme Court. However decisions to cancel or suspend licenses should take effect immediately and should not be deferred until the determination of an appeal unless a court otherwise orders.

Evidence in proceedings before the supervising authority should be permitted on affidavit without the necessity of personal appearance in the absence of objections unless the supervising authority directs. In addition, the supervising authority empowered to hold sittings throughout the State.

Minority view: That the supervising authority should be empowered to license land agents in the absence of objection. Otherwise the matter should be referred to a court.

That only a court should be empowered to cancel land agents' licenses and disqualify them from holding licenses.

That the supervising authority should be entitled to hold inquiries, suspend land agent licenses for up to two years, and in lieu of suspension, fine land agents up to a maximum of $200 or reprimand or caution them.

All decisions of the supervising authority should be subject to a right of appeal to the Supreme Court. However decisions to suspend licenses should take effect immediately and should not be deferred until the determination of an appeal unless a court otherwise orders.

(Paragraphs 14-19 above).
4. That -

(a) the grounds for objection should be prescribed and should be limited to matters affecting an applicant's suitability as a land agent, such as character, qualifications, convictions and business methods;

(b) any person should have the right to object to an application providing he gives prior written notice specifying the grounds of his objection;

(c) applicants for a license should be required to advertise their application and a public hearing should be held in every case where there is an objection.

(Paragraph 20 above).

5. That the supervising authority should be empowered to prescribe a code of professional conduct for land agents and land salesmen, and to take disciplinary action for any breach of that code.

(Paragraph 21 above).

6. That offences against the Act should be prosecuted in the courts in the normal way.

(Paragraph 22 above).

7. That an applicant for a land agent’s license should be required to satisfy the licensing authority that he has had sufficient practical experience in the sale and purchase of land to enable him to carry on the business of a land agent satisfactorily. If he has acted as a full time land salesman for two years with a licensed land agent this should be sufficient practical experience. The licensing authority should have the right to accept other equivalent forms of experience.

(Paragraph 23 above).

8. That a company should be entitled to obtain a land agent's license provided that -
(a) the company is financially sound;

(b) at least 50% of the directors of the company who are resident in this State are licensed land agents. If there are no directors resident in this State, then the officer in control of the business of the company in this State must be a licensed land agent. Transitional provisions should be enacted to give unlicensed directors an adequate opportunity to qualify for a license. (see Recommendation 15 below).

(c) all directors are jointly and severally liable for the acts and defaults of the company.

(Paragraphs 24-25 above).

9. That those trustee and pastoral companies which are at present licensed land agents should be named in any new legislation as being licensed land agents as from the commencement of the legislation, and be otherwise subject to all the provisions of the legislation, except

(a) the provisions of recommendation 8 above should not apply to them;

(b) the provisions of recommendation 13 below as to control of places of business should not apply to such companies, although all their land sales-men should be required to be registered land salesmen.

In the case of pastoral companies, the provisions of this recommendation should only apply when they are operating in rural areas.

(Paragraphs 26-28 above).

10. That a land agent's license should be continuous, with the payment of a fee for an annual certificate for the right to carry on business. If a licensee neglects to obtain a certificate for a consecutive period of five years, his license should expire.

(Paragraph 29 above).
11. That applicants for registration as land salesmen should be required to be fit and proper persons and of a prescribed minimum educational standard.

(Paragraph 30 above).

12. **Majority recommendation:** That the supervising authority should have the same powers to license and discipline land salesmen as does the Land Agents Supervisory Committee at present, except that the maximum fine in lieu of cancellation should be increased to $100.

**Minority view:** That the supervising authority should have powers for the licensing and disciplining of land salesmen similar to those proposed in the alternative minority view for land agents (see Recommendation 3 above), except that the maximum fine in lieu of suspension of a land salesman should be $100.

(Paragraph 31 above).

13. That a licensed land agent should be required to be in actual control of each place of business such that no one licensee is in control of more than one place of business.

(Paragraph 33 above).

That each place of business and the name of the licensee in actual control of that place and any changes thereto should be notified to the supervising authority and endorsed on his license.

(Paragraph 35 above).

14. That at least 50% of the partners in a land agency firm should be licensed land agents.

(Paragraph 34 above).

15. That a transitional period of three years should be provided before the implementation of the proposed requirements, that at least 50% of partners in a land agency firm, and at least 50% of the directors resident in this State of a licensed company, be licensed land agents (see Recommendation 8 above). In addition, there
should be a transitional period of three years before the implementation of the proposal in recommendation 13 above.

Paragraph 36 above).

16. That -
   (a) a land agent should be prohibited from holding more than one license;
   (b) a licensed land agent should be prohibited from advertising his license for sale or allowing an unlicensed person to use his license in any way;
   (c) a licensed land agent should be prohibited from employing an unregistered land salesman; and
   (d) a licensed land agent should be prohibited from sharing commission with any person other than with his employees or unlicensed partners or with another licensed land agent, or with an auctioneer.

Paragraph 37 above).

17. That land salesmen should be prohibited from being employed by different land agents and/or different developers at the same time and a land agent or developer should be prohibited from employing a land salesman who is already employed by another land agent or developer.

Paragraph 38 above).

(The subject of developers is discussed in Section B of this report).

18. That no statutory controls relating to the suitability and location of land agency offices should be imposed in the proposed legislation.

Paragraph 39 above).

19. That the use of business names by land agencies should not be subject to the approval of the supervising authority.
However a licensee should only be entitled to carry on one business as a land agent under one business name and this name should be recorded on his license.

And in addition, that where a land agency carries on business under a name other than the surnames of the licensees, those names should appear in all correspondence and a notice containing those names should be exhibited at every place of business.

(Paragraph 40 above).

20. That a licensee should be required to insert in all advertisements such details as are sufficient to identify the agent concerned.

(Paragraph 41 above).

21. That an appointment in writing of a land agent should be necessary for the recovery or retention of commission by that agent, although the appointment may be given at any time.

(Paragraph 42 above).

22. That a rule should be enacted that in the absence of an agreement to the contrary, a land agent's entitlement to commission only arises upon completion of a transaction, unless failure to complete is due to the fault of the agent's principal.

(Paragraph 43 above).

23. That rates of commission should be prescribed, and that power to do this should be given to the supervising authority, subject to disallowance by Parliament.

(Paragraph 44 above).

24. That no statutory obligation should be imposed on land agents to hold in trust, pending the completion of a sale, purchase money received by them.

(Paragraph 45 above).

25. That all money received by a land agent in respect of a land transaction should be paid into his trust account as soon as practicable, and that commission and other proper charges should be subsequently paid out of that account when they lawfully fall due.
26. That a land agent should be responsible for the adjustment of rates and taxes in all cases, although he should be permitted to delegate performance.

That the land agent should be liable for the cost of such adjustment unless the principal instructs the agent to obtain legal assistance in respect of that adjustment.

(Paragraph 47 above).

27. That a land agent should be required to give every intending purchaser of land a written statement signed by the agent containing particulars of any proposed finance promised by the agent, and a statement specifying who is responsible for arranging this finance.

That the contract of sale should be voidable at the instance of the purchaser within one month of the signature of the contract, if the statement is not given, or three months if the finance is not obtained, and that purchase money paid, including the deposit, be repayable.

(Paragraphs 49-50 above).

28. That a land agent should be required to give to every intending purchaser of a small business, the consideration for which does not exceed $50,000, a written statement signed by the vendor or his agent and containing details of the business, its turnover, profit, and other relevant matters. If the statement is not given, or if the details are incorrect, then the contract should be voidable at the instance of the purchaser within one month after he takes possession, and all purchase money should be repayable.

(Paragraph 52 above).

29. That it should be an offence for a land agent, or a specified person associated with a land agent, to be without his principal's prior written consent, directly or indirectly interested in any land transaction (including leases and options) in which he also acts or purports to act as an agent.

(Paragraph 53 above).
30. That a land agent or salesman should be required to give to a person signing an offer and acceptance or other form of contract, a true copy of the document immediately after he has signed it.

(Paragraph 55 above).

31. That a land agent should be required to appoint an auditor at the time of applying for his license, that this appointment should be continuous and that any change in auditor should be approved by the supervising authority.

(Paragraph 57 above).

32. That only auditor registered under the *Companies Act 1961-1973* should be entitled to audit a land agent’s accounts, with provision for the appointment by the supervising authority of other persons in districts where no such auditor is available.

(Paragraph 58 above).

33. That -

(a) a full audit of a land agent’s accounts should not be necessary in all cases, and that instead audits should be conducted in accordance with accepted auditing practice (including selective testing where appropriate);

(b) an auditor should 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;

(c) that the supervising authority should have power to extend the time limit for lodging audit reports.

(Paragraph 59 above).

34. That an auditor should be empowered to make an interim report to the supervising authority at any time if he discovers any irregularity or other matter which he considers should be reported.

(Paragraph 60 above).
35. That the supervising authority should be given power to require an auditor to furnish further information or carry out a further audit at any time, the cost thereof to be paid as directed by the authority either from the Fidelity Guarantee Fund or by the licensee concerned.

(Paragraph 61 above).

36. That in addition to the annual audit, a further audit should be required at the expiration of three months after the land agent commenced business, the report to be submitted within a further two months, with provision for the supervising authority to waive the requirement.

(Paragraph 62 above).

37. That the supervising authority should be given power to prescribe the minimum steps to be followed by all auditors in conducting an audit of land agents' accounts.

(Paragraph 64 above).

38. That an auditor should be required to disclose to the supervising authority any close relationship by blood or marriage he may have with a land agent whose accounts he is auditing or any business dealings he may have with or through such land agent existing or occurring at any time during his appointment as auditor, and the authority should have power, if it thinks fit, to disqualify that auditor from acting in that particular case.

(Paragraphs 65-66 above).

39. That the supervising authority should have power to cancel or suspend the right of an auditor to conduct land agent audits.

(Paragraph 67 above).

40. That the Supreme Court should have power to make an order appointing a receiver or manager to carry on a land agent's business, in addition to its present power to order a restraint upon trust account dealings.

(Paragraph 68 above).
41. That the grounds for claims against the Fidelity Guarantee Fund should be extended to include any loss of property arising out of the criminal or fraudulent conduct of the licensee, or the servant, agent, director or officer of the licensee.

(Paragraph 69 above).

42. That licensed land agents should be required to invest a specified portion of their trust accounts and that the income therefrom be paid into the Fidelity Guarantee Fund. In the event of the Fund requiring additional revenue, this should be made up by contributions from licensees.

(Paragraph 71 above).

43. That land auctions should only be held under the control of licensed land agents. The person actually conducting the auction should be a licensed auctioneer, although he need not also be a licensed land agent.

(Paragraph 73 above).

44. That only licensed land agents should be permitted to operate as business agents, the one license covering both activities.

That a transitional period of three years should be provided before this requirement takes effect, with credit to be given for practical experience to any unlicensed person who has acted as a business broker prior to his application for a land agent's license.

(Paragraph 74 above)

45. That it be an offence for any person to act or hold himself out as acting as a land agent in Western Australia in respect of any land irrespective of where the land is situated, if he is not licensed under the Western Australian Act.

(Paragraph 76 above).
B. DEVELOPERS

80. The questions arising out of paragraphs 91 to 94 of the working paper with respect to developers are -

(a) should all sales of land by developers be made through licensed land agents? This was the subject of an earlier working paper (see paragraph 3 above).

(b) should salesmen employed by developers be registered and be subject to the control of the supervising authority?

(c) should statutory controls over developers and their salesmen be enacted in specific areas of their activities only?

81. R.E.I.W.A. originally proposed that all sales of land by developers should be made through licensed land agents (see paragraph 80(a) above). However a number of the commentators on both working papers, including the Housing Industry Association (W.A. Division), the Master Builders’ Association of W.A., the Developers Institute of Australia, the Urban Development Institute of Australia and the Law Society of W.A., were strongly opposed to the proposal.

The Commission does not recommend the adoption of this proposal.

82. A number of commentators, including the Urban Development Institute of Australia, the Land Agents Supervisory Committee and the Law Society, considered that land salesmen employed by developers should be registered (see paragraph 80(b) above). The Law Society suggested that it may be desirable to go further and control developers in a similar manner to that applying in New South Wales. Such controls would prohibit developers from employing unregistered land salesmen and certain other disqualified persons, and would require them to publish their name and place of business in all advertisements, to have a registered place of business and to keep a record of their transactions.

In an extract from the Law Society's original submission to the Commission, it was said -
“A land salesman (whether an employee of a developer or not) generally works on some element of commission, and his very strong motivation is to make a sale. The interests of the parties in what is to them, so vital and important a transaction, may not always be uppermost in his mind.”

“On these general grounds, we think that all land salesmen engaged in the business of selling land should be subject to annual licensing control. To obtain a license, such persons should only have to show that they are of good character, but any breach of the legislation relating to them would prejudice the likelihood of renewal of the licenses. Broadly, the effect would be to extend to the employees of developers the present "land salesman" provisions of the Act”.

Only one commentator, the Bond Corporation, expressly opposed registration of developers' land salesmen, claiming that this was not practical and that as developers were responsible for their salesmen, the protection to purchasers flowing from the Sale of Land Act, 1970, sufficiently covered the situation.

83. The Commission agrees with the views of the Law Society and recommends legislation controlling developers in a similar manner to that applying in New South Wales, including the requirement that all land salesmen employed by developers be registered. However, the Commission suggests that the requirements for developers' advertisements should be the same as those recommended for land agents (see paragraph 41 above), and that developers should be prohibited from employing land salesmen already employed by other land agents or developers. (see paragraph 38 above and see Recommendation No. 46).

84. The proposal that developers should give to intending purchasers of land a signed statement as to proposed finance, in a similar manner to that recommended for land agents (see paragraphs 49 & 50 above) was supported by all who specifically commented on the matter, including the Urban Development Institute of Australia. However two commentators expressed the view that no further legislation was necessary with respect to developers.

The Commission considers that the proposed requirement would be useful and in any event suggests that there should be uniformity in this area in the practice of land sales both by land agents and developers. (see Recommendation 47).
SUMMARY OF RECOMMENDATIONS WITH RESPECT TO DEVELOPERS

46. That developers -

(a) be prohibited from employing unregistered land salesmen, or land salesmen employed by another land agent or developer, or persons whose land agents' licenses have been cancelled or suspended;

(b) be required to include in all their advertisements sufficient details to identify the developer concerned, in the same manner as has been recommended for land agents.

(see paragraph 41 above);

(c) be required to register with the supervising authority a place of business in Western Australia;

(d) be required to keep a record of all land transactions in which they have been involved.

All land salesmen employed by developers should be registered and be subject to the same controls as has been recommended for land salesmen employed by land agents (see paragraph 31 above).

47. That developers be required to give to intending purchasers of land a signed statement as to the proposed finance, in the same manner as has been recommended for land agents (see paragraph 49 above).
C. SETTLEMENT AGENTS

COMMENTS RECEIVED

86. Twenty of the commentators on the working paper referred to settlement agents. Of these, only the Law Society was categorically against any statutory recognition or de facto acceptance of settlement agents. The others seemed to accept their continued existence. Seven land agents, a developer and R.E.I.W.A. said simply that they should be licensed. The West Australian Real Estate Settlement Association, the Associated Banks in Western Australia, the Police Department, the Institute of Legal Executives, and the Land Agents Supervisory Committee went further and suggested the sort of controls which should be introduced for the protection of the public. These included a supervisory body, trust accounts, adequate audit provisions, a guarantee fund, some form of qualifying examination and a period of training.

87. The Law Society’s objections were based on the following arguments -

(a) **Contract**: Contracts for sale of land, in the form of an offer and acceptance on a printed form are usually completed by persons who are not qualified as legal practitioners. In the course of a settlement, questions of law arise. Settlement agents are not qualified either to recognise these problems when they arise, or to deal with them if recognised. Legal problems cannot be segregated from non-legal problems. It is unrealistic to assume that settlement agents always refer legal problems to legal practitioners, because of -

   (i) the possibility of a failure to recognise such problems;

   (ii) the possibility of a reference causing delay in the settlement; and

   (iii) the additional expense of legal practitioners' fees.

On the other hand, where legal practitioners act on settlements, the normal legal advice arising out of the settlements are included in the scale of fees of legal practitioners. Additional charges are made by legal practitioners only when a major dispute arises between the parties.

(b) **Title**: The assurance of a good and valid title to the property purchased which will transfer exactly what the purchaser contracted to buy and the vendor to
sell, involves the legal assessment of all the facts revealed by the title search and the terms of the contract of sale. It involves the need to -

(i) interpret the terms of the contract of sale;

(ii) ascertain the capacity of the vendor to sell - for example where he is an executor, or is holding under a contract of sale, or is acting under a power of attorney, or as a mortgagee, etc.;

(iii) evaluate the effect of encumbrances or caveats on the title, to advise as to whether and how they should be removed, and to appraise the effectiveness of documents purporting to evidence their removal;

(iv) solve many other legal problems. Some of these are listed in paragraph 109 of the working paper.

Settlement agents are not qualified to give purchasers advice as to such matters.

(c) **Conflict of interest**: Although settlement agents generally consider themselves to be responsible to land agents (who are generally the vendor's agents) and deal with matters from that point of view, they frequently purport to act for both vendor and purchaser, and claim a fee from each of them. However there may be a conflict of interest between the vendor and purchaser. Legal practitioners would recognise such a conflict and would urge the parties to take independent legal advice. Settlement agents may not. South Australia had encountered difficulties with the performance of conveyancing and settlement work by land brokers, both in the standard of work carried out by them and in the problem of conflict of interest. The Society drew attention in this connection to the critical remarks of the Chief Justice of South Australia and of the Hon. Mr. Justice Zelling in recent cases arising out of land transactions \*(Hines v. Taylor (unreported) 9 November 1972 and Ellul and Ellul v. Oakes (1972) 3 S.A.S.R. 377)*.\*

(d) **Standard of care**: If a land transaction is badly handled by a legal practitioner, and a party suffers a loss as the result, that party can bring an action for negligence against the legal practitioner and obtain damages by proving that
there was such a want of skill and care from the latter as to amount to a breach of contract. The court assesses the want of skill in the light of the qualifications which legal practitioners hold themselves out as having. If settlement agents were to be recognised by statute, any action for negligence against them would have to be looked at in the light of the amount of skill (substantially below that possessed by legal practitioners) that they possess. This would have the undesirable result of creating two standards of skill in actions for negligence where land transactions are concerned.

The Law Society concluded that, in the light of these considerations, settlement agents should neither be licensed nor allowed to continue doing what it considers is essentially legal practitioners' work.

88. The above comments of the Law Society dealt only with settlement agents. The Commission subsequently asked the Society for its views on the wider issue of how far its suggestions should apply to land agents, banks, and other institutions doing settlement work. To this the Society replied that in its view the Legal Practitioners Act should be amended to clarify and ensure that no person other than a certificated legal practitioner should act on behalf of another person in relation to the completion of an executed contract or other transaction relating to or affecting real estate.

89. The Commission made enquiries as to the role of the Queensland Public Curator, who has for many years undertaken general conveyancing work for the public. The present Public Curator, Mr. McAlpine, advised the Commission that his office did a substantial proportion of the conveyancing work. There are Deputy Public Curators in Rockhampton and Townsville and full time managers in other major centres and all work is done by or under the supervision of legally qualified officers. A similar but more limited scheme has recently been adopted in the Australian Capital Territory.

DISCUSSION

Introduction

90. A substantial proportion of vendors and purchasers of land avail themselves of the services of settlement agents. Land agents and others have expressed satisfaction to the
Commission with the standard of these services, and no person has complained to the Commission that he has not obtained a good title or that he has suffered loss due to the fault of a settlement agent.

Some of this popularity possibly arises from the belief that settlement agents give the same services as legal practitioners and charge less. Settlement agents are, of course, neither legally qualified nor authorised (subject to limitations as to which see paragraph 97 below) to provide legal services, and the scale of fees used by the group of settlement agents who do most of the business in this State is only marginally less than the scale applicable to legal practitioners. It should also be borne in mind that although no person has as yet complained to the Commission, this does not necessarily mean that in fact good title has always passed. Defects in title may remain undiscovered for years.

**Should settlement agents be recognised and controlled by statute?**

91. Settlement agents arrange and attend on settlements after offer and acceptance forms have been completed and signed, and in some cases effect registration. The area of their activities is not precisely laid down but they are doing work which previously would have been performed in the main by land agents or legal practitioners. The steps taken by a settlement agent in a typical transaction are outlined in paragraph 101 of the working paper.

92. In so far as agents are doing would otherwise be done by land agents, the main matters of concern are:

(a) that settlement agents handle large sums of money on behalf of others but are subject to no statutory control; and

(b) that their charges add to the costs of a transaction (see paragraph 98-103 inclusive below).

In so far as they perform tasks of a legal nature, involving the preparation of legal documents or the giving of legal advice, these tasks should be performed by legal practitioners.
93. If settlement agents are to be controlled by statute, as contemplated by most of the commentators in the working paper (see paragraph 86 above) the statute would need to:

(a) ensure financial protection for the public by providing for a fidelity guarantee fund, the maintenance of trust accounts and compulsory audits of such accounts;

(b) provide for a system of licensing, possibly with prescribed qualifications: Several commentators have suggested a qualifying examination and a period of training; and

(c) provide for the fixing of the fee that could be charged by them. This is dealt with in paragraphs 98-103 inclusive below.

94. The Law Society is opposed to statutory recognition (see paragraph 87 above), and except for South Australia, no other State permits the completion of land transactions on behalf of others otherwise than by or under the supervision of legally qualified persons.

95. The Commission has had considerable difficulty in trying to reconcile the view of the Law Society with the other comments received and is divided on the issue of whether settlement agents should be recognised and controlled by statute.

96. (1) Messrs. Freeman and Rowland, who constitute the majority on this issue, are of the view that any legislation controlling and recognising settlement agents would have the effect of creating a para-legal profession. They believe that, for the reasons advanced by the Law Society (see paragraph 87 above), in the long run the enactment of such legislation would be contrary to the public interest.

(2) They acknowledge that to give effect to their views it will probably be at least necessary -

(a) to amend s.77 of the *Legal Practitioners Act* by deleting from the proviso the provision which enables any person to draw or prepare a transfer under the *Transfer of Land Act* (see paragraph 97 (1) (a) below); and
(b) to provide that every dealing lodged for registration at the Titles Office must either be certified as being correct by the party claiming under or in respect of such dealing or by his solicitor (as is the case in N.S.W., Queensland, Tasmania and the Australian Capital Territory; New Zealand also has substantially the same provision). They consider that this would limit banks to the completion of their own transactions and would stop land agents and settlement agents acting in settlements on behalf of others.

(3) Mr. Rowland and Mr. Freeman wish to make clear that they are both lawyers (as is Professor Edwards, the other member of the Commission) and that Mr. Rowland is currently the President of the Law Society. Mr. Rowland and Mr. Freeman nevertheless believe that the public interest would be better served by limiting settlement work to legal practitioners.

(4) In the event of the Government not accepting the recommendation of the majority of the Commission on this issue, the majority would adopt the proposals put forward by Professor Edwards in paragraph 97-104 of this report.

Mr. Freeman would, however, express a reservation about the proposal put forward by Professor Edwards in paragraph 97 (3) of this report, which would prohibit more than one settlement agent from being employed in any one settlement. In practice many settlements require a discharge of an existing mortgage and the registration of a new mortgage and several parties may be involved. In Mr. Freeman's view, conflicts of interest may arise in such cases. Where one or more of the parties are not separately represented, such conflicts may go unrecognised, or if recognised, be inadequately dealt with. (See also paragraph 87(c) above). Mr. Freeman also considers that, notwithstanding any legal restrictions that might be imposed on settlement agents, there would be a tendency, which would be difficult to prevent, for settlement agents to give legal advice to one or other of the parties.

97. (1) In Professor Edwards' view, it is too late now to change a position that is well-established in Western Australia whereby persons other than legal practitioners are permitted, to a limited degree, to complete land transactions. The position is:
(a) that the *Legal Practitioners Act*, although it prohibits anyone other than a certificated legal practitioner from drawing or preparing "any deed, instrument or writing relating to or in any manner dealing with or affecting real or personal estate", excludes from this prohibition “any person drawing or preparing any transfer under the *Transfer of Land Act*” (s.77);

(b) that for many years some land agents and some banks, have prepared transfers on behalf of vendors and purchasers, and have arranged and attended on settlements; and

(c) that for several years now, settlement agents have done the same.

(2) Professor Edwards concedes that there is some risk that statutory recognition would tend to establish settlement agents as a profession similar to that of land brokers in South Australia (see paragraph 106 of the working paper), and he is strongly of the view that every effort should be made in the statute to ensure that there is no extension of the area in which legal work is at present permitted to be done by persons other than legal practitioners. The statute controlling and recognising settlement agents should therefore ensure that they are restricted to the clerical and routine aspects of settlements and that they do not perform legal work or act as legal advisers.

(3) To ensure that settlement agents do not engage in legal work, the statute should, in addition to dealing with the controls referred to in paragraph 93 above, prohibit more than one settlement agent from being employed in any one settlement. But this would in no way prevent any party from looking after his own interests or from engaging a legal practitioner to do so on his behalf. The settlement agent would be doing clerical and routine work which would be of common interest to all the parties to the settlement, regardless of who pays his fees.

The services which the settlement agent may properly perform are listed in Appendix II. It is to be noted from the Appendix that the settlement agent is limited to the preparation of simple transfers. This may already be the position under Section 77 of the *Legal Practitioners Act*, but the matter is not free from doubt. A settlement agent should not be permitted to prepare complicated transfers, involving the creation, granting or reservation of any encumbrances,
easements, reservations or covenants, for example, restrictive covenants as to building conditions and height restrictions, and easements granting water rights and rights of way. These are matters which should be handled by or under the supervision of legal practitioners.

There should be no question of conflict of interest because the settlement agent would not be looking after the separate interests of any of the parties. If there are complications which prevent the settlement being completed, the settlement agent would merely report to all the parties, each of whom would be free to seek whatever advice and take whatever action he thought fit.

Settlement Agents' Fees

98. If settlement agents are to be recognised by statute, the question of the fee they should be allowed to charge arises.

99. Before they entered the field, the work they now do was done by legal practitioners, banks and land agents. Legal practitioners of course charge for their services. Some of the banks also charge a fee when they arrange the settlement but this fee is small. As far as the Commission is aware, land agents have never made any separate charge for arranging settlements. Any charge for this service has been included as part of the commission on sale. The few land agents who still arrange settlements continue to do so without adding a separate charge for their service.

100. In those cases in which land agents would have previously arranged settlements themselves, but who now refer the parties to settlement agents, the settlement agents fees add to the costs of the transactions although the parties are not getting any additional services or protection.

Similar additional costs are, of course, incurred if settlements which would have been handled by land agents are now set to legal practitioners. But in such cases the parties are getting the extra protection comprised in the legal service for which they are paying.

101. One particular element arising out of the conduct of land settlements is the adjustment of rate and taxes. Although the meaning of s.15 of the Land Agents Act is not clear, it seems
to be accepted by most land agents that the section imposes on them the responsibility for the adjustment in all cases. The Commission has been informed by R.E.I.W.A. that the costs for such adjustment are included in their scale of commission on sale. The Commission is not aware of any cases where land agents make an additional charge for adjusting rates and taxes. Settlement agents in fact adjust rates and taxes and they incorporate in their fee some charge for this service, whether or not it is expressly detailed in their account. Consequently, where a sale has been effected by a land agent and a settlement agent is engaged to arrange the settlement, the client will in effect be charged twice for the adjustment. This duplication of charges may also exist in some cases where a legal practitioner undertakes the adjustment, but the Commission has been informed that the practice of at least some legal practitioners is to charge the land agent (and not the vendor or purchaser) for this service.

102. Any duplication of costs for the adjusting of rates and taxes would be avoided if the Commission’s recommendation in paragraph 47 above is adopted.

103. The fee to be paid to settlement agents for the clerical and routine services in a settlement (that is, the services listed in Appendix II and see paragraph 97(2) and (3) above) should be fixed on the basis of the nature of the duties involved, bearing in mind that these services have been and to a limited extent still are performed for no additional fee by land agents, and for a nominal fee by some banks. The fee should not, as it does at present, vary with the purchase price of the property, since the duties and responsibilities would be the same irrespective of the consideration. Nor should it include any element for advice or responsibility in relation to title or the assurance of title, as the settlement agent should neither be giving advice nor assuring title.

Banks and land agents have for many years been engaged in arranging settlements, and are as well qualified to give the same routine service as settlement agents. Banks and land agents should therefore also be authorised to charge for this service. As has been pointed out some banks already do so (see paragraph 99 above). However the statutory controls suggested for settlement agents in the report would not apply to banks or land agents because the land agents are already subject to statutory control under the Land Agents Act and there would not seem to be a need for such statutory control over banks.
Supervising authority

104. If settlement agents are to be recognised by statute it would be appropriate to include the suggested statutory controls in the statute dealing with land agents contemplated by this report. Settlement agents would then come under the control of the proposed supervising authority. This authority would also be an appropriate body to prescribe their fees.

Mr B.W. Rowland

CHAIRMAN

Prof. E.J. Edwards

MEMBER

Mr. E.G. Freeman

MEMBER

11 January 1974
APPENDIX I
PART I

Copies of the working paper were sent to the -

Associated Banks in W.A.
Australian Society of Accountants (W.A.)
Chief Justice and Judges of the Supreme Court
Citizens Advice Bureau of W.A.
Commonwealth Minister for Housing
Commissioner of Police
Commissioner of Titles
Estate Agents Association of Australia
Housing Industry Association
Institute of Chartered Accountants in Australia (W.A.)
Institute of Chartered Secretaries Administrators (W.A. Branch)
Institute of Legal Executives (W.A.) Inc.
Judges of the District Court
Land Agents Supervisory Committee
Law School of the University of W.A.
Law Society of W.A.
Magistrates’ Institute
Master Builders Association of W.A.
Real Estate Institute of W.A.
Registrar of Companies
Solicitor General
State Taxation Department
Technical Education Division of the Education Department
Under Secretary for Law
Urban Development Institute of Australia (W.A. Division)
W.A. Permanent Building Societies Association
W.A. Real Estate Settlement Association
Other law reform commissions and committees
A notice was placed in *The West Australian* in response to which 193 persons requested copies of the working paper.
APPENDIX I
PART II

In response to the Commission's invitation and to advertisements in *The West Australian*, comments were received from -

Allen Estate Agency Pty. Ltd.
Associated Banks in W.A.
Australian Society of Accountants (W.A.)
Bond Corporation
Brunton, E.W.
City Building Society
Commonwealth Institute of Valuers (Inc.) (W.A. Division)
Companies Registration Office
Conrad, R.J. & Associates (land agents)
Dalgety Australia Limited
Day, R.S.
Des Parr Pty. Ltd. (land agents)
Documentary Services (settlement agency)
Elder Smith Goldsborough Mort Limited
Graham's Estate Agency
Grant & Associates (land agents)
Institute of Chartered Accountants in Australia (W.A.)
Institute of Chartered Secretaries & Administrators (W.A. Branch)
Institute of Legal Executives (W.A.) (Inc.)
Johnston, F.S. & Associates (land agents)
Land Agents Supervisory Committee of W.A.
Law Society of W.A.
Lee, John & Associates (land agents)
Lindsay Developments Pty. Ltd.
Linton Investments Pty. Ltd.
Macfarlane, T. (chairman, Land Agents Supervisory Committee)
McCusker, Lawrence & Harmer (barristers & solicitors)
Moodys Real Estate Agency
Marris, John & Co. (land agents)
Mortgage Brokers Association of W.A.
Perpetual Executors Trustees and Agency Company (W.A.) Ltd.
Perth Technical College (Dept. of Law, Business and Commercial Studies)
Police Department
Reading, E.
Real Estate Institute of Western Australia
Realty Promotions (land agents)
Richardson Bell & Co. (land agents)
Rockingham Estate Agency
Sackville, Professor R. (University of New South Wales)
Urban Development Institute of Australia (W.A. Division)
Walter, Hugh & Co. (land agents)
W.A. Real Estate Settlement Association
West Australian Trustee Executor and Agency Company Limited
Westralian Farmers Co-operative Limited
Whittaker, J.P.
APPENDIX II

List of duties for settlement agents referred to in paragraph 97(3) above.

Searching at the Land Titles Office and at other departments and authorities.

Drawing and preparing a simple transfer* under the Transfer of Land Act 1893 and arranging its execution.

Preparing a settlement statement.

Arranging the stamping of any documents in the transaction.

Arranging and attending on settlement, including receiving and disbursing money.

Lodging of documents at the Land Titles Office for registration.

Uplifting of documents from the Land Titles Office.

Reporting to any party to the transaction on the stage proceedings have reached.

In performing any of the above duties no person other than a legal practitioner may, for reward, give any legal advice to a party to the transaction.

*The term "simple transfer" in this context means any transfer which does not itself create, grant or reserve any encumbrances, easements, reservations or covenants.

Note: No provision has been made in the above list for the adjustment of rates and taxes and notification of the transaction to the relevant authorities, as this is a function which should be performed by the land agent at his expense (see paragraph 47 of the report).
Project No 37

Review of
The Land Agents Act

WORKING PAPER

JUNE 1973
## TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>SECTION</th>
<th>PARAGRAPHS</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>TERMS OF REFERENCE</strong></td>
<td>1-4</td>
</tr>
<tr>
<td><strong>SCHEME OF THE WORKING PAPER</strong></td>
<td>5-7</td>
</tr>
<tr>
<td><strong>A. LAND AGENTS</strong></td>
<td>8-33</td>
</tr>
<tr>
<td><strong>LAW AND PRACTICE IN WESTERN AUSTRALIA</strong></td>
<td>10-13, 14-17, 18, 19, 20-26, 27-32, 33</td>
</tr>
<tr>
<td>Supervising authority</td>
<td>10-13</td>
</tr>
<tr>
<td>Licensing and qualifications of agents</td>
<td>14-17</td>
</tr>
<tr>
<td>Renewal of licences</td>
<td>18</td>
</tr>
<tr>
<td>Registration of salesmen</td>
<td>19</td>
</tr>
<tr>
<td>Duties of a land agent</td>
<td>20-26</td>
</tr>
<tr>
<td>Financial control</td>
<td>27-32</td>
</tr>
<tr>
<td>Other agents not covered by the Act</td>
<td>33</td>
</tr>
<tr>
<td><strong>DISCUSSION AND TENTATIVE PROPOSALS</strong></td>
<td>34-90</td>
</tr>
<tr>
<td>Supervising authority</td>
<td>36-40</td>
</tr>
<tr>
<td>Licensing of agents</td>
<td>41-49</td>
</tr>
<tr>
<td>Qualifications of a land agent</td>
<td>50</td>
</tr>
<tr>
<td>Incorporation of land agencies</td>
<td>51-52</td>
</tr>
<tr>
<td>Renewal of licences</td>
<td>53-55</td>
</tr>
<tr>
<td>Registration of salesmen</td>
<td>56-57</td>
</tr>
<tr>
<td>Management of land agencies</td>
<td>58-66</td>
</tr>
<tr>
<td>Duties of a land agent</td>
<td>67-81</td>
</tr>
<tr>
<td>(a) Commission</td>
<td>67-69</td>
</tr>
<tr>
<td>(b) Trust accounts</td>
<td>70-71</td>
</tr>
<tr>
<td>(c) Rates and taxes</td>
<td>72</td>
</tr>
<tr>
<td>(d) Representations as to finance</td>
<td>73-75</td>
</tr>
<tr>
<td>(e) Representations on the sale of businesses</td>
<td>76-77</td>
</tr>
<tr>
<td>(f) Disclosure of agent’s interest</td>
<td>78-79</td>
</tr>
<tr>
<td>(g) Forms of offer and acceptance</td>
<td>80</td>
</tr>
<tr>
<td>(h) Sole agencies and multiple listings</td>
<td>81</td>
</tr>
<tr>
<td>Financial control</td>
<td>82-88</td>
</tr>
<tr>
<td>(a) Audit and auditors</td>
<td>82-84</td>
</tr>
<tr>
<td>(b) Receivers</td>
<td>85</td>
</tr>
<tr>
<td>(c) Fidelity Guarantee Fund</td>
<td>86</td>
</tr>
<tr>
<td>(d) Interest on trust accounts</td>
<td>87-88</td>
</tr>
<tr>
<td>Other agents not covered by the Act</td>
<td>89-90</td>
</tr>
<tr>
<td>(a) Land auctioneers</td>
<td>89</td>
</tr>
<tr>
<td>(b) Business agents</td>
<td>90</td>
</tr>
<tr>
<td>Section</td>
<td>Pages</td>
</tr>
<tr>
<td>---------------------------------</td>
<td>-------</td>
</tr>
<tr>
<td>B. DEVELOPERS</td>
<td>91-94</td>
</tr>
<tr>
<td>C. SETTLEMENT AGENTS</td>
<td></td>
</tr>
<tr>
<td>THE PRESENT POSITION IN WESTERN AUSTRALIA</td>
<td>95-105</td>
</tr>
<tr>
<td>DISCUSSION AND TENTATIVE PROPOSALS</td>
<td>106-110</td>
</tr>
<tr>
<td>APPENDIX I</td>
<td></td>
</tr>
<tr>
<td>APPENDIX II</td>
<td></td>
</tr>
</tbody>
</table>
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) Than 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

<table>
<thead>
<tr>
<th>A. Land Agents</th>
<th>Western Australia</th>
<th>New South Wales</th>
<th>Victoria</th>
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<tbody>
<tr>
<td></td>
<td>Land Agents Act</td>
<td>Auctioneers and</td>
<td>Estate Agents Act</td>
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### Supervising Authority

<table>
<thead>
<tr>
<th>(a) Name</th>
<th>Lands Agents Supervisory Committee</th>
<th>Council of Auctioneers and Agents.</th>
<th>Estate Agents Committee</th>
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<tbody>
<tr>
<td>(b) Members</td>
<td>Three: chairman, accountant/auditor, land agent (REIWA). No fixed term.</td>
<td>Thirteen: One solicitor appt. by Gov., rest elected by licensees every 3 years.</td>
<td>Six: One lawyer, two other Govt. nominees, two R.E.S.I.V. &amp; one R.E.A.A. rep. Three year term.</td>
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</tbody>
</table>
| (c) Functions  | (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. | (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. | Generally as in W.A. May discipline agents for breach of rules of conduct. |
<table>
<thead>
<tr>
<th>Licensing of Agents</th>
<th>Western Australia (cont.)</th>
<th>New South Wales (cont.)</th>
<th>Victoria (cont.)</th>
</tr>
</thead>
</table>
| **(b) Qualifications** | 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. | 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) Firms & Companies** | (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) Renewals** | 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. |

<table>
<thead>
<tr>
<th>Salesmen</th>
<th>Western Australia (cont.)</th>
<th>New South Wales (cont.)</th>
<th>Victoria (cont.)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>(a) Salesmen registered by</strong></td>
<td>Committee. Appeal against cancellation to Petty Sessions.</td>
<td>As for agents.</td>
<td>As for agents.</td>
</tr>
<tr>
<td><strong>(b) Qualifications of Salesmen</strong></td>
<td>None required.</td>
<td>Fit &amp; proper person.</td>
<td>Good character.</td>
</tr>
<tr>
<td><strong>(c) Managers</strong></td>
<td>No provision.</td>
<td>No provision.</td>
<td>No provision.</td>
</tr>
</tbody>
</table>
### Management of Land Agencies

<table>
<thead>
<tr>
<th>Western Australia (cont.)</th>
<th>New South Wales (cont.)</th>
<th>Victoria (cont.)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Licensed agent or salesman with 2 years registration to be in charge of each branch.</td>
<td>Licensed agent to be in charge of each branch.</td>
<td>Licensed agent must supervise branches.</td>
</tr>
</tbody>
</table>

### Duties of Agents

**Management of Land Agencies**

<table>
<thead>
<tr>
<th>(a) Commission</th>
<th>(b) Trust accounts</th>
<th>(c) Rates &amp; Taxes</th>
<th>(d) Representations as to finance</th>
<th>(e) Representations on sale of business</th>
<th>(f) Disclosure of interest</th>
<th>(g) Forms of offer &amp; acceptance</th>
</tr>
</thead>
</table>
| 1. Cannot sue unless agent gets written appointment before finding purchaser.  
2. Rates of commission not prescribed. | To be applied in payment of -  
(i) expenses, commission & charges;  
(ii) balance to persons legally entitled, pending payment, balance in bank trust account. | Must ensure that –  
(i) statutory charges on land are paid and  
(ii) accruing charges are apportioned. | No provision. | No provision. | No provision. | No provision. |
| No rates of commission prescribed, but Council may review. | To be paid into trust account pending payment to person entitled. | Statement must be given to purchaser. | No provision. | No provision. | No provision. | No provision. |
| 1. Cannot sue for or retain unless appointment in writing.  
2. Rates of commission prescribed. | To be paid into trust account within 3 business days pending payment to person entitled. | Statement must be given to purchaser. | No provision. | No provision. | No provision. | No provision. |
<p>| Statement must be given to purchaser. | Agent or related persons may purchase only with principal’s prior consent. | Yes. | | | | |</p>
<table>
<thead>
<tr>
<th>Financial Control</th>
<th>Western Australia (cont.)</th>
<th>New South Wales (cont.)</th>
<th>Victoria (cont.)</th>
</tr>
</thead>
<tbody>
<tr>
<td>(b) Additional audits</td>
<td>Committee may order at any time.</td>
<td>Council may order at any time.</td>
<td>Accounts to be open for inspection at all reasonable times.</td>
</tr>
<tr>
<td>(c) Auditors</td>
<td>Must be approved by Minister.</td>
<td>Regd. under Public Accountants Reg. Act, or approved by Council.</td>
<td>Must be practising accountant or approved by Registrar.</td>
</tr>
<tr>
<td>(d) Restriction on dealings</td>
<td>Judge may restrain dealings on trust accounts.</td>
<td>Supreme Ct. may appoint receiver.</td>
<td>Treasurer may restrain dealings on trust account.</td>
</tr>
<tr>
<td>(f) Investment of trust funds.</td>
<td>No provision.</td>
<td>Part of trust funds to be deposited with Council. These may be invested and interest paid to Guarantee Fund and for other purposes.</td>
<td>No provision.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Other Agents</th>
<th>Western Australia (cont.)</th>
<th>New South Wales (cont.)</th>
<th>Victoria (cont.)</th>
</tr>
</thead>
<tbody>
<tr>
<td>(b) Business Agents</td>
<td>No licensing requirements.</td>
<td>Above Act applies.</td>
<td>Above Act applies.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>B. Developers</th>
<th>Western Australia (cont.)</th>
<th>New South Wales (cont.)</th>
<th>Victoria (cont.)</th>
</tr>
</thead>
<tbody>
<tr>
<td>No licensing requirements.</td>
<td>Real Estate dealers must be licensed as such, &amp; their salesmen regd.</td>
<td>Persons acting for owner-developer must be licensed as sub-agents. Builders and subdividers must give prescribed statement when selling land.</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>C. Settlement Agents</th>
<th>Western Australia (cont.)</th>
<th>New South Wales (cont.)</th>
<th>Victoria (cont.)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Exist but without statutory controls. May prepare transfers, but no other legal document.</td>
<td>Do not exist.</td>
<td>Do not exist.</td>
<td></td>
</tr>
<tr>
<td>A. Land Agents</td>
<td>Queensland</td>
<td>South Australia</td>
<td>Tasmania</td>
</tr>
<tr>
<td>----------------</td>
<td>-------------</td>
<td>-----------------</td>
<td>----------</td>
</tr>
<tr>
<td>Supervising Authority</td>
<td>Auctioneers and Agents Committee.</td>
<td>Land Agents Board</td>
<td>Auctioneers and Estate Agents Council</td>
</tr>
<tr>
<td>(a) Name</td>
<td>Six: One lawyer, three other Govt. nominees, one R.E.I.Q. rep, Registrar ex officio. Three year term.</td>
<td>Four: One lawyer, two other Govt. nominees, one R.E.I.S.A. rep. Three year term.</td>
<td>Seven: Chairman, three estate agents, &amp; three auctioneers. Three year term.</td>
</tr>
<tr>
<td>(b) Members</td>
<td></td>
<td>(1) May hold inquiries.</td>
<td>(1) May inspect accounts.</td>
</tr>
<tr>
<td>(c) Functions</td>
<td>(1) May hold inquiries, order audit.</td>
<td>(2) Licenses agents, managers &amp; salesmen.</td>
<td>(2) Licenses salesmen.</td>
</tr>
<tr>
<td></td>
<td>(2) Licenses agents, managers &amp; salesmen.</td>
<td>(3) May discipline agents for breach of rules of conduct.</td>
<td>(3) May object to grant or renewal or apply for cancellation of license for agents and managers.</td>
</tr>
<tr>
<td></td>
<td>(4) Administers Fidelity Guarantee Fund.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Licensing of Agents</td>
<td>Queensland (cont.)</td>
<td>South Australia (cont.)</td>
<td>Tasmania (cont.)</td>
</tr>
<tr>
<td>---------------------</td>
<td>--------------------</td>
<td>------------------------</td>
<td>-----------------</td>
</tr>
<tr>
<td>(a) By Whom</td>
<td>Committee. Appeal lies to Mags. Ct. &amp; then to District Ct. Ct may also cancel license.</td>
<td>Board. Appeal lies to Supreme Ct.</td>
<td>Magistrate in Petty Sessions.</td>
</tr>
<tr>
<td>(b) Qualifications</td>
<td>Must have passed exams, unless exempted by Committee.</td>
<td>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)</td>
<td>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.</td>
</tr>
<tr>
<td>(c) Firms &amp; Companies</td>
<td>(a) Firms: all partners licensed. (b) Companies: working directors to hold real estate or manager’s license.</td>
<td>(a) Firms: all partners licensed. (b) Companies: directors &amp; persons in control to be fit &amp; proper persons</td>
<td>(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 &amp; persons in control to be suitable.</td>
</tr>
<tr>
<td>(d) Renewals</td>
<td>If application made before expiry, license continues until renewed. If made after expiry, Committee may renew.</td>
<td>If application made before expiry, license continues until renewed. If made after expiry, Board may renew.</td>
<td>License expires 31 Dec but no provision for late renewal.</td>
</tr>
</tbody>
</table>

**Salesmen**

<table>
<thead>
<tr>
<th>(a) Salesmen registered by</th>
<th>As for agents.</th>
<th>As for agents.</th>
<th>Licensing by Council with appeal to Ct. of Petty Sessions. Cancellation by Ct. of Petty Sessions.</th>
</tr>
</thead>
<tbody>
<tr>
<td>(b) Qualifications of Salesmen</td>
<td>Prescribed educational qualifications &amp; be fit &amp; proper person.</td>
<td>Fit &amp; proper person.</td>
<td>Fit &amp; proper person with sufficient knowledge.</td>
</tr>
<tr>
<td>Management of Land Agencies</td>
<td>Queensland (cont.)</td>
<td>South Australia (cont.)</td>
<td>Tasmania (cont.)</td>
</tr>
<tr>
<td>-----------------------------</td>
<td>------------------</td>
<td>------------------------</td>
<td>-----------------</td>
</tr>
<tr>
<td>Licensed agent or manager to be in charge of each branch.</td>
<td>Licensed agent or manager to be in charge of each branch.</td>
<td>Licensed agent or manager to be in charge of each branch.</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Duties of Agents</th>
<th>Queensland</th>
<th>South Australia</th>
<th>Tasmania</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>(b) Trust accounts</strong></td>
<td>To be paid into trust account forthwith. To be paid out within 42 days unless notice of dispute.</td>
<td>To be paid into trust account next bank day. Not to be withdrawn except to complete transaction.</td>
<td>To be paid into trust account pending payment to principal.</td>
</tr>
<tr>
<td><strong>(c) Rates &amp; Taxes</strong></td>
<td>No provision.</td>
<td>No provision.</td>
<td>No provision.</td>
</tr>
<tr>
<td><strong>(d) Representations as to finance</strong></td>
<td>Statement must be given to purchaser.</td>
<td>No provision.</td>
<td>No provision.</td>
</tr>
<tr>
<td><strong>(e) Representations on sale of business</strong></td>
<td>No provision</td>
<td>No provision</td>
<td>No provision.</td>
</tr>
<tr>
<td><strong>(f) Disclosure of interest</strong></td>
<td>Agent or related persons may purchase only with principal’s prior consent.</td>
<td>No provision.</td>
<td>Failure to disclose is breach of rules.</td>
</tr>
<tr>
<td><strong>(g) Forms of offer &amp; acceptance</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>(i) Whether forms prescribed</strong></td>
<td>No.</td>
<td>No.</td>
<td>No.</td>
</tr>
<tr>
<td><strong>(ii) Delivery of signed forms to parties</strong></td>
<td>No provision.</td>
<td>No provision.</td>
<td>No provision.</td>
</tr>
<tr>
<td></td>
<td>Queensland (cont.)</td>
<td>South Australia (cont.)</td>
<td>Tasmania (cont.)</td>
</tr>
<tr>
<td>--------------------------</td>
<td>-----------------------------------------------------------------------------------</td>
<td>--------------------------------------------</td>
<td>-----------------------------------</td>
</tr>
<tr>
<td><strong>Financial Control</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(a) Statutory audit</td>
<td>Annual, including 2 unscheduled examinations.</td>
<td>As in W.A., with power to make interim report if breach discovered.</td>
<td>Annual.</td>
</tr>
<tr>
<td>(b) Additional audits</td>
<td>Required on cessation of license or business. Minister may order inspection or audit at any time.</td>
<td>Person authorised by A.G. may inspect books at any reasonable time.</td>
<td>Person ceasing to be licensee must arrange audit within 3 months. Officer of Council may inspect books at any reasonable time.</td>
</tr>
<tr>
<td>(c) Auditors</td>
<td>Must be regd. under Public Accountants Reg. Act or approved by Minister. Changes of auditor must be notified to Registrar.</td>
<td>As in W.A.</td>
<td>Must be company auditor.</td>
</tr>
<tr>
<td>(d) Restriction on dealings</td>
<td>Registrar may restrain dealings on trust account. Committee may appoint receiver.</td>
<td>No provision.</td>
<td>No provision.</td>
</tr>
<tr>
<td>(e) Guarantee fund or bonding</td>
<td>Guarantee Fund. Reimburses losses due to theft, fraud, breach of trust account provisions and certain other obligations.</td>
<td>Bond.</td>
<td>Bond.</td>
</tr>
<tr>
<td>(f) Investment of trust funds.</td>
<td>Part of trust funds to be deposited with Registrar. These may be invested and interest paid to Guarantee Fund.</td>
<td>No provision.</td>
<td>No provision.</td>
</tr>
</tbody>
</table>
### Review of the Land Agents Act

#### Queensland (cont.)
#### South Australia (cont.)
#### Tasmania (cont.)

<table>
<thead>
<tr>
<th>Other Agents</th>
<th>Queensland</th>
<th>South Australia</th>
<th>Tasmania</th>
</tr>
</thead>
<tbody>
<tr>
<td>(b) Business Agents</td>
<td>Above Act applies.</td>
<td>Separate legislation.</td>
<td>Above Act applies.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>B. Developers</th>
<th>Queensland</th>
<th>South Australia</th>
<th>Tasmania</th>
</tr>
</thead>
<tbody>
<tr>
<td>No licensing requirements.</td>
<td>Owner selling land as business must be licensed agent, &amp; his salesman registered.</td>
<td>No licensing requirements.</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>C. Settlement Agents</th>
<th>Queensland</th>
<th>South Australia</th>
<th>Tasmania</th>
</tr>
</thead>
<tbody>
<tr>
<td>Do not exist.</td>
<td>Landbrokers licensed under Real Property Act. May prepare wide range of documents.</td>
<td>Do not exist.</td>
<td></td>
</tr>
<tr>
<td>A. Land Agents</td>
<td>Australian Capital Territory</td>
<td>New Zealand</td>
<td></td>
</tr>
<tr>
<td>----------------</td>
<td>-------------------------------</td>
<td>-------------</td>
<td></td>
</tr>
</tbody>
</table>

**Supervising Authority**

<table>
<thead>
<tr>
<th>(a) Name</th>
<th>Agents Board</th>
<th>Real Estate Institute of N.Z.</th>
</tr>
</thead>
<tbody>
<tr>
<td>(b) Members</td>
<td>Five: One Govt. nominee, one solicitor, three agents. Agents to be elected for three year term.</td>
<td>(Private body of which all agents must be members).</td>
</tr>
<tr>
<td>(c) Functions</td>
<td>(1) May conduct inquiries, &amp; inspect accounts. (2) Licenses and registers agents. (3) May discipline agents for breach of rules of conduct.</td>
<td>Institute may discipline agents for breach of rules of conduct and it also administers Fidelity Guarantee Fund.</td>
</tr>
<tr>
<td>Licensing of Agents</td>
<td>Australian Capital Territory (cont.)</td>
<td>New Zealand (cont.)</td>
</tr>
<tr>
<td>---------------------</td>
<td>--------------------------------------</td>
<td>-------------------</td>
</tr>
<tr>
<td>(a) By Whom</td>
<td>Board. Appeal lies to Supreme Ct.</td>
<td>Magistrates Ct. Appeal lies to Supreme Ct.</td>
</tr>
</tbody>
</table>
| (b) Qualifications  | 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) Firms & Companies | (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) Renewals        | 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. |

<table>
<thead>
<tr>
<th>Salesmen</th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>(a) Salesmen registered by</td>
<td>No provision.</td>
<td>As for agents.</td>
</tr>
<tr>
<td>(b) Qualifications of Salesmen</td>
<td>-</td>
<td>Fit &amp; proper person.</td>
</tr>
<tr>
<td>(c) Managers</td>
<td>No provision.</td>
<td>No provision.</td>
</tr>
<tr>
<td>Management of Land Agencies</td>
<td>Australian Capital Territory (cont.)</td>
<td>New Zealand (cont.)</td>
</tr>
<tr>
<td>----------------------------</td>
<td>-------------------------------------</td>
<td>--------------------</td>
</tr>
<tr>
<td>No provision</td>
<td>Licensed agent or director to be in charge of each branch.</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Duties of Agents</th>
<th>Australian Capital Territory (cont.)</th>
<th>New Zealand (cont.)</th>
</tr>
</thead>
</table>
| (a) Commission   | 1. Not recoverable unless agent is licensed at time of engagement & acting.  
|                  | 2. Rates of commission not prescribed. | 1. Cannot sue unless appointment in writing.  
|                  |                                       | 2. R.E.I.N.Z. may prescribe rates of commission. |
| (b) Trust accounts| 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) Rates & Taxes | No provision. | No provision. |
| (d) Representations as to finance | No provision. | No provision. |
| (e) Representations on sale of business | No provision | No provision. |
| (f) Disclosure of interest | Failure to disclose is breach of rules. | Agent or related persons may purchase only with principal’s consent. |
| (g) Forms of offer & acceptance | | |
| (i) Whether forms prescribed | No. | No. |
| (ii) Delivery of signed forms to parties | No provision. | No provision. |
### Financial Control

<table>
<thead>
<tr>
<th>Australian Capital Territory (cont.)</th>
<th>New Zealand (cont.)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>(a) Statutory audit</strong></td>
<td>Annual. Auditor reports to agent &amp; Registrar.</td>
</tr>
<tr>
<td><strong>(b) Additional audits</strong></td>
<td>Registrar or inspector may inspect books at any reasonable time.</td>
</tr>
<tr>
<td><strong>(c) Auditors</strong></td>
<td>Must be company auditor.</td>
</tr>
<tr>
<td><strong>(d) Restriction on dealings</strong></td>
<td>Board may appoint receiver.</td>
</tr>
<tr>
<td><strong>(e) Guarantee fund or bonding</strong></td>
<td>No provision.</td>
</tr>
<tr>
<td><strong>(f) Investment of trust funds.</strong></td>
<td>No provision.</td>
</tr>
</tbody>
</table>

### Other Agents

| **(b) Land Auctioneers** | Separate legislation. |
| **(d) Business Agents**  | Above Act applies. |

### B. Developers

| No licensing requirements. |

### C. Settlement Agents

| Do not exist. | Landbrokers licensed under *Land Transfer Act*. May prepare certain documents. Only 3 licenses presently in force. |