



Government of **Western Australia**
Department of **Commerce**
Consumer Protection

CONSULTATION

POSITION PAPER

PROPOSED FEE DEREGULATION FOR
SETTLEMENT AGENTS AND LAND VALUERS

May 2014



Although every care has been taken to ensure accuracy in the preparation of this paper, the information has been produced as general guidance for persons wishing to make submissions to the proposed fee deregulation for settlement agents and land valuers in Western Australia. The contents of the paper do not constitute legal advice or legal information and they do not constitute Government policy. This paper should not be used as a substitute for a related Act or professional advice.

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COMMISSIONER'S FOREWORD AND EXECUTIVE SUMMARY

In June 2013 the Minister for Commerce, the Hon Michael Mischin MLC approved the preparation of this paper to enable Government to consider questions surrounding the continued regulation of fees for settlement agents and land valuers in Western Australia.

This paper proposes that fees charged by settlement agents and land valuers be deregulated and that legislation be amended to ensure consumers are provided with information to assist them make informed choices about service providers. This information would be modelled on fee disclosure required under the *Real Estate and Business Agents Act 1978* when fees for real estate and business agents were deregulated and included requirements such as:

- signed written agreements authorising action on a consumer's behalf;
- clearly defined services and associated fees in written agreements and statements;
- remuneration to be stated in dollar terms and not solely as a percentage of a sale price; and
- information provided advising consumers they can approach the Department of Commerce for assistance with disputes.

Western Australia remains the only Australian jurisdiction that sets maximum fees for settlement agents and land valuers.

The proposal to deregulate fees for settlement agents and land valuers is not new and is supported by industry professional associations and many of their members. It is also supported by reviews undertaken to promote competition and reduce red tape for business. The need to retain fee regulation is also questioned by evidence that fee regulation has been redundant for many years as the competition within the market place for both industries is such that the maximum fee is not usually charged.

This paper does not propose to alter the broader regulatory frameworks, of which fee regulation is one element, and which impose a range of requirements on service providers to act professionally, responsibly and ethically. The licensing Acts, supporting regulations and codes of conduct will continue to operate and be enforced by government as will the professional practice standards imposed by the professional bodies on their members. Significant investment has also been made in education and awareness programs to ensure that consumers have access to information to help them make informed choices and service providers understand their professional obligations.

The paper provides a summary of previous work to deregulate fees, outlines Western Australia's regulation of the sectors and compares this with interstate provisions, considers the need for fee regulation in the current market and the experience of fee deregulation in other professions.

Based on this analysis it is considered that there is little consumer benefit to be served by continuing to regulate the fees that settlement agents and land valuers charge in providing services and that deregulation will allow settlement agents and land valuers to respond more easily to market changes and to innovate.

Your comment is welcome and will assist Government form its view on whether to deregulate fees for settlement agents and land valuers.

Anne Driscoll

Commissioner for Consumer Protection

May 2014

TABLE OF CONTENTS

CONTENTS

- COMMISSIONER’S FOREWORD AND EXECUTIVE SUMMARY..... 3**

- HOW TO HAVE YOUR SAY..... 5**

- 1. INTRODUCTION..... 6**
 - Background to the consultation 6
 - Regulation of fees for services undertaken by settlement agents and land valuers..... 6
 - Previous reviews of settlement agents’ and land valuers’ fees and the factors supporting deregulation 7

- 2. FRAMEWORK GOVERNING SETTLEMENT AGENTS AND LAND VALUERS IN WESTERN AUSTRALIA 10**
 - Settlement agents 10
 - Land valuers..... 12
 - The Australian Consumer Law 13
 - Recent developments involving the settlement agents and land valuers codes..... 13

- 3. THE NEED FOR FEE REGULATION 14**
 - Information..... 14
 - Competition 14
 - Inter-jurisdictional comparison of the legislation governing settlement agents and land valuers 16
 - Overview of licensed occupations with unregulated fee structures within Western Australia..... 19

- 4 PROPOSALS FOR REFORM..... 24**

- 5 COMMENT..... 26**

HOW TO HAVE YOUR SAY

Written submissions

You are invited to make a submission in response to the paper. There is no specific format for submissions and you are welcome to write a letter outlining your general views or respond to particular issues raised in the paper.

If possible, please provide evidence to support your views, for example by including relevant statistics or examples. You are welcome to raise additional issues or areas of concern regarding the regulation of fees charged by settlement agents and land valuers even if they have not been specifically addressed within the discussion paper.

In order to facilitate feedback regarding the issues that have been raised within this paper, a version of the questions appearing at the end of this paper will be made available in online survey format on the Department of Commerce website www.commerce.wa.gov.au/consultations.

The position paper is available online by visiting: www.commerce.wa.gov.au/consultations.

Where to send submissions

Submissions can be mailed to: Proposed fee deregulation for settlement agents and land valuers
Department of Commerce
Locked Bag 14
Cloisters Square PO
Perth WA 6850

Or emailed to: consultations@commerce.wa.gov.au

Submissions close: The closing date for submissions is: Thursday **31 July 2014**

How input will be used

The information gathered from responses to this paper will be used to inform the Government's decisions regarding legislative change.

Information provided may become public

After the consultation period concludes, all responses received may be publicly available on the Department of Commerce website. Please note that because your feedback forms part of a public consultation process, the Government may quote from your comments in future publications. If you prefer your name to remain confidential, please indicate that in your submission. As submissions made in response to this position paper will be subject to freedom of information requests, please do not include any personal or confidential information that you do not wish to become available to the public.

1. INTRODUCTION

Background to the consultation

The purpose of this review is to obtain your comment on proposed reforms to legislation that would deregulate fees of settlement agents and land valuers in Western Australia. These reforms would see the removal of capped fees that may be charged by settlement agents and land valuers for various services that they provide to their clients. The authority to cap fees is set under the *Settlement Agents Act 1981* (SA Act) and the *Land Valuers Licensing Act 1978* (LVL Act).

Regulation of fees for services undertaken by settlement agents and land valuers

Settlement agents

Under the SA Act a maximum scale of fees applies to the services and related costs that settlement agents may charge clients in performing a settlement transaction. A client in a settlement transaction may however negotiate with a settlement agent a fee that is lower than the prescribed maximum for that transaction.

Section 44 of the SA Act provides that the Commissioner may, with the approval of the Minister and by notice published in the Government Gazette, fix the maximum fees that settlement agents may charge for services associated with the performance of their functions. The Settlement Agents (Remuneration) Notice 2013 (the SA Notice 2013) sets out these fees and costs and came into effect on 1 October 2013. Previously, fees were updated on 20 May 2008.

Under section 44 of the SA Act a settlement agent must not demand or receive, in respect of any service provided by the settlement agent, any fee that exceeds the amount prescribed for the service. It also provides that any fee amount received by a settlement agent that exceeds the prescribed maximum may be recovered as a civil debt in a court of competent jurisdiction.

Where a client is dissatisfied with the amount of a fee that a settlement agent has charged in relation to a settlement transaction the matter may be referred to the Commissioner. The Commissioner, on the written agreement of the settlement agent and the client, may appoint a suitable person to conciliate between the parties and make a determination on the matter.

The fees which settlement agents charge for conducting real estate settlements and business settlements are based on an ad valorem scale. This means that the maximum fee prescribed is based on the value of the real estate property or business settled.

Land valuers

Section 25 of the LVL Act provides that the Commissioner may, with the approval of the Minister, from time to time by notice published in the Government Gazette, fix the maximum remuneration (fees) that licensed valuers may receive for the various kinds of services provided. The Land Valuers Licensing (Remuneration) Notice 2013 prescribes the maximum fees which land valuers may charge for their services and commenced on 1 October 2013. The previous adjustment made to fees was on 28 September 2010.

Under section 25 of the LVL Act, a licensed valuer or a firm of which the licensed valuer is an officer must not demand or receive, in respect of any service provided by the licensed valuer, any fee that exceeds the amount prescribed for the service. It also provides that any fee amount received by a land valuer that exceeds the prescribed maximum may be recovered as a civil debt in a court of competent jurisdiction.

Previous reviews of settlement agents' and land valuers' fees and the factors supporting deregulation

National Competition Policy

Fee deregulation for services provided by settlement agents and land valuers in Western Australia was considered by the National Competition Council (NCC) during its reviews of Western Australia's overall progress in implementing National Competition Policy (NCP) and the 1995 Competition Principles Agreement.¹ The guiding principle for legislative reform under the NCP was that legislation should not restrict competition unless it could be demonstrated that:

- “ (a) the benefits of the restriction to the community as a whole outweigh the costs; and
(b) the objectives of the legislation can only be achieved by restricting competition.”

Settlement agents

Western Australia's report of the NCP review of the SA Act was completed in February 2002.² The NCP review specifically addressed matters concerning the maximum fees for services provided by settlement agents and recommended:

“That regulation of the maximum fees an agent can charge for services rendered be removed by the repeal of the Settlement Agents (Remuneration) Notice 2000 and that the Act be amended to make it a disciplinary offence for an agent to receive or demand a fee which is excessive and to give the Board the power to review fees demanded or charged by and including the power to order the repayment of an excessive fee received.”

Ultimately the Government did not implement the recommendation to remove the fee cap on services provided by settlement agents.

Land valuers

In 1999 the former Ministry for Fair Trading began the NCP review of the LVL Act however this process was postponed because of the Gunning Inquiry and the work of the Temby Royal Commission.³ When these inquiries were completed the NCP review was updated to reflect the recommendations arising from these inquiries and received Government endorsement in late 2003.

The 2000 Gunning Inquiry recommended the replacement of seven licensing boards within the former Ministry of Fair Trading (including the Settlement Agents Supervisory Board and the Land Valuers Licensing Board) with a single licensing authority.

The 2001 Temby Royal Commission into the Finance Broking Industry recommended that valuers be licensed and while it was critical of the methods used by valuers in making valuations the Commission did not make a specific recommendation regarding the maximum fees charged by land valuers. The updated NCP review identified certain anti-competitive restrictions within the land valuers' legislation but found them to be in the public interest and recommended that the following provisions should be retained:

- *the requirement for land valuers to be licensed;*
- *the criteria for licensing;*

¹ Council of Australian Governments: Competition Principles Agreement – 11 April 1995 (*As amended to 13 April 2007*) <http://www.coag.gov.au/node/52>

² Government of Western Australia – Department of Treasury and Finance (2002) Progress Report: Implementing National Competition Policy in Western Australia – Report to the National Competition Council (May) p14.

³ *Ibid.* p16.

- *the power to discipline land valuers; and*
- *the power to set maximum remuneration received by valuers.*⁴

Industry Representation

Since the mid 2000's industry bodies have been approaching government and proposing deregulation of fees.

Settlement Agents

In 2010 the former Settlement Agents Supervisory Board engaged consultants to review settlement agents' fee structures and addressed the question of whether fees should be deregulated as part of this review. The consultants recommended retaining fee regulation as approximately 75 per cent of settlement agents surveyed indicated they would not support deregulation. Many commented that fee deregulation would result in a decline in the quality of services provided and that in order to maintain industry integrity the Settlement Agents Supervisory Board would be required to increase its monitoring of the industry. The report noted that the Board did not have powers that would allow consumers to dispute fees if they were not considered to be fair and reasonable and that to establish such a process would require additional resources⁵ & ⁶.

In June 2010 the Australian Institute of Conveyancing (WA) (AICWA)⁷ wrote to the former Settlement Agents Supervisory Board supporting deregulation formally for the first time.

AICWA questioned the relevance of the scale of fees, noting that the prevailing market levels of fees were considerably lower than the maximum regulated fees. AICWA asserted that some settlement agents had come to rely upon the scale of fees as a marketing tool to compensate for what may be an absence of contemporary marketing and business skills needed to operate effectively within a highly competitive marketplace. Instead of the scale of fees being used to perpetuate an artificial situation, AICWA submitted that greater focus should be directed to improving agents' knowledge and understanding of key business factors which in turn should enhance consumer protection outcomes and contribute to public confidence in regulatory processes.

AICWA acknowledged that a large proportion of settlement agents continue to support the setting of maximum fees. However, AICWA's assessment was that this reflected the natural conservative tendencies among some elements of the industry, and a level of uncertainty on the part of many agents about the market conditions that might exist under any deregulated fee structure.

Conversely, AICWA also identified a large support base for deregulation and the setting of fees by market forces. Within this context, AICWA asserted that regulated fees by their nature discourage specialisation in any particular aspect of the conveyancing process and argued instead that removal of the maximum fees would enhance consumer protection and confidence.

In 2012 AICWA also wrote to the Department supporting fee deregulation as being in the long term interest of the industry. AICWA's 2012 submission asserted that settlement agents have been subject to increasing business costs in carrying out settlement functions for clients whilst incomes are subject to significant pressures due to the industry-wide impacts of fee discounting.⁸

⁴ Government of Western Australia – Department of Treasury and Finance (2003) Progress Report: Implementing National Competition Policy in Western Australia – Report to the National Competition Council (June) p 6.44.

⁵ Paxon Group (2010) Review of the Scale of Fees included in the Settlement Agents Remuneration Notice 2008 (April).

⁶ In 2010 section 44 of the SA Act was amended as part of the introduction of the *Fair Trading Act 2010* to enable the Commissioner to conciliate disputes about fees with the consent of both parties.

⁷ AICWA (2010) Correspondence to former Settlement Agents Supervisory Board, June.

⁸ Australian Institute of Conveyancers (WA Division) Inc. (2012): AICWA Fee Submission 2012 (August).

Land Valuers

In February 2007 the Australian Property Institute Western Australia Division (API WA) submitted to then Minister for Consumer Protection the Hon Sheila McHale MLA, that fee regulation was anti-competitive and that it generated minimal community benefit. The argument made by API WA supporting deregulation was based on the fact that:

- Western Australia is the only jurisdiction that prescribes the maximum fees charged by land valuers;
- land valuers operate within a highly competitive market and hence the fees which valuers charge for services are typically below the maximum rate;
- linking the fees with the value of the property is arbitrary because the complexity of a valuation is not determined by the value of the property and creates an incentive to overvalue; and
- fee regulation restricts competition and it results in similar fees being charged regardless of skill or ability. Customers are disadvantaged by the lack of price competitiveness and innovation in service delivery.

The former Land Valuers Licensing Board in responding to API WA submission made the following points about fee regulation:

- it may protect those consumers who have limited market knowledge or who fail to make detailed enquiries when seeking to find a valuer;
- it may act as an informal means of price collusion and dampen downward pressure on prices;
- some valuers may charge more than market rates and refer to the maximum fee to justify this;
- consumers who wish to secure a particular valuer, for example because of their skill and service, are unable to do so by agreeing to pay more than the maximum rate;
- there is probably no net benefit to consumers from fee regulation; and
- if fees were to be deregulated, valuers should be required to obtain the prior written consent of clients to the fees that will be charged for each particular valuation service.

In 2010 the then Minister for Commerce the Hon Troy Buswell MLA, endorsed the former Land Valuers Licensing Board's proposal to review fees with the potential to move to a more deregulated framework. Mr Buswell's endorsement was subject to the former board consulting specifically with industry and stakeholders on deregulation.

Consultation which the former Board conducted as part of the 2010 review of fees elicited a number of submissions from licensed valuers commenting on the suitability and relevance of prescribed fees.

There were mixed views from respondents with no clear position having emerged on the issue of fee regulation.

In 2012 API WA reaffirmed its position on fee deregulation and highlighted the disparity in the marketplace that exists between the bargaining power of banks and large lending institutions that constitute land valuers' predominant client base and the many valuers that provide services.⁹ The basis of API WA submission was these entities, through their economies of scale and market presence, are capable of significantly influencing the quotations that valuers provide for valuation work. Consequently there is little relevance between market-based fees and the maximum regulated fee.

API WA cited widespread discounting of valuers' fees as a significant factor affecting the business activities of valuers and that prospective clients typically expect that valuers will provide competitive quotations.

⁹ Australian Property Institute (Western Australia Division) (2012) – Submission: Proposed Increase to the Maximum Remuneration Fees for Land Valuers (August).

2. FRAMEWORK GOVERNING SETTLEMENT AGENTS AND LAND VALUERS IN WESTERN AUSTRALIA

Fee regulation is only a small component of a broader licensing regime for settlement agents and land valuers in Western Australia which is intended to safeguard the interests of consumers. In addition to licensing and conduct requirements these occupations also have professional associations that promote high standards of conduct for members.

The regulatory frameworks and the professional ethical conduct mechanisms that presently apply to the settlement and valuation industries are formed around common principles. Importantly for consumers they assist in creating environments which promote responsible conduct and allow compliance and enforcement to occur when required.

Elements of regulatory frameworks that govern the conduct of settlement agents and land valuers are outlined in the following sections of the position paper.

Settlement agents

Government regulation

The SA Act was introduced into Western Australia in 1981 and it allows for a specific licensed occupational group of persons to perform services in settlements in real estate and business transactions. Subsidiary legislation, notably the Settlement Agents Regulations 1982 (the SA Regulations) and the Settlement Agents Code of Conduct 1982 (the SA Code), support the SA Act in regulating the activities of settlement agents.

Prior to the introduction of the SA Act the performance of conveyancing work within Western Australia had been confined to the legal profession. The legislation recognises that legal practitioners also conduct settlements within the scope of the *Legal Profession Act 2008*.

The SA Act provides the following consumer safeguards:

- **Licensing**

The licensing system promotes consumer protection by providing that the Commissioner must be satisfied as to the suitability of a person. This assessment is made on the basis of the Commissioner being satisfied of the applicant's good character, repute and fitness to hold a licence; as well as the applicant's professional qualifications, experience and financial resources.

- **Remuneration**

In addition to the fee cap prohibitions, penalties apply if a licenced settlement agent seeks to directly or indirectly:

- demand, receive or hold any reward contrary to the provisions of section 44 of the Act;
- demand, receive or hold any reward for the referral to a licensee any business involving the performance of the functions of a settlement agent; or
- pay or give any reward to any person referring to the licensee any business involving the performance of the functions of a settlement agent.

- **Trust accounts**

Settlement agents are required to establish and maintain trust accounts to hold consumers' funds and the SA Act imposes significant accountability and fiduciary obligations upon settlement agents.

- Fidelity Guarantee Account

Licensed settlement agents contribute to the Fidelity Guarantee Account which exists to reimburse people who suffer pecuniary loss or loss of property resulting from a defalcation by a licensed settlement agent.

- Educational requirements

Since 1 January 2008, settlement agents have been required to undertake compulsory professional development (CPD) as a condition of being licensed.¹⁰

CPD helps to promote industry compliance and consumer protection outcomes by ensuring that settlement agents maintain skills and are aware of new developments within the industry.

The SA Code requires licensed settlement agents to know their legal obligations and to act professionally and ethically. It covers matters including disclosure of interests, conflict of interest, confidentiality, keeping clients fully informed and working with due skill and diligence. Where the licensed settlement agent employs staff the SA Code requires that the licensed person is fully responsible for their conduct.

Industry regulation

The Australian Institute of Conveyancers (AIC) is the peak body representing settlement agents, through separate state divisions in New South Wales, South Australia, Tasmania, Victoria, Western Australia and the Northern Territory. The AIC advises that it has continued to pursue the licensing of specialist conveyancers in Queensland.¹¹

Settlement agents have existed in Western Australia as a discrete group since the mid-1960s, with the 1970s seeing a significant expansion in their activities. In 1972 the first settlement agents' peak body was formed. The AIC WA Division (AICWA) as the peak body has represented settlement agents since 1995 and its membership currently comprises 250 licensed conveyancers.

Members of AICWA are required to comply with its Constitution and policies which include a Code of Conduct¹² which addresses agent conduct in relation to:

- professional integrity;
- duties to clients;
- conflict of interest;
- diligence and competence; and
- supervision and control of employees.

Many of the categories that are covered under this industry-based code mirror the provisions which operate within the SA Code.

If members do not adhere to AICWA's Code of Conduct, AICWA Council may investigate complaints and allegations of breaches and it may take whatever disciplinary action that it considers appropriate.

¹⁰ Settlement Agents Supervisory Board (2007) *Settlement Agents News* No.39, Winter 07, pp1-2.

¹¹ Australian Institute of Conveyancers (2011) About /What Is AIC <http://www.aicnational.com.au/about/what-is-aic>.

¹² Australian Institute of Conveyancers WA (2013): Code of Conduct <http://www.aicwa.com.au/code-conduct>.

Land valuers

Government regulation

In Western Australia, the functions performed by land valuers are regulated under the LVL Act. The Land Valuers Licensing Regulations 1979 (the LV Regulations) and the Licensed Valuers Code of Conduct made on 23 December 2011 (the LV Code) support the LVL Act in regulating the activities of land valuers.

The LV Code contains a number of rules that define the duties and legislative obligations which valuers must fulfil when carrying out their functions.¹³ It also highlights contemporary valuation industry skills and professional standards to which valuers must adhere when providing services to clients.

Under the LVL Act, the safeguards that are provided to consumers are as follows:

- Licensing

The Commissioner must be satisfied as to the good character and repute of the person and his or her competence to carry out the duties of a licensed valuer. This assessment is based on qualifications, experience and professional body membership.

- Discipline

The Commissioner may commence proceedings in the State Administrative Tribunal (SAT) where there has been a breach of the LVL Act, LV Code or any other alleged circumstance has occurred that brings into question the fitness of the valuer to hold a licence.

The LV Code sets standards of professional and ethical conduct for licensed valuers and the responsibilities of valuers in performing their functions. Obligations on licensed valuers include providing services to clients with honesty and integrity, impartiality and independence, and without conflicts of interest.

Industry regulation

The Australian Property Institute (API) is the national peak industry body comprising a membership of around 9,000 property experts, with the WA Division representing the interests of over 700 members throughout this state.¹⁴

The API's membership comprises predominantly professionals who undertake work in valuation, property development, construction, finance, land economics, and asset and funds management.¹⁵

The API aims to promote high standards of professionalism among valuers by requiring that its members must observe and comply with:

- a Constitution;
- by-Laws;
- a Code of Professional Conduct;
- any practice standards or guidance notes published by the Institute; and
- the Australian and New Zealand Valuation and Property Standards as published by the Institute from time to time (the "Professional Rules").¹⁶

¹³ Licensed Valuers Code of Conduct – *Government Gazette* No.248, Friday, 23 December 2011.

¹⁴ Australian Property Institute (Western Australia Division) (2012) – Submission: Proposed Increase to the Maximum Remuneration Fees for Land Valuers (August).

¹⁵ The Australian Property Institute (2011) About API: Who is the API <http://www.api.org.au/menuitem/about-api/who-is-the-api>.

¹⁶ The Australian Property Institute (2011) <http://www.api.org.au/menuitem/professional-and-technical-standards/code-of-professional-conduct>.

The API through its Code of Professional Conduct (“the API Code”) provides a statement of the organisation’s principles and values. The API Code also allows the National Council to establish standards of behaviour which all members must observe. The use of by-laws allows the API to enforce these standards and enables it take disciplinary action against a member who has committed professional misconduct. The API Code and associated rules share many similarities with legislative provisions regulating land valuers.

The Australian Consumer Law

Since 2011 the Australian Consumer Law (ACL) has been in operation and contains provisions where action can be taken against service providers, including settlement agents and land valuers, who engage in misleading or deceptive conduct, false or misleading representations, unconscionable conduct or harassment and coercion. The ACL also provides guarantees that services will be provided with due care and skill, are fit for purpose and provided within reasonable time.

Recent developments involving the settlement agents and land valuers codes

In May 2013, the Department released a discussion paper as part of a review of the effectiveness of codes of conduct relevant to various property industries regulated by the Department. An evaluation of aspects of the SA and LV Codes was included in this process.

The purpose of the review was to:

- identify the risks associated with consumers dealing with land valuers, settlement agents and real estate and business agents; and
- describe the various conduct regulations that currently apply in Western Australia and in other jurisdictions, and identify relevant provisions of the ACL which also address those issues.

In undertaking the review, the Department specifically considered the following matters:

- whether the codes promote and encourage fair trading practices in the property industry, a competitive and fair market, and protect the interests of consumers;
- whether the codes impose regulation that is excessive to the requirements of consumer protection;
- drafting and technical issues, including the consistency of each code with its enabling Act, regulations, and the other codes; and
- whether the codes are consistent with the Australian Consumer Law (ACL) or whether they unnecessarily duplicate the ACL.

Submissions regarding the issues raised within the discussion paper were received by the Department up until the end of June 2013. Proposals arising from the review which identified potential reforms to the property industry codes of conduct are now being developed and when introduced will provide greater consistency between codes and ensure compatibility with the ACL.

3. THE NEED FOR FEE REGULATION

The benefit of regulating fees is that this assists to protect consumers from exploitation when they are not in a position to determine whether the services they receive are of the type and quality they need, provided by competent service providers and so provided for a reasonable price.

Such protection is not required when consumers have readily available information to help them make these judgements and/or the market is sufficiently competitive that consumers can choose between providers who compete on price and quality.

Information

There is no question that the skill and knowledge required for undertaking the work of a settlement agent or land valuer is specialised and that most consumers would not be in a position to assess the scope of work required or the competence with which it was provided (until perhaps things go wrong). It is an area where information asymmetry exists between provider and consumer and so some consumer safeguards are warranted.

It is a question whether capped fees are a necessary element of such protection. This may be particularly so in relation to land valuers who tend to provide services to institutional or sophisticated clients rather than general consumers and where it is a reasonable expectation that information asymmetry may be less marked.

Competition

Settlement agents

The Department presently licenses 633 real estate settlement agents and 32 business settlement agents throughout the state.¹⁷

Notwithstanding the fact that settlement agents are regulated in the performance of their statutory functions and in providing services to consumers the settlement industry in Western Australia is subject to considerable competition. The Department has been advised by AICWA that fee discounting is a widespread and long-standing business practice among settlement agents.

AICWA and individual licensed settlement agents have in representations to government and the former Settlement Agents Supervisory Board identified the following factors as influencing settlement agents to engage in discounting:

- competitive pressures from other settlement agents and solicitors;
- expectations of clients; and
- prospects of securing repeat business from clients.

AICWA advises that it is common for settlement agents to offer discounts of 20 per cent on the maximum fee for three quarters of the real estate settlement transactions that are undertaken.¹⁸ Given the level of competition, it is appropriate to consider whether the continued provision within the SA Act of a statutory fee setting mechanism remains relevant or necessary.

Electronic conveyancing will also be introduced in Western Australia during 2015 and it is expected that this will result in changes to the composition of the market and potentially economies in transaction costs.

¹⁷ Register of Real Estate Licence Holders (Various) As at 2 December 2013 - Government Gazette (No 223) Tuesday, 10 December 2013.

¹⁸ Australian Institute of Conveyancers (WA Division) Inc. (2012): AICWA Fee Submission 2012 (August).

Consumer complaints data (Table 1.1) of the Department and the former Settlement Agents Supervisory Board indicate that fee-related issues comprise a very small proportion of the total matters investigated.

Entity	Year	Complaints Investigated	Fee-related Complaints Investigated
Settlement Agents Supervisory Board	2009/2010	109	0
Settlement Agents Supervisory Board	2010/2011	177	4
Department of Commerce – Consumer Protection	2011/2012	116	3
Department of Commerce – Consumer Protection	2012/2013	120	4

Source: Department of Commerce 2014

Land valuers

The API has identified that banks and large lending institutions constitute the predominant client base for the work that valuers undertake¹⁹. These entities, through their economies of scale and market presence, are capable of significantly influencing the quotations that valuers provide for valuation work. The APIWA noted that banks and financial institutions typically award contracts for services based upon bulk quotations formulated around discounted rates. Consequently there is little relevance between market-based fees and the maximum regulated fee.²⁰

The APIWA cites widespread discounting of valuers' fees as a significant factor affecting the business activities of valuers. From an industry perspective, prospective clients now typically expect that valuers will offer to provide discounted fees as part of competitive quotations.

The Department currently licenses 826 valuers throughout the state.²¹

Investigation and enforcement activities against land valuers by the Department and the former Land Valuers Licensing Board for 2009/2010 to 2011/2012 indicate that fee-related complaints represent a small proportion of the total investigations that were undertaken (Table 1.2).

Entity	Year	Complaints Investigated	Fee-related Complaints Investigated
Land Valuers Licensing Board	2009/2010	9	1
Land Valuers Licensing Board	2010/2011	6	0
Department of Commerce – Consumer Protection	2011/2012	11	1
Department of Commerce – Consumer Protection	2012/2013	4	0

Source: Department of Commerce 2014

¹⁹ Australian Property Institute (Western Australia Division) (2012) – Submission: Proposed Increase to the Maximum Remuneration Fees for Land Valuers (August).

²⁰ Ibid. p3.

²¹ Western Australian Government Gazette: Perth, Monday, 9 December 2013 (No. 221) – List of Persons Holding a Land Valuers' Licence (as at 29 November 2013).

Inter-jurisdictional comparison of the legislation governing settlement agents and land valuers

The following section of this paper compares Western Australia's approach to regulating the activities of settlement agents and land valuers with those that have been adopted elsewhere in Australia.

Western Australia is only jurisdiction that regulates maximum fees for these licensed occupations.

Settlement agents

New South Wales, Victoria, South Australia, Tasmania, and the Northern Territory are the other Australian jurisdictions which together with Western Australia, currently legislate to regulate settlement agents as a discrete licensed occupational group. Queensland and the Australian Capital Territory do not provide for this occupation and conveyancing work within these jurisdictions is performed exclusively by legal practitioners.

In New South Wales, Victoria, South Australia, Tasmania and the Northern Territory the legislation that operates to regulate conveyancers (as they are known in those jurisdictions) is broadly comparable to that in Western Australia. Licensed conveyancers are required to meet prescribed qualifications and experience criteria, must comply with statutory obligations relating to trust account management and audit, avoidance of conflict of interest, supervision of businesses, and contribute to a fidelity-based compensation fund. Interstate legislation also provides for the regulators to bring disciplinary proceedings against conveyancers before appropriate tribunals and courts for alleged breaches of provisions.

Table 1.3 summarises the provisions applying in other licensing jurisdictions in relation to fees.

Table 1.3 Comparison of Settlement Agents Fee Provisions Across Licensing Jurisdictions

Western Australia	New South Wales	Victoria	Tasmania	Northern Territory
Settlement Agents Code of Conduct 1982	<i>Conveyancers Licensing Act 2003</i>	<i>Conveyancers Act 2006</i>	Conveyancing Regulations 2005.	Agents Licensing Regulations As in force at 28/5/2012
<p>Rule 26. Bill of costs A licensee shall render a bill of costs, promptly at any time if requested by his client so to do but he need not render an itemised bill unless the client requests it provided he has satisfied himself that his lump charge is fair and proper.</p>	<p>Section 36(1) A licensee must disclose to a client in accordance with this Division the basis of the costs for conveyancing work to be carried out for the client by the licensee and any conflict or beneficial interest of a kind required to be disclosed by the regulations. (2) The following matters are to be disclosed to the client: (a) the amount of the costs, if known, (b) if the amount of the costs is not known, the basis of calculating the costs, (c) the billing arrangements, (d) the client’s rights under Part 4 in relation to the hearing of disputes about the fees by the Tribunal, (e) any conflict or beneficial interest of a kind required to be disclosed by the regulations, (f) any other matter required to be disclosed by the regulations.</p>	<p>Section 47(1) A licensee must, in accordance with this section, disclose to a client the costs of the conveyancing work that the licensee is to carry out for the client. <i>Penalty: 120 penalty units.</i> (2) A licensee must give the disclosure referred to in subsection (1)— (a) before or at the time the licensee is retained by the client; or (b) if it is not reasonably practicable to make the disclosure at that time, as soon as practicable after being retained by the client. (3) A disclosure under subsection (1) must contain the following information— (a) if the amount of the costs is known, that amount (b) if the amount of the costs is not known, the basis for their calculation; (c) the manner in which the client will be invoiced; (d) the following avenues that are open to the client in the event of a dispute in relation to costs— (i) making a complaint to the Director under Part 6.2 of the <i>Australian Consumer Law and Fair Trading Act 2012</i>; (ii) making an application to VCAT under Chapter 7 of the <i>Australian Consumer Law and Fair Trading Act 2012</i>; (e) any other prescribed information. (4) A client of a licensee is not required to pay the licensee’s costs if— (a) the licensee does not make a disclosure to the client in accordance with this section; and (b) section 48 does not apply.</p>	<p>Part 5 – Rules of Conduct 12. Practice of conveyancing (6) A conveyancer must, on accepting instructions from a client to act, provide full information to the client about the expected costs of transaction including – (a) an estimate of the total cost; and (b) the method of calculating costs. (7) A conveyancer must, as soon as practicable after completion of the matter in which he or she was instructed to act, give a statement of account to the client stating the actual costs of providing each service.</p>	<p>Regulation 25 – Rules of conduct (Schedule 4). <i>General Rules</i> 6. A conveyancing agent shall, at the same time as the agent presents to the client a form of appointment for signature in accordance with clause 1(1) of Part 2 of the Schedule to the Act, provide a bona fide quote of the cost of the services to be rendered in respect of the particular transaction for which the appointment is to be made. The amount of the cost shall be based on a fair and reasonable fee for the service at the prevailing rate in the Territory.</p>

The comparison of conveyancing legislation operating throughout Australia shows some disclosure requirements about fees and their method of calculation that could be considered for inclusion in Western Australian legislation if fees are deregulated to provide added safeguards to consumers. These include a requirement to provide a consumer with an itemised breakdown of costs and the method by which fees have been calculated.

By contrast WA settlement agents are only required to provide the statement of costs associated with providing of services at the request of the client.

Land valuers

Western Australia, New South Wales and Queensland are the only jurisdictions that licence land valuers. South Australian and Tasmania maintain a negative licensing regime²² which also requires that valuers attain specific qualifications.

Tasmania's *Land Valuers Act 2001* requires valuers to satisfactorily complete an accredited course and practical experience as determined by the API or any other organisation representing the interests of land valuers within that state. Likewise in South Australia, the *Land Valuers Act 1994* and the Land Valuers Regulations 2010 require valuers to attain prescribed qualifications and hold membership of the API in Australia or New Zealand or the Royal Institution of Chartered Surveyors (General Division).

Land valuers operating throughout Victoria and the Northern Territory are not regulated.

Legislation that operates in New South Wales and Queensland provides for regulations to be made which set out professional conduct rules that licensed/registered valuers must observe when providing services to clients. These rules are comparable to the provisions of Western Australia's Code of Conduct and require a valuer to act with honesty and integrity, avoid conflicts of interest and disclose interests to clients.

In relation to fees charged, both New South Wales and Queensland prohibit valuers from setting fees that are contingent on, or a percentage of, an amount of compensation if a valuation is made that may be used to assess compensation relating to a dispute. Queensland also requires a valuer, if asked by a client, to provide information about the way a fee is calculated.

²² Under negative licensing, individuals can operate within an industry unless removed due to being unfit. This is in contrast to positive licensing regimes, where legislation requires prospective entrants to demonstrate that they meet pre-conditions before entering the industry.

Overview of licensed occupations with unregulated fee structures within Western Australia

The following section considers regulated industries that share similarities with settlement agents and land valuers and where fees have ceased to be regulated or have never been regulated in Western Australia. Real estate and business agents and finance brokers have previously had maximum fees capped. Employment agents are required to have their fee schedules approved by the Commissioner but there is no imposed cap on fees. Motor vehicle dealers have never had fees regulated. These highly consumer-oriented, market-responsive industries are regulated in a similar way to settlement agents and land valuers and individuals and entities that are licensed to carry on business within these occupations operate within environments where fees are subject to competitive forces.

Real estate and business agents

The legislative framework that operates for the real estate industry is comparable to those that apply for the regulation of settlement agents and land valuers and so past legislative reforms to deregulate fees for the services provided by real estate and business agents and sales representatives are particularly relevant.

Real estate commissions and charges were deregulated on 1 November 1998, with government having adopted this reform as part of broader, wide-ranging changes contained within the *Real Estate and Business Agents Amendment Act 1998*.²³ Prior to that time, the maximum commissions that real estate agents could charge on the sale of residential property had been determined according to an *ad valorem* scale and were fixed. Under section 61(1) of the Real Estate and Business Agents Act 1978 it is still possible for the Commissioner to fix the maximum amount of remuneration that a licensee may receive, however agreement may also be reached between the parties. When fees were deregulated for real estate and business agents the Government introduced the following protections into legislation:

- a prohibition on licensees demanding, receiving or holding, in the licensee's capacity as an agent, any commission or reward which is unjust in the circumstances;
- provisions allowing the former Real Estate and Business Agents Supervisory Board to resolve disputes about fees;
- signed written agreements authorising action on a consumer's behalf with a copy retained by the consumer;
- a statement in the written agreement explaining that the agent's fees are not fixed by a regulated scale of fees and that fees are to be agreed upon between the parties (this statement must be placed immediately before the agent's commission or selling fee);
- clearly defined services and associated fees in written agreements and statements;
- commissions to be stated in dollar terms or when the commission is expressed as a percentage then the basis of calculation (such as selling price or gross rental) is to be clearly stated; and
- information provided advising consumers they can approach the Department of Commerce for assistance with disputes.

In 2008 a study was commissioned by the former Real Estate and Business Agents Supervisory Board to review the impact of fee deregulation on the real estate industry in Western Australia.²⁴ Tables 1.4 and 1.5 provide comparisons of commission incomes for 1998 and 2007 using percentile median house prices. The comparisons suggest that significant increases in commissions occurred in real terms for both metropolitan and regional areas. However it is important to note that commissions as a percentage of median house prices within the various property thresholds actually decreased

²³ Real Estate and Business Agents Supervisory Board (1998): REBA NEWS Issue number 16 – Spring.

²⁴ Allen Consulting Group (2008): Review of Real Estate Agents' Commissions and Charges: Report to the Real Estate and Business Agents Supervisory Board, Perth.

during the same period. This is demonstrated in the analysis shown at Table 1.6. This indicates that fee increases were a result of the value of housing increasing rather than fees escalating.

Table 1.4 Change in Real Estate Agent Commissions at each Value Decile: Perth Metropolitan Area ²⁵							
1998				2007			
Sale Price (10 per cent intervals)	Residex median house price 1998	Maximum commission on Residex median house price 1998	Residex median house price 2007	Average Commission 2007 (excluding GST)	Average Commission 1998 (excluding GST)	% real change	Sample size (2007 property transactions)
10%	\$49,000	\$2,333	\$295,000 (+/- 1%)	\$8,361	\$6,308	170%	20
20%	\$67,000	\$2,885	\$340,000 (+/- 1%)	\$9,979	\$7,511	160%	18
30%	\$83,500	\$3,380	\$375,000 (+/- 1%)	\$9,521	\$7,166	112%	22
40%	\$97,500	\$3,800	\$407,400 (+/- 1%)	\$9,982	\$7,513	98%	32
50%	\$115,000	\$4,250	\$440,000 (+/- 1%)	\$10,807	\$8,134	91%	22
60%	\$132,000	\$4,675	\$475,000 (+/- 1%)	\$11,461	\$8,627	85%	26
70%	\$152,450	\$5,180	\$515,000 (+/- 1%)	\$11,349	\$8,542	65%	22
80%	\$179,000	\$5,778	\$575,000 (+/- 1%)	\$13,030	\$9,807	70%	16
90%	\$228,000	\$6,880	\$699,000 (+/- 1%)	\$14,391	\$10,832	57%	9
100%	\$328,000	\$8,935	\$1,023,000 (+/- 5%)	\$22,569	\$16,987	90%	2

²⁵ Ibid. p10.

Table 1.5 Change in Real Estate Agent Commissions at each Value Decile: Non-metropolitan Western Australia ²⁶

Sale Price (10 per cent intervals)	1998			2007			Sample size (2007 property transactions)
	Residex median house price 1998	Maximum commission on Residex median house price 1998	Residex median house price 2007	Average Commission 2007 (excluding GST)	Average Commission 1998 (excluding GST)	% real change	
10%	\$34,000	\$1,695	\$150,000 (+/-10%)	\$5,180	\$3,899	130%	10
20%	\$45,000	\$2,163	\$220,850 (+/-5%)	\$6,777	\$5,101	136%	7
30%	\$56,000	\$2,555	\$265,000 (+/- 5%)	\$9,009	\$6,781	165%	11
40%	\$70,000	\$2,975	\$300,000 (+/- 5%)	\$9,870	\$7,429	150%	14
50%	\$85,000	\$3,425	\$340,000 (+/- 5%)	\$11,043	\$8,312	143%	20
60%	\$100,000	\$3,875	\$375,000 (+/- 5%)	\$11,078	\$8,338	115%	28
70%	\$120,000	\$4,375	\$410,000 (+/- 5%)	\$12,733	\$9,584	119%	36
80%	\$140,000	\$4,875	\$470,625 (+/- 5%)	\$13,934	\$10,488	115%	24
90%	\$165,000	\$5,643	\$560,000 (+/- 5%)	\$16,746	\$12,605	131%	12
100%	\$231,800	\$6,966	\$720,000 (+/- 5%)	\$17,466	\$13,146	89%	8

²⁶ Ibid. p11.

Perth Metropolitan		Non-metropolitan Western Australia	
1998	For 10% decile: House price of \$49,000 Maximum Commission = \$2,333 (4.76%).	1998	For 10% decile: House price of \$34,000 Maximum Commission = \$1,695 (4.98%).
2007	For 10% decile: House price of \$295,000 Average Commission = \$8,361 (2.83 %).	2007	For 10% decile: House price of \$150,000 Average Commission = \$5,180 (3.45%).
1998	For 50% decile: House price of \$115,000 Maximum Commission = \$4,250 (3.69%)	1998	For 50% decile: House price of \$85,000 Maximum Commission = \$3,425 (4.03%).
2007	For 50% decile: House price of \$440,000 Average Commission = \$10,807 (2.46%).	2007	For 10% decile: House price of \$340,000 Average Commission = \$11,043 (3.25%).
1998	For 80% decile: House price of \$179,000 Maximum Commission = \$5,778 (3.22%).	1998	For 80% decile: House price of \$140,000 Maximum Commission = \$4,875 (3.48%).
2007	For 80% decile: House price of \$575,000 Average Commission \$13,030 (2.23 %).	2007	For 80% decile: House price of \$470,625 Average Commission = \$13,934 (2.96%).

The 2008 review also identified that the information made available to consumers provided them with product knowledge and afforded significant protections. It also found the majority of participating agents were willing to negotiate with clients on fees for services provided.

Complaints data about fees following fee deregulation also indicates that this is not an issue for consumers (Table 1.7).

Entity	Year	Complaints Investigated	Fee-related Complaints Investigated
Real Estate and Business Agents Supervisory Board	1998/1999	570	N/Available
Real Estate and Business Agents Supervisory Board	1999/1990	770	N/Available
Real Estate and Business Agents Supervisory Board	2009/2010	1053	5
Real Estate and Business Agents Supervisory Board	2010/2011	1051	6
Department of Commerce – Consumer Protection	2011/2012	1133	4
Department of Commerce – Consumer Protection	2012/2013	1302	10

Source: Department of Commerce 2014

²⁷ Ibid. pp 10 - 11.

Finance brokers

The maximum fees that finance brokers may charge for their services (by way of commission or otherwise) were fixed until 2010 when the responsibility for regulating consumer credit providers was transferred to the Commonwealth.²⁸

Under uniform national regulatory arrangements administered by the Australian Securities Investments Commission (ASIC), credit providers must comply with general conduct obligations in the course of their activities which are prescribed under the Commonwealth *National Consumer Credit Protection Act 2009*. They are also required to have internal and external dispute resolution systems in place that conform to the standards or requirements made or approved by ASIC and comply with Australian Standard AS ISO 10002 referred to as *Complaints Handling* published by Standards Australia (effective as at 5 April 2006).²⁹

Employment agents

In Western Australia employment agents arrange professional engagements or contracts of service for clients for a fee. A range of businesses operate as employment agents:

- traditional employment agencies and employment brokers;
- booking agencies;
- babysitting agencies;
- housesitting agencies; and
- cleaning agencies.³⁰

Fees for services provided by employment agents to clients are not regulated. An employment agent however, must not use a scale of fees or expenses in relation to any service unless it has first been approved by the Commissioner (section 38 of the *Employment Agent Act 1976*).

The Red Tape Reduction Group (RTRG) established in 2009 by the Treasurer Hon Troy Buswell MLA recommended replacing licensing of employment agents with a negative licensing regime and within this, removing the requirement that employment agents' fee scales be subject to the Commissioner's approval with fees instead to be open to negotiation between agents and employers. Red Tape Reduction initiatives are being progressively advanced having regard to other Government priorities.

Motor vehicle dealers and related licensed occupations

In Western Australia legislation requires the licensing of persons who are engaged in the buying and selling of motor vehicles as motor vehicle dealers and in other related occupations such as yard managers, salespeople and car market operators. The fees that these licensed persons or corporates receive in terms of commissions have never been regulated.

²⁸ *Credit (Commonwealth Powers) Act 2010* given Royal Assent in WA in June 2010 gave effect to national credit legislation.

²⁹ Australian Securities & Investments Commission (ASIC) (2011) Credit: Compliance - Dispute Resolution <http://www.asic.gov.au/asic/ASIC.NSF/byHeadline/Credit%20dispute%20resolution>.

³⁰ Department of Commerce: Consumer Protection – Licensing requirements relating to Employment Agents: http://www.commerce.wa.gov.au/ConsumerProtection/Content/Licences/Employment_Agents/.

4 PROPOSALS FOR REFORM

This paper has considered whether there is an ongoing consumer benefit in continuing to regulate maximum fees to settlement agents and land valuers within the context of comprehensive industry licensing regimes, the ACL and industry professional practice regulation.

Western Australia is the only jurisdiction in Australia to do this and there is no pressure for such regulation in other jurisdictions which is an indicator that such regulation is unnecessary. Western Australia has also removed fee regulation for real estate and business agents and finance brokers without adverse consumer outcomes.

As noted in chapter 3 the benefit of regulating fees is that this assists to protect consumers from exploitation when they are not in a position to determine whether the services they receive are of the type and quality they need, provided by competent service providers and so provided for a reasonable price.

Such protection is not required when consumers have readily available information to help them make these judgements and/or the market is sufficiently competitive that consumers can choose between providers who compete on price and quality.

It is acknowledged that for most consumers, information asymmetry exists and that they need some guidance in assessing services offered. Some jurisdictions require that consumers be given a breakdown of services and costs and how costs are calculated in order to improve consumer knowledge and bargaining power. Western Australia also followed this approach when fees were deregulated for real estate and business agents. Competition between providers appears to be the greatest constraint on fees charged and fee discounting has been a sustained and common feature of settlement agent and land valuer practice.

An analysis of the costs and benefits of fee deregulation compared to no change is summarised in Table 1.8. Fee deregulation is considered to provide the greatest public good with benefits most evident for industry and government. While there is a potential risk to consumers of unreasonable fee escalation this is considered unlikely due to market factors and other consumer protection measures provided through legislation and the work of professional associations.

Consequently it is proposed that fees charged by settlement agents and land valuers be deregulated and that legislation be amended to ensure that consumers are provided with information that will assist them to make an informed choice about fees charged. This information is to be modelled on information disclosure required under the Real Estate and Business Agents Act when fees for real estate and business agents were deregulated.

Table 1.8 Comparison of costs and benefits of fee deregulation		
	Deregulation	Status Quo
Consumers	<p>Potential for fees to escalate but current competitive markets and the experience of fee deregulation for real estate and business agents indicates that this is an unlikely outcome.</p> <p>Proposed additional information for consumers will assist to understand costs and negotiate fees.</p>	<p>Fee regulation provides certainty about maximum fees. However in the current competitive market fees are usually less than the maximum.</p> <p>Safeguards provided by licensing, the ACL and professional bodies can address unfair pricing in individual cases.</p>
Industry	<p>Ability to respond to business pressures and opportunities through fee adjustments as required.</p> <p>Fees can evolve with business specialisation, work complexity and other factors.</p>	<p>Inability to respond to increasing business costs once the fee cap is reached risking business profitability and viability. The probability of this occurring increases the longer the interval between fee increases which are subject to government business priorities.</p>
Government	<p>Savings through not having to periodically review fees.</p>	<p>Costs of reviewing fees periodically. Conservatively estimated at \$3,500 for a simple adjustment based on CPI up to \$75,000 for an extensive review analysing business costs and models. An extensive review is now warranted if fee regulation is maintained.</p>

5 COMMENT

The Department of Commerce seeks to ensure that information that it receives through this consultation process is assessed accurately and so asks that you provide the requested demographic information when responding to the following questions.

Respondent Area of Interest

Your primary area of interest, in commenting on this discussion paper, relates to:

Please Tick (v)

SETTLEMENT AGENTS

LAND VALUERS

BOTH

Respondent Background

The category that best describes you is:

Please Tick (v)

SETTLEMENT AGENT

LAND VALUER

CONSUMER

OTHER

(Please specify)

Questions

1. Do you support the deregulation of the prescribed maximum fees for the services provided by settlement agents and land valuers in Western Australia?

Please tick (v)

YES NO

If "NO", please provide reasons as to why you consider that regulation of the fees charged by settlement agents and land valuers should continue

2. Do you consider that the proposals to provide additional information to consumers about fees provide adequate consumer safeguards?

Please tick (v)

YES NO

If "NO", please identify the types of consumer protection mechanisms which government should consider introducing to accompany any fee deregulation reforms.

Please provide any additional comments that you may have about fee deregulation for settlement agents and land valuers.

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