



THE REPUBLIC OF UGANDA

Private Sector Foundation Uganda

SECOND PRIVATE SECTOR COMPETITIVENESS PROJECT (PSCP II)

CREDIT NUMBER: 3975 UG

**Review of the Legal Framework
for Land Administration**

**FINAL DRAFT ISSUES PAPER
PROPOSED LAW ON ESTATE AGENCY
IN UGANDA**

Revised March 2010

Kalenge, Bwanika, Kimuli & Co., Advocates

1.0 BACKGROUND TO THE CONSULTATION

1.1 INTRODUCTION

1.1.1	The scope of this Draft Final Issues Paper.....	5
1.1.2	The Project for Review of the Legal Framework for Lands Administration.....	5
1.1.3	The Consultant.....	5
1.1.4	The Second Private Sector Competitiveness Project (PSCP II).....	5
1.1.5	Terms of Reference	6

2.0 METHODOLOGY

2.1	Approach and Methodology	7
2.2	Literature Review.....	7

3.0 GENERAL OVERVIEW OF THE LAND MARKET

3.1	What is a Land Market?	9
3.2	“Land Market” or “Real Estate Market”?	10
3.3	Formal and Informal Markets.....	10
3.3.1	Formal Land Market	10
3.3.2	Informal Land Market.....	12
3.4	The need for formalization and the ways forward.....	13
3.5	Policy Background - the LSSP and other Policies.....	14
3.6	The implementation of the LSSP and the Land Market.....	15
3.7	The Land Market and the practice of Estate Agency.....	19
3.8	Rationale for regulating land market professionals.....	20

4.0 REGULATION OF ESTATE AGENTS

4.1	Regulation of Estate Agency and Occupational Regulation.....	22
4.1.1	What is regulation?	22
4.1.2	Rationale of Estate Agency Regulation.....	23

4.1.2.1	Consumer Protection - No General Consumer Protection Law in Uganda	23
4.1.2.2	Land Market Perspective.....	24
4.1.2.3	Estate Agency Professional Regulation Perspective.....	24
4.1.2.4	Market failure, information asymmetries and negative externalities.....	25
4.1.3	Fraud in estate agency transactions generally.....	34
4.1.4	Positive externalities.....	34
4.1.5	Other risks posed by estate agency services.....	38
4.2	Types of Occupational Regulation.....	42
4.2.1	Entry Barriers.....	43
4.2.2	Registration	44
4.2.3	Certification.....	44
4.2.4	Accreditation	44
4.2.5	Licensing.....	45
4.2.5.1	Further Aspects of Licensing.....	46
4.2.6	Self-regulation.....	49
4.2.6.1	Advantages of Self-regulation.....	49
4.2.6.2	Disadvantages of Self-regulation.....	49
4.3	Resolution of Disputes and the Pursuit Of Redress.....	51
4.3.1	Disciplinary Organs and Procedures	51
4.3.2	Funding the Tribunal.....	54
5.0	WHO SHOULD QUALIFY FOR LICENSING AS AN ESTATE AGENT?	
5.1	Should the proposed statutory regulation of estate agents absorb all current (unlicensed) practitioners?.....	55
5.2	Transition Process: Grandfather Clauses.....	57

5.3	Experience requirements.....	57
5.4	“ <i>Fit and proper person</i> ” requirement.....	58
5.5	Regulatory Impact – Dalili – Bakayungirizi – “land and property brokers”	61
5.6	Exempting Legal Practitioners from the licensing requirements of the Estate Agents Law	66
5.7	Other land professions.....	67
5.8	Training and Capacity-Building: Development of the Real Estate Profession.....	69
5.9	Should estate agency practice be available to non-citizens?	71
5.11	Salespersons.....	74
6.0	THE REGULATORY REGIME: DUTIES AND OBLIGATIONS OF AN ESTATE AGENT	
6.1	Common Law and fiduciary duties	76
6.2	Non-fiduciary duties of an Estate Agent.....	78
6.3	Obligations to consumers generally.....	79
6.4	Duties/Obligations with regard to the Agency Agreement.....	82
6.4	General aspects of Agent’s duty.....	83
6.5	Regulatory aspects of Conduct of Estate Agency Business	84
6.6	Business licensing.....	85
6.7	Regulation of Property Developers.....	85

BIBLIOGRAPHY

Acknowledgements

1.0 BACKGROUND TO THE CONSULTATION

1.1 INTRODUCTION

1.1.1 The scope of this Draft Final Issues Paper

This is the Final Draft Issues Paper on Estate Agency. It builds on the Consultant's earlier Issues Paper on Estate Agency (called more fully "Issues Paper: Proposed Law on Estate Agency in Uganda") delivered in 2009. The Consultants have taken the opportunity in this Draft Final Issues Paper to review the discussion and recommendations in that earlier Paper. Our earlier Paper also included draft legislation (which we called the *Draft Real Estate Agents Act 2008*, and which we refer to in this Paper as the *Draft REA 2008*). With this Draft Final Issues Paper, we include a revised version of that Draft Act, which we refer to as the *Draft Real Estate Agents Act 2010*.

This Final Draft Issues Paper also takes into account the comments which the Law Reform Working Group (LRWG) made as a result of the LRWG retreat on 24 January to 27 January 2010.

1.1.2 The Project for Review of the Legal Framework for Lands Administration

The *Review of the Legal Framework for Lands Administration* is a sub-component of the Uganda Second Private Sector Competitiveness Project (PSCP II).

The Government of Uganda has received funds (under Credit Number: 3975 UG) from the International Development Association (IDA), towards the cost of the PSCP II. It has applied part of the proceeds of this Credit to the Land Component of the PSCP II.

1.1.3 The Consultant

Under the Land Component of the PSCP II, the Private Sector Foundation Uganda (PSFU) has procured the services of a Consultant (Kalenge, Bwanika, Kimuli & Company, Advocates, in association with several subconsultants with national and international expertise) to provide consultancy services for the Review of the Legal Framework for Lands Administration. This assignment, in summary, entails comprehensively reviewing land-based laws; recommending revisions and harmonization where appropriate; and drafting new laws in certain areas.

1.1.4 The Second Private Sector Competitiveness Project (PSCP II)

The objective of the PSCP II is: to support Uganda's efforts towards creating sustainable conditions conducive to enterprise development and growth; encourage investment; facilitate private sector development; increase micro, small and medium enterprises (MSMEs); increase competitiveness in the local and export markets; and increase employment opportunities in Uganda. These objectives are to be achieved through: (a) reducing the cost of doing business; and (b) improving the business environment and public-private dialogue.

From the viewpoint of land administration, the key constraints affecting the business environment, particularly the public-private sector interface, are the inadequate provision of services in the land

sector, the inefficiency of the Land Registry, an outdated legal framework in certain areas, and institutional inefficiencies in the relevant areas.

The Land Component of the PSCP II builds upon the *Medium Term Competitiveness Strategy*¹. It also builds upon Uganda's other national goals, such as the Poverty Eradication Action Plan (PEAP), which aims to reduce the proportion of the population living in absolute poverty to below 10% by 2017. The Land Component seeks to improve the land registry, restore its integrity, and strengthen the underlying legal, regulatory and institutional structures by building on ongoing experiences and, in particular, by complementing activities funded by other development partners².

Among the sub-constituents of the Land Component of the PSCP II is a requirement for a **new law on estate agents**. The purpose of this new law is to recognize estate agents, regulate their conduct and fees, and legislate for standards and disciplinary procedures.

1.1.5 Terms of Reference

At the broad level, the Terms of Reference ('ToR') require the Consultant to conduct a comprehensive review of all land-based laws, and to draft new laws where necessary. One area where recommendations are required is the law and practice of estate agents. At present, estate agents in Uganda are unregulated.

The ToR require the Consultant to take into consideration a number of matters when proposing new legislation to improve the environment for business competitiveness. They include the rapid evolution of land markets, and the needs of the financial sector, private sector developers, and estate agents.

The ToR also recognize the importance of an appropriate legal framework to regulate the production, management and archiving of **land records**. Without this, public confidence in the operation of the real estate market is unlikely to be sustained and long term economic growth and poverty-reduction are unlikely to be achieved.

The ToR also require the Consultant to endeavour to establish critical links between the Land Sector Strategic Plan 2001-2011 (LSSP) and the PSCP II, and to identify policy and legal loopholes in the regulatory environment for that are holding back growth in the land sector.

Lastly, a clarification to the ToR made at a meeting between the Consultant and MLHUD (on 19th November, 2007) required the Consultant to review the land market as part of the Issues Paper for the proposed law regulating the estate agency industry in Uganda.

1. Now replaced by the *Competitiveness and Investment Climate Strategy (CICS)*.

2. For example, SIDA financed the preparation of a detailed plan to reform the Land Registry, while rehabilitation of land records was initiated under the USAID-financed Support of Private Enterprise Expansion and Development (SPEED) Project.

2.0 METHODOLOGY

2.1 Approach and Methodology

This Draft Final Issues Paper (as with the earlier Issues Paper) has been drafted on the basis of the Consultant's existing knowledge, preliminary consultations with the Client, and an extensive literature review. Considerable effort has been spent studying and examining international best practice and previous and contemporary projects in other countries.

On some matters, this Draft Final Issues Paper does not make final conclusions. Rather, it canvasses issues and problems, and then suggests tentative proposals to be further tested at later stages of the law revision exercise (particularly at stakeholder and public consultations). The methods to be used during the later stages of the law review will include:

- focus sessions, including stakeholder and public consultations;
- in-depth interviews with stakeholders; and
- further review and analysis, if required to fine-tune findings or recommendations arising from the consultative process.

It is envisaged that it will conclude by formulating and generating final proposals and recommendations.

2.2 Literature Review

The key literature reviewed includes the following:

- 1) Project Appraisal Document on a Proposed Credit to the Government of Uganda for a Second Private Sector Competitiveness Project, Report Number: 29639-UG, dated July 7, 2004.
- 2) The Land Sector Strategic Plan, 2001-2011: Utilising Uganda's Land Resources for Sustainable Development.
- 3) The Land Sector Analysis: Land Market, Land Consolidation, and Land Re-Adjustment Component, by Rose Mwebaza and Richard Gaynor, Rural Development Institute/Government of the Republic of Uganda, February 2002. Grant No. PHRD/02/04.
- 4) Annex 6 to the Land Act Implementation Study (Legal Appraisal), Final Report, 6 September 1999, by Patrick McAuslan and Rose Mwebaza.
- 5) Numerous World Bank publications, including *World Development Reports*, the *Doing Business* series (a product of staff of the World Bank Group, being a series of annual reports investigating the regulations that enhance business activity and those that constrain it), World Bank Policy Research Reports (PRR) and Policy Research Working Papers (most of which contain case studies, country studies and empirical investigations), and documents/papers of other international financial institutions, particularly the Inter-American Development Bank, UN-Habitat, and Land Equity International.
- 6) Publications of key development partners and institutions involved in improving land administration, including GTZ of Germany, the Department for International Development (DFID) of the United Kingdom, the Swedish International

Development Cooperation Agency (SIDA), the Land Registry of the United Kingdom, and the Cadastre, Land Registry and Mapping Agency of the Netherlands.

- 7) Publications of key land administration institutions, such as the United Nations Economic Commission for Europe (UNECE) (in particular, the Working Party on Land Administration of the UNECE Committee on Human Settlements), the International Federation of Surveyors (FIG), UN-Habitat, Global Land Tool Network (GLTN), Landnet Americas, and other international institutions such the Food and Agricultural Organization of the United Nations (FAO).
- 8) Harmonization of Land Tenure Legislation—Final Report, Ministry of Water, Lands and Environment, June, 2005.
- 9) Detailed Plan for the Design, Development and Implementation of a Land Information System in Uganda, Swedesurvey, March, 2004.
- 10) Technical Audit on Current Initiatives and Proposals for Securing Land Registry Records in Uganda, Swedesurvey, October 2003.
- 11) Securing and Upgrading the Land Registry and Implementation of a Land Information System in Uganda—Baseline Evaluation Report, Geo-Information Communication Ltd, Kampala, Uganda – May, 2007.
- 12) Report on investigation into alleged mismanagement of the Land Registry in the Ministry of Water Lands and Environment, Inspectorate of Government, Kampala.
- 13) Poverty Eradication Action Plan (PEAP).
- 14) Plan for the Modernization of Agriculture (PMA).
- 15) The Medium-Term Competitiveness Strategy (MTCS).
- 16) Competitiveness and Investment Climate Strategy (CICS).
- 17) Uganda’s land-related legislation.
- 18) Other literature cited in the footnotes and the Bibliography.

3.0 GENERAL OVERVIEW OF THE LAND MARKET

3.1 What is a Land Market?

Land markets exist wherever private rights in land are recognised and where it is possible to exchange those rights, usually for agreed amounts of money. One report describes the land market as “a set of arrangements in which buyers and sellers are brought together through the price mechanism”.³

In this Draft Final Issues Paper, we use the term ‘land market’ in the basic sense of land trading (buying, selling, mortgaging and leasing land) and the land administration and information systems needed to facilitate that trading.⁴

An efficient land market needs to be underpinned by an efficient administration and information infrastructure:

“There must be a sound land administration system, good land policy and a legal framework in place to underpin the land market. A fair and open land market needs guaranteed security of land rights; low transaction costs for all users; access to credit; transparency with openness and ease of access to all; protection of minorities;⁵ opportunities to raise revenues through land and property taxes; and support for environmental sustainability⁶.”

-
3. *Land Administration in the UNECE Region: Development Trends and Main Principles*, ECE/HBP/140, United Nations, Economic Commission for Europe, Geneva, 2005. *Key Note: Impact of Land Policies and Legislation on the Land Market*, by Ninel Jasmine Sadjadi, Project Manager Research, Center of Legal Competence (CLC), Vienna, FAO Regional Workshop, Development of Land Markets and Related Institutions in Countries of Central and Eastern Europe (Topic B: Legal framework and support policies to develop land markets), Nitra, May 6-7 2005. <http://www.fao.org/regional/seur/events/landmark/docs/sadjadi.pdf>
 4. In modern times, land markets may be said to transcend simple land trading, so as to include the trading in complex commodities, such as mortgage-backed certificates, water rights, land information, time shares, unit and property trusts, financial instruments, insurance products, options, corporate development instruments and vertical villages. See *Thinking outside the Triangle – Taking Advantage of Modern Land Markets*, by Ian Williamson, Centre for Spatial Data Infrastructures and Land Administration, The University of Melbourne; see also *Developing Cadastres to Service Complex Property Markets*, by Jude Wallace and Ian Williamson, Australia.
 5. *Overcoming Gender Biases in Established and Transitional Property Rights Systems*, by Renee Giovarelli, and *A Framework for Land Market Law with the Poor in Mind*, by Leonard Rolfes, Jr., both in John W. Bruce, Renee Giovarelli and others, *Land Law Reform: Achieving Development Policy Objectives*, The World Bank, Legal Vice-Presidency, 2006; sections 31 and 39 *Land Act*, Cap. 227, Laws of Uganda, Revised Edition, 2000; *A Concept for a National Land Information System in Uganda*, Swedesurvey, at p.44 (65); LIS Baseline Evaluation Report – Final Report – May 2007; *Land Sector Strategic Plan 2001-2011 (4.9 Women And Vulnerable Groups – Actions)*.
 6. *Land Markets—Why are they required and how will they develop?* by Peter Dale, Robert Mahoney, Robin McLaren, conference paper, Strategic Integration of Surveying Services, FIG Working Week; available via <http://www.rics.org/NR/rdonlyres/3CF7C26F-9D55-4DE8-B4E6-CDACFB7333DA/0/LandMarkets.pdf>.

3.2 “Land Market” or “Real Estate Market”?

Land in a legal sense is *real estate*. “Real estate” (or “real property”) is a generic term for land and buildings.⁷ Some legal systems differentiate between land and the buildings attached to it, but this is not generally the case in countries which have adopted the common law, including Uganda.

As a consequence, references to “*land market*”, “*real estate market*” and even simply “*property market*”, are interchangeable, and we use them interchangeably in this Draft Final Issues Paper. There is a tendency in land market literature to refer to urban land and buildings as “real estate” and to rural land as “land”; but this does not reflect the legal reality, and so we do not follow that tendency in this Issues Paper.

For our purposes, the real estate market encompasses all dealings in rights or interests in land and buildings. By “dealings” we mean the transfer of rights temporarily or permanently from one person to another in return for a consideration, usually money. And so the real estate market includes not only sales of land, but other transactions such as mortgaging and leasing.

In this context, “real estate” agency involves

*“introducing to someone else a person who wishes to buy, sell or lease land or property, and being involved in negotiating the subsequent deal. The work must be in the course of business, whether as employer or employee, and as a result of instructions from a client. The land or property may be commercial, industrial, agricultural or residential”.*⁸

3.3 Formal and Informal Markets

3.3.1 Formal Land Market

The land market is much like the normal marketplace. An ordinary market, where participants buy and sell goods and services, requires an administrative system and rules of the game. Likewise, the land market requires an administrative system and rules of the game—it requires regulation for its coordination and control. The essential distinction between formal and informal markets depends on the extent of regulation and control.

In the field of land administration, a *formal land market* is one whose activities are serviced by public, authorized, and established systems that are provided by or organized through government. Formal regulatory frameworks provide infrastructure to manage the processes that deliver land

7. *Multilingual Thesaurus on Land Tenure*, FAO, 2003. The terms, *real property* and *real estate*, derive historically from the medieval concept of a “real” action, under which an owner who was wrongly deprived of land was entitled to recover it. According to Section 2 (II) of the *Interpretation Act*, Chapter 3, Laws of Uganda Revised Edition, 2000, “*land*” includes *messuages, tenements, hereditaments, houses and buildings of any tenure and land covered by water*. In the *Registration of Titles Act*, “land” includes messuages, tenements and hereditaments corporeal or incorporeal; and in every certificate of title, transfer and lease issued or made under the Act, “land” also includes all “*easements and appurtenances appertaining to the land described therein or reputed to be part of that land or appurtenant to it.*”

8. *Improving Competition in Real Estate Transactions 2007*, Organisation for Economic Co-operation and Development (OECD), DAF/COMP (2007) 36.

registration, valuation, taxation, and planning and development. A formal land market, operating within a legitimate framework, provides for planned and sustainable development and infrastructure.

Experts emphasize that a formal land market must operate within a clear set of policies and laws that are consistent, enforceable and acceptable to market participants.⁹

That legal framework for a land market should define:¹⁰

- the nature of land and interests in land (for example, whether it includes building and construction, strata or condominium property, and time-based rights);
- the rights that relate to land and the manner in which those rights are held and can be transferred;
- the restrictions and obligations that may apply to land (for example, physical planning controls);
- the way in which land ownership and rights are determined;
- procedures for settling disputes over land;
- procedures for the state's compulsory purchase of land, and associated compensation.

Up-to-date land information underpins the security, validity and transferability of rights within a land market. This means that the legal framework must also address issues of access to land information and the intellectual property rights to that information, so that information about land can flow lawfully and easily through the system. All participants in the market must have access to land-related information.

It is not enough for the policies and laws underpinning the land market to be in place. They must also be enforced. This is necessary to provide confidence to those using or intending to use the land market. Other factors that need to be in place include a functioning financial and banking system, and a private sector providing professional land-market services. We will explore these later. For the time being, it suffices to say that for the formal market, the most important requirements are a sound legal, governmental, and administrative framework.

9. *The Importance of Land Administration in the Development of Land Markets - A Global Perspective*, by Peter Dale, Department of Geomatic Engineering, University College London, England; *Land Markets and Land Consolidation in Central Europe IV*, © TU Delft - UDMS 2000; *Land Law Reform: Achieving Development Policy Objectives*, The World Bank, Legal Vice-Presidency, 2006; *Consultancy for Drafting a Bill to regulate the Practice of Real Estate Agency for Facilitation of the Operation of the Land Market in Tanzania*, Business Environment Strengthening for Tanzania (BEST) Programme, Dar-es-Salaam; *Key Note: Impact of Land Policies and Legislation on the Land Market*, by Ninel Jasmine Sadjadi, Project Manager Research, Center of Legal Competence (CLC), Vienna; FAO Regional Workshop, *Development of Land Markets and Related Institutions in Countries of Central and Eastern Europe* (Topic B: Legal framework and support policies to develop land markets), Nitra, May 6-7 2005; <http://www.fao.org/regional/seur/events/landmark/docs/sadjadi.pdf>

10. *Land Markets and the Modern Economy*, by Peter Dale, Robert Mahoney, Robin McLaren, RICS Christmas Lecture, University College London, December 2007, available via www.rics.org and www.fig.net.

BOX NO. 1: LAND MARKET EFFICIENCY

An effective land market requires adequate financing mechanisms to be in place to support the buying, selling, leasing and development of property-related assets. A key driver in a land-market-based economy is housing finance, as it allows house owners to use the capital value of their home to fund other economic activities. A vibrant mortgage market vitalizes the economy by enabling greater access to capital for investment while also spurring the development of the construction sector.

Conversely, in environments where credit markets do not function well, land sales markets will have a tendency to lead to undesirable, efficiency-reducing results, such as speculative purchases, high transaction costs, distress sales, and reduced opportunity for small-scale producers to purchase land¹¹. In imperfect credit markets (limited credit market access), the unavailability of credit will inhibit the ability of farmers to finance large-scale land acquisitions, or to consolidate fragmented holdings.¹² Imperfect credit markets will also negate the operation of neo-classical land market theory, because where credit markets are limited and the purchase of land cannot be effectively financed, land will not necessarily be transferred to the most efficient producers.¹³

3.3.2 Informal Land Market

Where the land market operates *outside* the parameters of legislation, an ‘informal’ land market arises.¹⁴ The informal market may run in parallel with the formal.

An informal land market not only operates extra-legally, but it results in many undesirable phenomena. For example:¹⁵

11. *Agriculture Investment Sourcebook* (Module 10: Investments in Land Administration, Policy, and Markets), May 2006, available from www.worldbank.org/agsourcebook.
12. Final Report: Land Sector Analysis - Land Market, Land Consolidation, and Land Re-Adjustment Component, Grant No. PHRD/02/04, by Rose Mwebaza & Richard Gaynor, RDI/GOU, February 2002.
13. Under the general theory on the allocative function of land markets, under appropriate institutional frameworks markets will tend systemically to move land towards the most economically efficient ownership and use. Well-functioning land markets transfer land to its best uses and to better operators: *Agriculture Investment Sourcebook*, The World Bank, May 2006: www.worldbank.org/agsourcebook, p.2; *Report of the Workshop on Land Tenure and Cadastral Infrastructures for Sustainable Development*, 18th - 22 October 1999, Bathurst, Australia, Final Edition, <http://www.geom.unimelb.edu.au/UNConf99/>, p.32; *Land Administration Reform: Economic Rationale and Social Considerations*, by Gershon Feder, The World Bank, October 1999, p.3, accessible at www.fig.net; *Regulatory Policies and Reform: The Case of Land Markets*, by Antonio Salazar, P. Brandao, and Gershon Feder, The World Bank, Private Sector Development Department, PSD Occasional Paper No. 15, January 1996, p.22.
14. *Development of a Cadastral and Land Management Model for Existing Informal Land Rights in South Africa*, by Mark van den Berg and Peter Hoffmann, South Africa.
15. *The New Land Act and Its Possible Impacts on Urban Land in Tanzania*, by J.M. Lusugga Kironde, 2003 Lincoln Institute of Land Policy, Conference Paper, Lincoln Institute Product Code: CP98A08; *Property Rights, Land Markets, and Poverty in Namibia's 'Extra-Legal' Settlements: An Institutional Approach*, by Many M. Mooya and Chris E. Cloete, Global Urban Development Volume 3, Issue 1, November 2007.

- a) purchases or borrowings are left unregistered, and so title remains informal;
- b) there may be conflicting and unrecorded ownership claims;
- c)
- d) multiple sales may occur of the same property;
- e) fraud is rife;
- f) negotiations for transactions can be lengthy;
- g) no general framework exists for setting prices;
- h) access to credit may be difficult or even impossible (because informal land markets do not attract the participation of formal financial institutions);
- i) knowledge of land availability, and other aspects of land-related information, is imperfect. The informal market relies more on inefficient systems of “land information” or communication, such as word-of-mouth or instruments that lack legal efficacy;
- j) the process of trading land depends on local systems of enforcement that are often not transparent;
- k) rules are not apparent, and therefore interests in land may be unrefined, irregular, or insecure;
- l) slum development is encouraged. Land obtained from informal land markets tends to be inadequately served by built-environment infrastructure, such as roads, power, water, sewerage, and telecommunications.

3.4 The need for formalization and the ways forward

The transformation of informal real estate markets into a formal market raises numerous issues, many of which are beyond the scope of our ToR. For the purposes of this Paper we concentrate on the key issues of informality of land rights, land tenure, and land transactions.

In Uganda, as in many sub-Saharan countries, the formal land market exists mainly in urban and peri-urban areas. Most land outside these areas is not officially titled or formally documented. Other factors also tend to encourage the informal land market in such areas. For example:

- Aspects of the formal land market are unattractive to many people. As several prominent land market analysts have pointed out, these unattractive elements may need to be reformed. The formal system of property transactions is viewed as prescribing the use of lawyers, conveyancers, and other professionals who come at a cost. Land sales in the formal market often require authentication by written sales agreements witnessed by a number of people, who may include local notables and/or local government officials; these too come at a cost. If people who either hold or wish to acquire land rights view the costs of participating in the

formal system to be higher than the costs of a less-formal method of recognizing rights, they will opt for informality.

- Additionally, there are costs arising from bureaucratic procedures, delays, corruption or unofficial rents.

All these factors drive people into the informal sector.

The reform process should therefore examine all the causes that drive land transactions into informality, and address them comprehensively. That is why, elsewhere, this Project has addressed the need for an effective Land Information System, the need to harmonize all land-sector legislation, and the need for systematic demarcation and adjudication—all are necessary elements in wholesale land-sector reform.

Formal real estate markets rely on a range of institutional arrangements, organizations and players to structure and facilitate property transactions. Besides a legal and regulatory framework (laws and regulations), these include simplified transaction forms, the services of professionals (i.e., estate agents, conveyancers, lawyers and surveyors), and the availability of financial services and access to credit. They also include, of course, land registries; thus, under the LSSP,¹⁶ the *Land Registration Department* is central to plans to formalize the land market.

Informal real estate markets lack these characteristics. They have very few of the institutional fundamentals. If the informal market is to be reformed and re-directed towards the formal market, then all of these issues will need investigation.

Turning now specifically to estate agency: the lack of adequate professional estate agency expertise contributes to informality in the land market. The informality is compounded when those in the estate agency industry fail to keep adequate and reliable records of transactions in the land market. And it is further exacerbated by public distrust of the industry and its participants.

To achieve a secure land and property market, the public must have access to competent, trustworthy and professional support services—including real estate agency services. The credibility and integrity of real estate agents is therefore essential for the smooth functioning of a formal property market. It is also essential for public confidence in the real estate market generally.

3.5 Policy Background - the LSSP and other Policies

The Ministry of Water, Lands, and Environment has developed the Land Sector Strategic Plan (LSSP), which the Government has approved for implementation. The Plan is designed to provide the operational, institutional and financial framework for sector-wide reforms and land management. SIDA has financed the preparation of a detailed plan to reform the Land Registry, and the Government is committed to proceed with these reforms.

The LSSP takes cognizance of and follows the strategy in the Poverty Eradication Action Plan (PEAP).¹⁷ This requires Government and the public sector to disengage from undertaking development, and instead, switch to facilitating development by the private sector.

16. Land Sector Strategic Plan 2001-2011, p.48.

The LSSP is designed to provide the operational, institutional and financial framework for implementing sector-wide reforms and land management, including implementing the *Land Act*. It is based on a vision for the land sector, a mission, and *strategic objectives* for achieving that mission.

Strategic Objective No. 2 of the LSSP is “*To put land resources to sustainable productive use.*” The Plan quotes available data as suggesting that only one-third of Uganda’s cultivable land is used at present. There is a need to expand the productive asset base, and to increase the productivity of land already under cultivation, as key steps towards increasing incomes and eradicating poverty. One of the three principal strategies for achieving this objective is:

“... *Supporting the land market and land rental market.*”

According to the UN Economic Commission for Europe (UNECE),¹⁸ land markets exist in a number of forms. While they may be based around the sale of freehold,¹⁹ they may also be based around transactions with leases (the “land rental market”). The development of the land sales market and the land rental market must go together.²⁰

3.6 The implementation of the LSSP and the Land Market

The implementation of the policies in the Land Sector Strategic Plan is expected to have a significant and positive impact on the land market. In particular, improved management of land and land information will increase the confidence of buyers and sellers in the land market. Implementing the policies should also generate improved accessibility to land services, which in turn will impact positively on the land market.

Specifically, implementing the LSSP policies can be expected to beneficially affect the land market in the following ways:

- a) “*Passporting*”²¹ land or property, by providing paper documentation (certificates and titles). This should increase land-market activity, but only if there is public confidence in the accuracy and currency of the information in those certificates and titles.²² By ensuring that certificates and title registers are kept up to date, and by reducing the costs related to transfer, the LSSP policies will provide incentives to both transferors and transferees to formalize the recording of land transfers and related dealings.

17. *Poverty Eradication Action Plan (2004/5-2007/8)*, Ministry of Finance, Planning and Economic Development.

18. *Guidelines on Real Property Units and Identifiers*, Economic Commission for Europe, Geneva, 2004.

19. And Mailo, in the case of Uganda.

20. The World Bank's 2003 Policy Research Report (PRR) on land is clearly not optimistic about land sales markets as a means for the poor to access land, and suggests broader use of rental markets for this purpose. See Klaus Deininger, *Land Policies for Growth and Poverty Reduction*, World Bank Policy Research Report (World Bank & Oxford University Press 2003). The report's primary focus is on rural land policy.

21. See Box.

22. LSSP, Executive Summary page v., and p.31

Registration of interests in land is a cardinal requirement for a properly functioning land market. It serves as the basis of formal land transactions, underpinning the efficient operation of the land market. For land markets to operate effectively, land owners must be able to demonstrate proof of ownership and their power to sell. Buyers need to know who owns the land and what burdens and mortgages exist on the property. And banks and other financiers need to be satisfied about ownership before they can confidently lend money against property.

BOX NO. 2 “PASSPORTING” LAND AND PROPERTY

The reference to “passporting” land and property in developing nations comes from Hernando de Soto’s influential book, *The Mystery of Capital*.²³ Under his neoclassical economic theory, titling of land creates or encourages security of tenure, which is important for enhancing the collateral value of real estate, thus making credit markets possible. This neoclassical approach appears to have influenced the World Bank’s thinking about urban land markets.²⁴

De Soto argues that in many developing countries land is “dead” capital, which will only be resurrected by legal reforms. In his view, people in developing countries lack an integrated formal property system, and as a consequence have only informal ownership of land and goods. While the poor in many developing countries already possess the land assets they need to make capitalism work for them, they hold these assets in defective forms—that is, they lack proof of title to their land and ownership of property which they could otherwise use to invest in businesses. This renders their assets ‘dead’ capital.

The lack of title to property rights makes it impossible for the poor in developing nations to leverage or transform their informal land and property ownerships into capital (such as collateral for credit). By contrast, in the West there is a direct correlation between property ownership and prosperity. The continued poverty of developing countries is a consequence of their undeveloped property regimes. De Soto estimates the total value of such ‘dead’ capital to be at least US\$9.3 trillion. “They have houses but not titles, crops but not deeds, businesses but not statutes of incorporation” (de Soto 2000:7).

Titling the land and property assets thus gives an asset a “passport” or official title, which in turn has both an identifying role and a capital formation role. Titling would identify capital tied-up in land, and permit the land to be collateralized, giving the poor access to credit.

“[A]ssets can live an invisible, parallel life alongside their material existence. These assets can also provide a link to the owner’s credit history, an accountable address for the collection of debts and taxes, the basis for the creation of reliable and universal

23. *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (Basic Books, 2002).

24. See *The World Bank’s view on Land Markets*, in *Question & Answer on Land Issues at the World Bank*, accessible at: <http://lnweb18.worldbank.org/ESSD/ardext.nsf/PrintFriendly/99D70AAF3D039DAF85256D5E00621DAE?Opendocument#view>; *World Development Report 2002 - Building Institutions for Markets*; *Land Policies for Growth and Poverty Reduction, Volume 1*, World Bank / Klaus Deininger, 2003; *Unlocking Dead Capital: How Reforming Collateral Laws Improves Access to Finance*, by Mehnaz Safavian, Heywood Fleisig, and Jevgenijs Steinbuks, The World Bank Group, Private Sector Development Vice Presidency, March 2006; *Reforming Land and Real Estate Markets*, by Ahmed Galal and Omar Razzaz, World Bank; John W. Bruce, Renee Giovarelli and others, *Land Law Reform: Achieving Development Policy Objectives*, The World Bank, Legal Vice-Presidency, 2006; *Making Urban Land Markets Work for the Poor: Policy, Practice and Possibility*, by Manya M. Mooya and Chris E. Cloete, p.16

public utilities, and a foundation for the creation of securities (like mortgage-backed bonds) that can now be rediscounted and sold in secondary markets.”²⁵

Furthermore, as part of the strategy to establish a Land Information System, the LSSP envisages:

- (i) rehabilitating the Land Registry and existing land records, so as to alleviate the current predicament where inaccurate, non-existent or unclear land records make it impossible to enforce existing land rights; and
 - (ii) facilitating the decentralization of records, to improve access to land and title information.
- b) Prioritizing for systematic demarcation those areas of the country where there exists a thriving informal land market, such as customary land plots in many urban areas. Systematic recording of land ownership in these (and then other) areas should reduce the costs associated with transactions, improve the reliability of the land rights system in those areas, and lead to a more dynamic and efficient land market. The systematic registration of rights results in a growing mass of registered land parcels, and increases the supply of land to the land market.²⁶
- c) Stimulating a market in occupancy rights (Bibanja holdings on registered land), by issuing certificates of occupancy and registering occupancy rights transactions.
- d) Piloting land-adjustment and land-sharing techniques, with the aim removing the existing land-use impasse between the occupants of Mailo land and registered owners. This should release previously sterile Mailo land onto the land market, again increasing the supply of land.
- e) Taking similar measures as in (d) in relation to customary land in rural areas, again with the expectation of increasing land-market activity.

The improved operation of the land market is expected to provide a range of opportunities for individuals and micro, small, and medium enterprises (MSMEs). It will also generate extensive

25. *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (Basic Books, 2002), p.6.

26. Businesses see as major constraints to growth not only the lack of security of land tenure, but also the lack of supply of land and therefore resulting high prices. As to security of tenure: businesses need to ensure that their land is genuinely registered, and also that it is included under local land use planning laws and schedules; otherwise it is unsafe to invest in (for example) a factory, warehouse, other commercial facilities or housing estates. But SMEs and development partners view the lack of available land as a major impediment to the growth of SME businesses. See *Project Component 1: Developing Infrastructure and Financial Services*, in the Project Appraisal Document for the Uganda Second Private Sector Competitiveness Project (PSCP II), at pp. 2, 4, 8, 24, 36, 43-44.

benefits in greater overall efficiency of land use, expanded use of land in some areas, and reductions in land fragmentation.²⁷

These LSSP strategic objectives are amplified by the Project Appraisal Document (PAD)²⁸. The PAD reaffirms that the availability of reliable and easily accessible land information is a prerequisite to enhancing activities in the land market. The PAD highlights the linkage between titles and economic performance—that is, the effect of titles in enhancing tenure security, and the role of titles in collateral arrangements and facilitating access to institutional credit. It points out that when the high risks associated with uncertainty in land ownership are removed by the provision of accurate information, returns on investment are increased. A well-functioning land delivery system, supported by a modernized national information system, will encourage greater reliance on land as collateral for security for loans, along with providing reduced transaction costs. This will stimulate land transactions. And from that stimulus will flow better opportunities for private sector, market-led development.

The LSSP sees one of the ways²⁹ in which Government will facilitate the private sector is by ‘*creating an enabling environment for the private sector*’.³⁰ In this respect, the LSSP recognizes that the quality of land services delivery is crucial for the private sector, including the entrepreneurial sector; and, like the PAD, the LSSP acknowledges that Uganda’s private sector is characterized by small and medium enterprises, whose access to capital to acquire land is limited.

The PAD also recognizes that land is one of the most important assets of households and MSMEs, as well as being one of the most important asset bases for creating new enterprises. When land is appropriately and clearly titled, tenure insecurity is removed; and a clear title or certificate of occupancy can transform potential assets into tradable assets or capital. The land subcomponent of the PSCP II therefore aims to help increase the effectiveness of public land institutions so as to make it easier to obtain and transfer evidence of land ownership.

Secure and clear land titles also increase access to credit. Improving property records is the starting point to securing property rights. Failings in the land registration system have been identified as a significant barrier to investment and the development of the Ugandan land market. The current poor state of the Land Registry’s manual records makes service delivery slow, cumbersome, and frustrating. It also makes land registration processes prone to mistakes and fraud.

In its current state, the Land Registry does not satisfactorily serve the needs of the private sector. Existing service delivery is clouded by complaints; they include loss or inaccessibility of **land records** files, fraud, inefficiency, widespread corruption, and slow delivery. The result is to disrupt land market transactions. This limits the private sector’s ability to access credit by using land as collateral; and this in turn limits productive investment portfolios.

The LSSP therefore aims to modernize the Land Registry as a means of facilitating private-sector development. It regards modernization as critical for the private sector, particularly because charges

27. *Land Sector Strategic Plan* (LSSP), p.31-31

28. Project Appraisal Document for the Uganda Second Private Sector Competitiveness Project (PSCP II), at p. 44.

29. The other ways are divestiture and private supply of technical services.

30. *Land Sector Strategic Plan 2001-2011*, at p.43.

and mortgages, which are used as collateral to secure lending, are registered in the Land Registry. The Land Registry must be able to furnish land market participants and the public generally with speedy, accurate and up-to-date information.

The LSSP builds on numerous studies carried out since 1990 on the land administration system in Uganda. The findings of these studies were recently updated by the Baseline Evaluation Report. It recommended establishing a Land Information System to support the land registry and cadastre, computerizing the land records management system, and streamlining registration procedures. If implemented, these reforms should facilitate the title registration process, reduce the incidence of mistakes and fraud, and help fight corruption and improper practices in land administration.

The LSSP, along with these land-sector studies, therefore seeks to implement complementary policies to:

- reform government land agencies;
- establish business-like and customer-oriented land agencies;
- modernize survey procedures;
- upgrade and modernize land information and cadastral systems;
- streamline land-titling procedures; and
- ensure better documentation of land transactions.

All of these policies will support the development of formal land markets.

3.7 The Land Market and the practice of Estate Agency

The interrelationship between the Land Market and Estate Agency

“*Land administration*”, properly understood, extends to the support of land markets.³¹ One of the most common reasons why governments invest in land administration systems is to create dynamic land markets.³² It has been said that the prime objective of a modern land administration system is to support the operation of an efficient and effective land market.³³

Within the land market itself, expertise is needed for the market to operate efficiently. This expertise is provided by land-market professionals. They provide supporting services, such as transaction frameworks, valuation information, estate management, and mechanisms to put buyers and sellers in contact with each other. Together the professionals form a network, each member contributing to the market and to the effectiveness with which it operates.

31. *Land Administration Guidelines: With Special Reference to Countries in Transition*, Publication ECE/HBP/96, United Nations, Economic Commission for Europe (UNECE), Geneva, 1996, p.14; *Land Administration In The UNECE Region: Development Trends and Main Principles*, Publication ECE/HBP/140, United Nations, Economic Commission for Europe (UNECE), Geneva, 2005, p.20.

32. *Building Land Markets*, by Jude Wallace and Ian Williamson, Department of Geomatics, The University of Melbourne, Australia, July 2004.

33. *The Importance of Land Administration in the Development of Land Markets - A Global Perspective*, by Peter Dale, Department of Geomatic Engineering, University College London, England, in *Land Markets and Land Consolidation in Central Europe IV*, TU Delft - UDMS 2000; *Building Land Markets in the Asia Pacific Region*, by Ian Williamson and Jude Wallace, Centre for Spatial Data Infrastructures and Land Administration, Melbourne, Australia.

To expand on this—the network typically comprises:

- a) lawyers and judges, who are versed in the legal framework of land and property rights and in the legal and judicial system for protecting and enforcing those rights;
- b) specialists in the transfer of land or interests in land (in Uganda, these are Advocates of the High Court; in some countries they are called notaries³⁴);
- c) real estate agents and brokers, who provide information about available land;
- d) valuers who advise market participants on the appropriate price to be paid for land;
- e) land surveyors, who describe the location and boundaries of land parcels;
- f) land use regulators, who impose restrictions on the rights of use of land.

Item (c) encompasses the practice of real estate agency.

There is no magic in the term “estate agent” or “real estate agent”. Both terms are in common use in Uganda. Elsewhere, different terms are sometimes used. For example, the Tanzania Draft Bill for a *Land Market Practitioners Act* 2005 adopted the all-embracing term “**Land Market Practitioner**”—meaning an estate agent, a land broker, a land valuer, a land economist, a mortgage broker, and any other person providing services connected with the operation of the land market.³⁵

3.8 *Rationale for regulating land market professionals*

We have endeavored to demonstrate that, without regulation, a land market descends into informality, with all the risks inherent in that informality. A well-functioning land market overcomes those risks by providing a legal basis for operations in the market, so that dealings are safe and secure. Under a well-functioning system, regulatory institutions ensure a stable and transparent framework in which transactions take place, providing easy access to the market for all participants and keeping transaction costs low.

34. In some countries, a single profession has the right to carry out conveyancing transactions. In a number of European countries, notaries have this exclusive right: all property transactions must occur through the medium of a notary. Notaries often have a fee schedule determined through historical custom and entry limits to the profession. They are bound by a strict code of ethics, enforced by national bodies. In other countries, conveyancing occurs exclusively through lawyers or solicitors.

Our Draft Registration of Titles Act 2010 (discussed in our Draft Final Issues Paper on the Registration of Titles Act) introduces the concept of “**conveyancing agents**” (section 183). In line with recommendations in this Paper to protect the public against unscrupulous operators, under the Draft Act only qualified “**conveyancing agents**” would be allowed to act for reward in land transactions. As it will take time for the qualifications of conveyancing agents to be approved, and their licensing undertaken, the Act allows the Minister to defer the operation of this provision for up to 3 years. The Minister has the power to prescribe the qualifications for conveyancing agents (section 193).

35. *Draft Report - Consultancy for Drafting a Bill to regulate the Practice of the Real Estate Agency for Facilitation of the Operation of the Land Market in Tanzania*, Business Environment Strengthening for Tanzania (BEST) Programme, Dar-es-Salaam.

In a well-functioning land market, these regulatory institutions are also responsible for enforcing and maintaining standards. This includes regulating and supervising the registration and practice of land market professionals. This is necessary to safeguard property values and to protect the wider interests of citizens and land-market players.

Traditionally, the State is responsible for providing the regulatory framework for the land market. It is also responsible for providing the institutional arrangements, systems and processes that underlie the land market. The regulatory framework includes the recording of land transactions and the adjudication of rights. In short, the key purpose of the State's regulatory function is to ensure the integrity of the records of rights and interests in land. The integrity of the records in turn ensures that transactions in land can occur efficiently and effectively, that information in relation to land is trustworthy and readily available to all, and that disputes are solved in accordance with law.

Where activities or responsibilities in the land market are assigned to non-government institutions or to the private sector, governments must regulate to safeguard the quality of the products or services being delivered. The regulation should include professional standards (education, training, ethical behaviour), required levels of competencies, benchmarks of good performance, and liability for fraud or mistakes.

This brings us back to the profession of estate agency. A sound land market requires integrity and competence on the part of all professionals in it. And so the principal rationale for regulating estate agency is to protect the customers of the estate agency services, the agents and brokers themselves, and the wider public.

The regulatory framework must seek to ensure this objective by establishing adequate entry standards for estate agency practitioners, ensuring continuing professionalism and expertise, and demanding ethical conduct. Only in this way will customers and the general public be protected and a thriving land market encouraged.

4.0 REGULATION OF ESTATE AGENTS

4.1 Regulation of Estate Agency and Occupational Regulation

Regulation of Estate Agents lies within the field of *Occupational Regulation*.

Occupational Regulation refers to any controls on the ability for individuals and businesses to provide services, or any constraints on the way that those services are provided. This includes traditional forms of regulatory controls on professions, for example, registration of doctors and plumbers. Occupational regulation can be made into law or implemented by legislation which establishes who can do what, determines entry-into-practice conditions for the regulated service or activity, sets conditions under which practitioners must perform their functions, and specifies who can use what kind of title.

4.1.1 What is regulation?

Regulation is a common feature of all modern societies. For the purposes of this Paper, it may be broadly understood as an effort by the State to address social risk, market failure or equity concerns, through the rule-based direction of social and individual action. Any government effort to influence the performance and behavior of economic agents amounts to regulation.

Common examples of regulation include the control of market entry, prices, wages, pollution, safety in workplaces, and standards of production for goods. Breach of regulations can result in fines, orders to cease doing certain things, or, in some cases, criminal penalties or banishment from the regulated activity.

Most occupational, professional and economic activity is regulated in one way or another. Familiar examples are doctors,³⁶ lawyers,³⁷ architects,³⁸ accountants and auditors,³⁹ and pharmacists.⁴⁰ All are subject to special laws which govern their right to practice and provide for oversight and discipline. Again, the creation of business vehicles, such as companies, partnerships and co-operatives, is subject to special laws which govern their mode of incorporation, their governance and reporting requirements, and their winding-up.

This Paper is concerned with a particular type of regulation—the regulation of estate agents.

We shall begin this by considering the rationale behind estate agency regulation. We will then proceed to discuss the most suitable form of regulation for estate agents in Uganda.

36. *Medical and Dental Practitioners Act*, Cap. 272

37. *Advocates Act*, Cap. 267

38. *Architects Registration Act*, Cap. 269

39. *Accountants Act*, Cap. 266.

40. *Pharmacy and Drugs Act*, Cap. 280

LRWG response to this part of earlier Draft Paper

The LRWG make the point, in response to this discussion, that there is need to regulate how much is being charged to consumers. We take this to be a reminder that regulation of any profession involves expense, whether public or private, and that this is passed on to the consumer—by way of taxes, in the case of public expense; or by way of fees or charges, in the case of private expense. We agree that this is an important consideration. It is one that we keep in mind in the following discussion.

4.1.2 Rationale of Estate Agency Regulation

4.1.2.1 Consumer Protection - No General Consumer Protection Law in Uganda

The Uganda Law Reform Commission has said the following about the state of consumer protection law in Uganda.:

“Consumer protection refers to the protection afforded to a consumer not only against fraud and dishonesty in commercial dealings but also oppressive bargains and qualitatively deficient goods and services. Consumer protection is an ancient law, yet little has been done in this regard in this country. Regulatory systems and machinery does exist but this is unsophisticated, incomplete and insufficient. This leads to confusion and places consumers in weaker positions than those with whom they deal, depriving them of their money’s worth and product value. Consumer protection laws play a very important role in laying down and enforcing rights of consumers.”⁴¹

In some countries,⁴² consumers of real estate agency services are protected by layers of consumer protection laws⁴³. These laws include fair trading legislation, which renders illegal false representations and other misleading conduct about land. These laws generally help consumers obtain compensation for loss suffered through a real estate agent’s misleading representations.

While such laws are beneficial, they have some drawbacks. One is that consumers must take legal action to get compensation, and for most ordinary people litigation is too expensive and time-consuming to be practical. Another is that, while consumer protection laws may deter dishonest, misleading or incompetent behaviour, they do not of themselves protect the large amounts of money that real estate agents hold on behalf of clients.

41. *Study Report on Selected Trade Laws - Consumer Protection Law*, Uganda Law Reform Commission (Law Com Pub. No. 27 of 2004). The report is accessible at: <http://www.ulrc.go.ug/>

42. An example is New Zealand.

43. Among unfair trade practices, misleading advertisements and information are most common. Their existence may be attributed in general to a lack of consumer protection law, and in particular a lack of laws and regulations on advertisement. See *Competition and Consumer Protection Scenario in Uganda*, CUTS Centre for Competition, Investment & Economic Regulation, accessible at: siteresources.worldbank.org/INTCOMPLEGALDB/Resources/UgandaMonograph.pdf

In Uganda, there is no underlying statutory layer of general consumer protection law. In 2004 the Uganda Law Reform Commission (ULRC) published a *Study Report on Consumer Protection Law*,⁴⁴ to which it annexed a draft Consumer Protection Bill. According to that Study Report, the ULRC did not wish to duplicate legislative protections contained under other laws—in particular, competition law, consumer protection law or occupational health and safety law. However, this rationale is quite unfortunate, given the absence of any general consumer protection law.

4.1.2.2 Land Market Perspective

In the introductory section of this Paper we noted that, within the land market, certain types of institutions are needed for the market to operate efficiently and in ways that facilitate market transactions. We also observed that a network of competent and accessible professionals is required to support transactions in real estate markets. These professionals provide services such as valuation, estate management, and mechanisms for putting buyers and sellers in contact with each other. Each of these professionals contributes to the market and to the efficiency and effectiveness with which it operates.

The network includes real estate agents and brokers. But while their services are needed in the land market, their activities must be regulated to ensure that their services are given honestly and efficiently and do not undermine the workings of the market.

We also noted that, without regulation, the land market descends into informality, with all the inherent risks attendant on informality. An inefficient market, with high transaction costs and vague rules, is unlikely to alleviate poverty, stimulate the housing market, promote economic development, or encourage the market in financial services.

A sound regulatory framework for real estate agents would establish appropriate entry standards and require acceptable standards of conduct and ethics. It would demand appropriate levels of competence and integrity. In so doing, it would help ensure a stable and transparent framework within which land transactions can take place. This, in turn, would encourage market cohesion and dynamism.

4.1.2.3 Estate Agency Professional Regulation Perspective

Estate agency is a profession or occupation. The main aim of regulating professions and occupations is to protect the public from incompetence, recklessness and unscrupulous practices.⁴⁵

Specifically in relation to estate agents, there are two principal reasons for regulation. They are to protect consumers by:

- mitigating the problems caused by *information asymmetry* (which in turn is part of a larger problem of *market failure*); and
- reducing the risk of financial loss, through the misappropriation of trust funds.

44. Law Com Pub. No. 27 of 2004.

45. *Policy Framework for Occupational Regulation: A Guide for Government Agencies Involved in Regulating Occupations*. http://www.med.govt.nz/templates/MultipageDocumentTOC_9112.aspx

By *market failure*, we do not mean that a given market (here, the land market) has ceased functioning. Rather, we mean a situation in which the market does not *efficiently* organize production or allocate goods and services to consumers. Economists apply the term to situations where the inefficiency is particularly dramatic, as where individuals' pursuit of self-interest leads to unsatisfactory results for society as a whole. Intervention is then seen as necessary to redress the imbalance. (Indeed, it has been said that the emergence of the cadastral public information system is a direct response to market failure.⁴⁶⁾

According to economic theory, a well-functioning land market tends systemically to move land towards the most economically efficient ownership and use. To promote this end (theorists argue) the state should create and sustain 'enabling' environments for the efficient working of markets⁴⁷. State intervention can create appropriate institutional and regulatory frameworks to ensure low-cost ways of contracting, accessible institutions for contract-enforcement, and ready availability of information. These are seen as important elements in improving the functioning of land markets and minimizing inequity and inefficiency.⁴⁸

4.1.2.4 Market failure, information asymmetries and negative externalities

The most frequently-cited examples of *market failure* (as economists use that term) in relation to estate agency are:

- information asymmetries; and
- negative externalities.

(a) Information Asymmetries

*Information asymmetry*⁴⁹ occurs where one party in a transaction has more or better information than another. This creates an imbalance of power, which leads to consequences such as adverse selection and moral hazard.⁵⁰

46. *Deep Information: The Role of Information Policy in Environmental Sustainability*, by John Felleman, Peter Herson, in *Political Science* – 1997.

47. *Agriculture Investment Sourcebook*, The World Bank, May 2006: www.worldbank.org/agsourcebook, p.2; *Land Administration Reform: Economic Rationale and Social Considerations*, by Gershon Feder, The World Bank, Presented at the UN-FIG Conference on Land Tenure and Cadastral Infrastructures for Sustainable Development, Melbourne, Australia, 25-27 October 1999, p.3; *Regulatory Policies and Reform: The Case of Land Markets*, by Antonio Salazar, P. Brandao, and Gershon Feder, The World Bank, Private Sector Development Department, PSD Occasional Paper No. 15, January 1996, p.22.

48. For the World Bank's view on Land Markets generally, see *Question & Answer on Land Issues at the World Bank*, accessible at: <http://lnweb18.worldbank.org/ESSD/ardext.nsf/PrintFriendly/99D70AAF3D039DAF85256D5E00621DAE?Op=endocument#view>; *Reforming Land and Real Estate Markets*, by Ahmed Galal and Omar Razzaz, World Bank; John W. Bruce, Renee Giovarelli and others, *Land Law Reform: Achieving Development Policy Objectives*, The World Bank, Legal Vice-Presidency, 2006; *Making Urban Land Markets Work for the Poor: Policy, Practice and Possibility*, by Manya M. Mooya and Chris E. Cloete, p.16.

49. An illustrative example of *information asymmetry* is given in two papers by Gershon Feder and Dr. Frank Byamugisha, albeit in relation to land registration and credit. They cite the example where an institutional

In our view, information asymmetry is the principal *market failure* associated with estate agent services. The following sums up the position:

“Asymmetric information lies at the heart of the principal-agent problem. One of the features of a complex modern economy is that people (principals) have to employ others (agents) to carry out their wishes. If you want to go on holiday, it is easier to go to a travel agent to sort out the arrangements than to do it all yourself. Likewise, if you want to buy a house, it is more convenient to go to an estate agent.

The crucial advantage that agents have over their principals is specialist knowledge and information. This is frequently the basis upon which agents are employed. But given the asymmetry of information, it will be very difficult for the principal to judge in whose interest the agent is operating. The estate agent may try to convince the vendor that it is necessary to accept a lower price, while the real reason is to save the agent time, effort and expense.”⁵¹

A useful summation of that overview comes from the National Competition Policy (NCP) Review of Property Agent Legislation in New South Wales, Australia. This shows that market failure arising from information asymmetry occurs not only in transactions where the parties (e.g. buyer and seller) have different sets of information, but also where individuals lack sound information about risk. The Review found that:

“the basic reason for regulating the activities of property agents, particularly in relation to property sales, is because:

- *consumers engage in property and business sales and purchases, and other property transactions, relatively infrequently—consumers therefore generally have limited knowledge of the market;*
- *these transactions involve a large proportion of an individual’s total wealth—these are probably the most expensive transactions people undertake in their lives; and*
- *large amounts of money are held in trust by agents.*

Any agency relationship involves trust as the consumer engages a person to act on their behalf. Delegation of responsibility is involved. There is a risk that an agent will act in his/her own interest to the detriment of the property owner.

lender (such as a bank) is lending money in support of a project: the lender typically has less information (compared to the borrower) about the project and the borrower’s capacity and willingness to repay the loan. These asymmetries in turn bring about incentive problems and increased transaction costs related to opportunistic behavior. See *The Benefits of Land Registration and Titling: Economic and Social Perspectives*, by Gershon Feder and Akihiko Nishio, World Bank, Paper published in Land Use Policy, Vol, 15, No.1, pp.25-43, 1998; and *The Effects of Land Registration on Financial Development and Economic Growth – A Theoretical and Conceptual Framework* by Frank Byamugisha, World Bank Policy Research Working Paper 2240, November 1999.

50. *Adverse selection* can occur if information asymmetries exist before a contract is closed—e.g. when agents misrepresent alleged benefits and promise outcomes they know they cannot achieve. *Moral hazard* is the risk that agents will put in less effort than promised towards achieving the principal’s objectives. These problems can occur, for example, if the agent has multiple clients and/or ineffective and incomplete incentive contracts.

51. *Asymmetric Information and Market Failure*, by John Sloman, Economics Network, University of Bristol, UK.

*In a property transaction, the consumer faces risks such as not finding a buyer/tenant, failure to maximise the true value of the property and loss of deposit or rental income. The engagement of an agent can assist in managing some of those risks but can also generate further risks. The main risks associated with the agency relationship are the safety of monies held in trust and levels of competence. There can also be a risk that consumers do not understand the nature of the contract which has been entered into with the agent—the relative rights and responsibilities of agents and property owners.”*⁵²

We can elaborate by reference to other terms used in the economic theory of markets. Professional services, such as those provided by estate agents are *credence goods* or (to a lesser extent) *experience goods*, not *search goods*. *Search goods* are those whose quality the consumer can assess before purchase (for example, the colour of clothes). *Credence goods* are those whose quality the consumer cannot assess, before or after purchase or consumption; lacking information about the goods, the consumer must rely on the seller’s assurance that their quality is sufficient. Most professional services are credence goods.

Experience goods are those whose quality the consumer can assess only after purchase and consumption, not before; the goods must be purchased and used before their attributes can be evaluated. For example, a consumer can only assess the quality of a bottled drink after purchasing and opening the can. If *experience goods* are bought regularly, consumers may learn about their quality by repeat purchase. This excludes most residential property buyers. They form the majority of buyers in the land market, but have the least experience of and knowledge about property and business transactions. Many residential property buyers undertake this kind of transaction once in their lifetime. They do not have the opportunity for repeat experience enjoyed by property speculators or commercial property buyers. Thus, most estate agency services fall into the category of *credence goods*.⁵³

Five key characteristics of professional services tend to increase information asymmetry and its consequences.⁵⁴ They are:

- (i) Professional services are generally not observable before they are “purchased”. The consumer cannot inspect a professional service before purchase in the same direct way as he or she can inspect most goods. Thus, a house buyer or prospective tenant cannot really carry out due diligence on a property-finder service before the service is rendered.

52. *Market Failure and the Objectives of Regulation: Review of the Property, Stock and Business Agents Act 2002*: accessible at http://www.fairtrading.nsw.gov.au/About_us/Legislation/Comment_on_proposed_legislation/Market_failure_and_the_objectives_of_regulation.html

53. Prof. Dr. Roger Van den Bergh, *Theory and Evidence on the Regulation of the Latin Notary Profession, A Law and Economics Approach*, ECRI-report 0604, June 2006; Bergh, R.J. Van den (2006), *Towards Efficient Self-Regulation in Markets for Professional Services; The Regulation of Conveyancing Services in Victoria, Final Report June 2005*, prepared for the Victorian Department of Justice by the Allen Consulting Group Pty Ltd.

54. *Occupational Regulation*, by Professor Allan Fels, and David Parker, Blair Comley and Vishal Beri, APEC Regulatory Reform Symposium, Ministry of Commerce, New Zealand/Government of Malaysia/The APEC Committee on Trade & Investment, Kuantan, Malaysia, 5-6 September 1998.

- (ii) Professional services are by their nature complex. To deliver them and to tailor them to the consumer's needs requires considerable skill. This makes it difficult for the consumer to assess the quality of the service before he or she purchases it.
- (iii) The quality of many professional services can be difficult to assess even *after* the service has been purchased. For example, where a person hires a lawyer to undertake litigation which is ultimately unsuccessful, it can be difficult for the client to know whether the legal services were poorly delivered or whether the case was inherently difficult to win.
- (iv) Many consumers are infrequent consumers of professional services. They do not have repeat purchases to help them assess quality. Residential purchasers are usually in this category; by contrast, property market speculators are not.
- (v) The consequences of purchasing poor professional services can be significant. The price for the services may be high; and defective services create the risk of serious harm.

If buyers cannot judge the quality of professional services, then regulation is needed to ensure competence. Ideally, a regulatory scheme for estate agents would centre on the five characteristics listed above. This should help ensure a guaranteed level of service quality and therefore reduce the risks associated with purchasing the services. A regulatory scheme should also help consumers with information-gathering and assessment, thereby leading to lower transaction costs. The regulatory scheme should help consumers “*take a glimpse behind the scenes*” of the businesses with which they deal, creating transparency and thereby encouraging fairer and more open markets.

Complexity of the Uganda land registration law as a source of asymmetry

Another Consultancy Report on the Regulation of Conveyancing Services, this time in Victoria, Australia, illustrates a very practical difficulty—one that is relevant both to the present legal framework for conveyancing in Uganda and the practice of estate agency generally. It is the inherent complexity in land registration law. The Report quotes a submission made by the Land Registry for the State of Victoria (Australia):

The complexity of the Transfer of Land Act 1958, Property Law Act 1958 and associated regulations and guidelines create a knowledge gap between the consumer and the conveyancing professional. When one also considers that most consumers undertake a property transaction only every seven years on average, it is difficult to make the argument that consumers are able to make well informed choices about selection of a conveyancing practitioner to represent their interests and the risks of the choice.

The *Transfer of Land Act 1958* of Victoria is the successor to the *Transfer of Land Act 1890* on which the *Uganda Registration of Titles Act* was modeled:

“... the Uganda Registration of Titles Ordinance 1922 is, practically word for word, a copy of the 1915 version of the Victoria Transfer of Land Act, which is very

*similar to that of 1890. This shows how much out of date is the style as well as the content, of the Uganda Act.*⁵⁵

The Victorian Act has been roundly condemned as one of the most abstruse and complex to be found in Australia. That complexity led a commentator, Sheppard, to condemn it as most unsuited for Uganda.⁵⁶

If we assume that an estate agent is personally conversant with the intricacies of land law and registration law (perhaps an unwarranted assumption), then a large knowledge gap exists between the consumer and the real estate professional.

(b) **Negative externalities**

Finally in this section, we introduce another term from economic and market theory: *externality*. An *externality* is an impact (by way of either a cost or benefit) on a third party not directly involved in an economic decision. That is, an externality occurs when an economic activity causes external costs or external benefits to third parties who did not directly participate in the economic transaction. Another term is “*spillover*”: the external costs or external benefits are “spillover costs” or “spillover benefits”.

Transactions by individuals or firms frequently affect others, but the effects are not reflected in the value of the transactions. The effects—the externalities—may be *positive* or *negative*. Beneficial effects are positive externalities; harmful ones are negative externalities.

The substandard performance of professional services may cause *negative* externalities to third parties and to society at large. Simple illustrations are when a poorly constructed bridge jeopardizes traffic safety; or when a company pollutes the local environment to produce its goods, without compensating affected local residents. In a free market, these negative externalities are not internalised in the supplier’s decision-making process.

Examples of *negative externalities* in the provision of legal services include where an inaccurately-drafted Will harms the testator’s heirs; or where incompetent criminal prosecution services have undesirable implications for public safety; or where a conveyancing transaction is not competently completed, with implications for later purchasers of the property.

In the context of real estate services, negative externalities and their potential harms have been described as follows:-

“Negative externalities

Negative externalities exist in the professional services market when a transaction between a provider and consumer causes significant harm to a third party. Nearly all occupations have the capacity to cause significant

⁵⁵. Chapter 21 - Registered Land Law, Land Law and Registration by S. Rowton Simpson, (2nd Edition) 1984. Crown Copyright/ HMSO, partly available in PDF format from www.landadmin.co.uk/Documents

⁵⁶. West H.W. (1965) *The Mailo System in Buganda*, Government Printer, Entebbe; Bosworth, J., 2002, *Country Case Study of Uganda* - World Bank Seminar.

harm to third parties. For example, a traditional concern is the effect that provision of low quality services, say in the medical professions, might have on members of society other than the patient — such as, the spread of disease to others, the standing of the profession, loss of productivity due to time off work, and so on.

In this case, the failure of a conveyancer may create a series of ripple effects as innocent third parties are affected because of the loss of money, delays in transfer settlement, and so on. The magnitude of the funds involved in conveyancing means that costs for third parties can be large even with only a few problem conveyances.⁵⁷

This sentiment was echoed by the Legal Practice Board (LPB) of Victoria,⁵⁸ which stated:

It is clear that the conveyancing industry is characterised by “information asymmetries and negative externalities” as so described in the Report. Consequently, the Board is of the view that a laissez-faire approach to regulation is insufficient to protect consumers and third parties from prospectively large losses resulting from practitioner misconduct.

Similarly, in the same Report, the Law Institute of Victoria (LIV)⁵⁹ is stated to have expressed the view that:

When a conveyancing company engages in fraud, not one but many consumers are at risk of losing substantial amounts of money, as was the case in Grove Conveyancing. The purchase of a ‘family home’ is usually the biggest investment most consumers will be involved in over the course of their life.”

A brief look at two accounts of the Grove Conveyancing case from Australia may be useful.

BOX NO.3: CASE STUDY NO.1 - GROVE CONVEYANCING SERVICES⁶⁰

Grove Conveyancing Services was a partnership providing conveyancing services in the Geelong area of Victoria (Australia). The business collapsed after allegations of misappropriation of funds, affecting a large number of consumers. Victoria Police and Consumer Affairs Victoria undertook investigations, and Consumer Affairs Victoria coordinated caller information to relieve pressure on other government agencies such

-
57. The Regulation of Conveyancing Services in Victoria, Final Report, Prepared by The Allen Consulting Group Pty Ltd, for the Victorian Department of Justice, June 2005; accessed at: <http://www.consumer.vic.gov.au/>
58. Legal Practice Board (LPB) of Victoria, Australia. See Report, “*The Regulation of Conveyancing Services in Victoria*”, at p.20.
59. Also in “*A submission from the Property and Environmental Law Section of the Law Institute of Victoria*”, (LIV) in response to the discussion paper titled, *The Regulation of Conveyancing in Victoria*, Allen Consulting Group/Department of Justice of Victoria, Australia, 20 May 2005. Accessible at https://www.liv.asn.au/members/sections/submissions/20050520_47/index.html.
60. <http://www.consumer.vic.gov.au/>
[http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Publications_Annual_Report_2005/\\$file/AnnualReportChapter1.pdf](http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Publications_Annual_Report_2005/$file/AnnualReportChapter1.pdf).

as the Land Registry and the State Revenue Office.

In order to secure evidence for use to protect consumer interests, Consumer Affairs Victoria seized 13,318 files from the offices of Grove Conveyancing Services under warrant. Victoria Police seized a further 168 files. Consumer Affairs Victoria catalogued the files, established an inquiry register, answered 396 enquiries, and returned 111 certificates of title and other security documents found in the seized files to their lawful owners.

As at year-end investigations were still underway, and Consumer Affairs Victoria had identified specific transaction files to be forwarded to Victoria Police for further action.

The discussion paper was prompted by the collapse of Grove Conveyancing Services in Geelong ('Grove Conveyancing'). Grove Conveyancing had been established for 15 years.

In October 2004 concerns were raised about Grove Conveyancing when clients who had provided money to it were unable to obtain their money. From newspaper reports it appears that there may have been very significant fraud.

The LIV [Law Institute of Victoria] understands that Grove Conveyancing was able to obtain clients' funds by requesting that settlement funds be payable to it. The cheques were deposited into the Firm's account and apparently dealt with by the signatories to the account without client approval. Grove Conveyancing had no authority to operate a trust account. It appears that the firm mixed clients' money with its own money in its general account.

It also appears that other client monies may have been stolen. This apparently includes monies paid to Grove Conveyancing for stamp duty and registration fees or alternatively settlement proceeds paid direct to Grove Conveyancing.

What is clear is that if the same situation had occurred in a legal practitioner's office, consumers would have been protected by the legal practitioner's compulsory fidelity and professional indemnity insurance. Grove Conveyancing was not subject to like requirements and so its innocent clients have been left out of pocket and unprotected. Substantial sums appear to have been lost.⁶¹

Irrespective of the categorization—whether *information asymmetry* or *negative externalities*—it is clear that where a real estate services provider engages in substantial fraud, there is a clear 'market failure'. This failure can be very significant. Examples are the massive real estate market collapse and turbulence arising from the recent USA subprime mortgage crisis.⁶²

61. LIV Submission above; see https://www.liv.asn.au/members/sections/submissions/20050520_47/index.html

62. *The Subprime Mortgage Crisis of 2007: Anatomy of a Market Failure*, by Kenneth A. Posner, Morgan Stanley, http://www.ieor.columbia.edu/seminars/financialengineering/2007-2008/spring/Posner_Kenneth/seminar.html

The nearest local equivalent of the Grove Conveyancing case involves the saga of the land agents known as Property Masters. The first decided Court case in this saga is that of *James Kashugyera Tumwine v Willie Magara*, High Court of Uganda (Commercial Court Division).⁶³

The defendants (the sellers) had a property for sale. Kasulu Property Masters (the “Agents”) advertised the property in the New Vision newspaper on behalf of the defendants. The plaintiffs (the buyers) became interested in the property. They approached the Agents, were shown the property, were satisfied with it, negotiated the price with the Agents, paid for it, and were issued with receipts by the Agents. The payment was made before the sale agreement between the buyers and the sellers was signed.

The buyers and sellers later executed a sale agreement. In the agreement, the sellers acknowledged that the buyers had deposited the full amount of the purchase price with the Agent, and that the sellers would, on receiving full payment from the Agent, relinquish possession and all their interest in the land. The sellers were also to execute transfer forms in favour of the buyers and, on receipt of the full payment from the Agent, were immediately to hand the forms over to the buyers. Thus, completion of the transaction depended on the sellers receiving the purchase price.

Before the parties could complete the transaction, the Agent disappeared with the money. The buyers, husband and wife, sued the sellers for recovery of money had and received in the sum of Shs.50 million—being the amount they had paid to the Agents. As at date of judgment (27/06/2005), the sellers had not received the payment and the buyers had not taken possession of the property. The buyers then cancelled the deal.

The Judge found that the Agent has no authority from the sellers, express or implied, to receive the money from the prospective buyer. He therefore decided that the sellers were not bound by the Agent’s unilateral decision to receive the money from the buyers. The buyers had entrusted the money to the Agent, and only the buyers could recover it from the Agent.

Another local case is *Edward Mpagi v Kasulu Property Masters E.A. Ltd*, High Court of Uganda (Commercial Division) HCT-00-CC-CS- 0487 OF 2004.⁶⁴

Edward Mpagi (the buyer) sued to recover Shs.5 million he had paid to Kasulu Property Masters E.A. Ltd, plus interest and costs. The Defendant (the Agent) had agreed to sell 58 decimals of land situated at Lugard Avenue, Entebbe to the buyer.

Mpagi testified that he saw a newspaper advertisement for certain land at Entebbe, on 31 March 2000. He approached the Agent and offered to buy the land. He was taken to inspect the property by an employee of the Agent. Immediately after inspection he rang the proprietor of the Agent company, Mr. Kasulu, and said that he had decided to buy the plot at the advertised price of Shs.35 million. Mr. Kasulu informed him that there was somebody

63. The text of the original judgment is accessible at:-

<http://www.saflii.org/cgi-bin/disp.pl/ug/cases/UGCommC/2005/31.html>

64. <http://www.saflii.org/cgi-bin/disp.pl/ug/cases/UGCommC/2005/16.html?>

interested in the plot and was going to pay for it on 5th April, but that if he wanted to have an “advantage” over that person he should deliver Shs.5 million in cash to the Agent’s offices. The buyer agreed to take the “advantage” and delivered the Shs. 5 million to the Agent and was given a receipt for the money.

Mpagi further testified that, on 7 April 2004, Mr. Kasulu informed him that there was a problem concerning the plot of land and that it was not available for him to buy. He offered an alternative plot, which Mpagi turned down. Mpagi demanded a refund of his Shs.5 million. On 21 May 2004, Mr. Kasulu gave the plaintiff a cheque postdated to 28 May 2004 for the Shs. 5 million; but the cheque was dishonoured when Mpagi presented it for payment. He informed Mr. Kasulu of the dishonour of the cheque by telephone and by letter which he served on him personally. Despite this notice and numerous reminders, neither Kasulu nor his company made good on the cheque. The Agent did not appear to defend the suit. Judgment was entered for the buyer for Shs.5 million with interest and costs.

According to the Australian reviews, this kind of fraud is a consumer-related market failure.⁶⁵

When a market failure of this magnitude occurs, or when any substandard professional service is offered, not only the consumer of the service but also other individuals not involved in the transaction, may be harmed. Regulation is needed to overcome problems caused by such *negative externalities* or spill-overs.

A telling headline appeared in *The East African*, a Regional News paper, on Monday, August 30, 2004. The story was titled – “*Kasulu’s Arrest Deals Blow to Real Estate*”. The Report stated:

BOX NO.4: THE EAST AFRICAN NEWS PAPER, MONDAY, AUGUST 30, 2004

THE COLLAPSE of one of Uganda's leading real estate agents, Property Masters, following the arrest and eventual imprisonment for fraud of its chief executive, Patrick Kasulu, has dealt a blow to the country's real estate sector.

Several real estate agents are carrying adverts in the press and on radios, assuring the public that they are genuine and can help them acquire good houses and plots of land, but the damage is irreversible and there is a general loss of confidence.

Players in the real estate sector are also negotiating the formation of a body that will bring them together and develop a code of conduct. It will also work out entry requirements into the sector, which are expected to weed out briefcase and pseudo companies infested with conmen. To be known as the Uganda Estate and Property Managers Association, the body is expected to be launched in September, real estate managers said last week.

Even before the arrest of the Property Masters boss, the relationship between landlords and real estate agents in Uganda was one of mutual suspicion, because each

65. *The Regulation of Conveyancing Services in Victoria*, Final Report (Prepared for the Victorian Department of Justice), The Allen Consulting Group Pty Ltd, June 2005, p.18.

party believes it is cheated by the other. The arrest of Kasulu has worsened the situation.

Property Masters, a leading real estate agency in Uganda, is currently at the centre of a scandal in which clients have lost about Ush300 million (\$170,000) and several land titles.

Some of the people conned are Ugandans in the diaspora, who had remitted money in the hope that they could secure good houses and plots with the help of professionals like Property Masters. Many have in the past been conned by relatives, to whom they sent money to buy houses for them but who used the money for their own businesses.

Police told *The East African* last week that they had so far recovered up to 280 land titles from Kasulu, which members of the public had entrusted to his company in order to look for buyers. They are calling on the public to either pick them up or place caveats on them with the land registry so that they do not lose their land.

Elizabeth Kuteesa, the Criminal Investigation Department (CID) boss, told the press that several clients had lodged complaints against the company, citing cases where the proprietor was double-selling some properties and issuing bouncing cheques to property owners.

The company's main portfolio was commercial and agricultural land dealership and connecting people who want to buy houses to those selling them.

4.1.3 Fraud in estate agency transactions generally

In the Report of the Inspectorate of Government (IGG) on *Investigation into Alleged Mismanagement of the Land Registry in the Ministry of Water Lands and Environment*,⁶⁶ the IGG observed that:-

It is also true that there has been a tremendous increase in land transactions which give rise to unregulated and unregistered land Agents popularly (or notoriously) called “Bakayungirizi”.

It concluded that unregulated land dealers could be a source of forgeries and fraudulent transactions.⁶⁷

4.1.4 Positive externalities

However, this discussion of the regulation of estate agents should not be all pessimism. An aspect of professional services regulation, sometimes neglected in the policy discussion, is that not only poor quality services but also high quality services may require regulation.

We here introduce another economic theory term: *public goods*.

66 . March, 2007. See also the Observations on p.48 of the IGG’s Report.

67. See also the Observations on p.48 of the IGG’s Report: www.igg.go.ug/docs/investigate.pdf

Public goods are goods that can be consumed by everyone—even those who do not ask and pay for them—and from which the producer of the goods cannot exclude non-paying beneficiaries.⁶⁸ Certain kinds of professional services have the characteristics of public goods. Public goods create positive externalities, i.e. *benefits* for parties not involved in the transaction. These “externalities” can then be consumed by everyone, including those who do not ask or pay for them⁶⁹.

An example of a positive externality in the case of the market for legal services is the practice of lawyers in creating legal precedents and information which benefit other practitioners and the broader community. Another example, more pertinent to this discussion, is that of governments in disseminating information on land prices; this is an example of *public goods* because it increases transparency in the market. Land information is a *public good* that is central to the functioning of the Land Market and of other government sectors, making it an automatic contributor to economic growth and poverty eradication.

An important function of estate agents is their intermediary role of matching buyers with sellers. *Matching* is the process by which a buyer and a seller are connected and by which the parties reach agreement over the terms of a property sale/purchase. Although matches can be made without a professional intermediary (direct matching), estate agents bring together property buyers and sellers in more effective and efficient ways than would exist without them. In particular, by creating a list of properties for sale (Listing Service)⁷⁰, estate agents significantly extend the number of potential buyers who are aware that a particular property is for sale. As a result, the number of buyer-seller matches is raised and the fit between sellers’ offers and buyers’ requirements is improved.

Estate agency professionals thus make land markets “work” by facilitating easy comparisons between properties, providing knowledge of relative prices in a location or neighborhood, and being a conduit through which offers to purchase can be made. These and associated services help drive the land market, particularly the housing market. They also add value,

68. *Towards Beneficial Competition in the Legal Professions - Lessons from England-Wales and the Netherlands*, by Roger Van den Bergh, Faculty of Law, Erasmus University Rotterdam, Rotterdam; *Chapter Three, Land Transactions, Land Policies for Growth and Poverty Reduction*, Vol. 1, The World Bank & Klaus Deininger, in A World Bank Policy Research Paper (World Bank & Oxford Univ. Press 2003).; *Securing and Upgrading the Land Registry and Implementation of A Land Information System in Uganda: The Baseline Evaluation Report*, Final Draft v.1.1, Geo-Information Communication Ltd / Ministry of Land, Housing and Urban Development, Kampala, Uganda – May, 2007.

69. *Criteria for an Economic Analysis of the Latin Notary Profession*, by Prof. Dr Roger Van den Bergh, Professor of Law and Economics at the Erasmus University of Rotterdam, Visiting Professor of Law and Economics at the University of Bologna.

70. In some countries, real estate professionals have developed databases of houses that are for sale. The database may include information not only on homes for sale, but also the actual sales prices for homes sold. The databases are sometimes shared via a joint database accessible to recognised intermediaries; this permits selling agents to post information about properties for sale to a common database. Source: *Improving Competition in Real Estate Transactions*, proceedings of a Roundtable on Improving Competition in Real Estate Transactions, held by the Competition Committee of the Organisation for Economic Co-operation and Development, Document No. DAF/COMP(2007)36, 08-Jan-2008.

when sellers obtain optimal outcomes and property buyers are more likely to be satisfied with the property and its price.⁷¹

As well as directly providing benefits for their clients (who may be sellers or buyers), estate agents' matching functions generate positive externalities for property consumers (sellers or buyers) in general. The information which estate agents generate (even though at times tailored to the needs of the specific consumer) is often available to the public at large. It has the capacity to become a public good—i.e., a good that can be consumed by everyone. In this respect it has been observed that:

“By greatly improving general information about housing markets, homeowners have much clearer ideas of the value of their homes, for example. Homeowners can use this information in such situations as deciding upon optimal times to move, asset allocation, borrowing decisions and whether it is worthwhile improving their properties. This information can be gathered from indirect sources or directly from agents, who are generally willing to value properties for free as part of their attempts to win clients. Furthermore, the higher level of sales that results from the matching function greatly improves market liquidity, so that sellers and buyers are more likely to be able to move into and out of properties when they want to, whether or not they actually use an estate agent. Even homeowners that do not use the services of an estate agent consequently benefit from their existence and free ride on the market information and liquidity benefits generated by the existence of extensive estate agency services.”⁷²

Property information from the activities of estate agents in a regulated estate agency market can be harnessed to ensure positive externalities, particularly market information. This information can be put to use in populating land information systems and thereby expanding their usefulness. For example, estate agents could be statutorily required to file a return indicating the location, size, development and price of properties sold through their agency. This information could also enhance the efficiency of stamp duty collection. The World Bank's *Land and Real Estate Assessment (LARA)*⁷³ shows how property information can be sourced from estate agents.

An experience from Hong Kong demonstrates how this kind of information can be usefully captured. The Hong Kong territory's Estate Agents Authority (EAA) is a statutory body, established in 1997 under the Estate Agents Ordinance (Cap. 511) (EAO). Its principal functions are to regulate the practice of estate agency in Hong Kong, to promote integrity and competence within the industry, and to facilitate training for estate agency practitioners to enhance their standards and status, and to regulate the estate agency trade through a licensing system. The Ordinance also empowers the EAA to prescribe matters relating to the conduct and practice of estate agents. In 1999, the EAA made a *Practice Regulation*, parts of which enable the capture of property information generated by the activities of the estate agency industry:

71. *Annexe C of Estate Agency Market in England and Wales: International Comparisons*, Office of fair Trading, United Kingdom, March 2004, Document No. OFT693c, Accessible at: www.oft.gov.uk.

72. *Estate Agency Market in England and Wales: International Comparisons*, *ibid*, paras 2.4 – 2.7.

73. By Omar Razzaz and others, The Lincoln Institute of Land Policy/The World Bank Group.

“Provision of specified property information

5. *The EAO has already specified certain types of property information to be provided by a licensed estate agent to his client upon the introduction of the property. The estate agent must also take reasonable steps to ensure that such information is accurate. Specified information includes prima facie evidence of ownership, subsisting incumbrances, saleable floor area, year or period of completion of the property, permitted use, unexpired term of the lease [in Hong Kong, properties are leasehold, not freehold] and whether there is a right of renewal and if so, the term. The estate agent is also asked to obtain a statement from the owner of the property as to whether any structural additions or alteration works have been undertaken and whether there are any commitments to repairs and improvements which may involve additional costs to the new owner.*
6. *To assist the trade in the provision of property information, the EAA has prescribed two standard forms for use by estate agents, one for sale/purchase of properties and the other for leasing of properties. The EAA also prescribes the sources whereby such property information are to be obtained. These include the Land Registry, Rating and Valuation Department and Buildings Department.*
7. *If an estate agent fails to comply with these requirements, they will subject themselves to disciplinary actions by EAA. And if the client suffers loss or damage as a result of such failure, the non-compliance will also constitute a cause of action whereby damages or remedy may be recovered via legal proceedings. However, it shall be a defence for an estate agent to show that he has taken all reasonable steps and exercised due diligence to avoid the failure, e.g. the agent relies on information obtained from a prescribed source.”⁷⁴*

LRWG response to this part of earlier Draft Paper

The LRWG agreed with our recommendation that regulation of estate agency practice is necessary. Accordingly, the recommendation that follows remains unchanged.

RECOMMENDATION:

Due to the risks of market failure, fraud, excessive transaction costs and other risks associated with estate agency practice, there is clear need to regulate estate agency practice in Uganda.

74. Legislative Council Brief: Estate Agents Practice (General Duties and Hong Kong Residential Properties) Regulation and Estate Agents (Determination of Commission Disputes) Regulation. http://www.legco.gov.hk/yr98-99/english/hc/sub_leg/sc09/general/sc09_brf.pdf.

Estate agency regulation can also be used to harness information in meaningful documented form, in the interests of developing a vibrant land market.

A law to regulate estate agency practice is urgent and necessary, and is in the best interests of the Ugandan land market.

4.1.5 Other risks posed by estate agency services

We have already mentioned some of the risks posed by estate agency services. We now elaborate on those and other risks.

Experience from Uganda and elsewhere suggests some common themes:

i) **High Transaction Costs and Estate Agent's Fees**

Transaction costs are the costs associated with the processes of exchange. They are incurred in identifying potential partners, locating a service provider, reaching agreement on the price and other aspects of the exchange, arranging a contract and, once executed, monitoring and enforcing it.⁷⁵ They also include the costs of research in obtaining accurate information about the nature of conveyancing services to be provided, the costs caused by deficient services, and obtaining redress if services are inappropriate.

Where transaction costs are too high, the poor will simply not do market deals, or will carry them out informally, with all the risks and uncertainty associated with informality. Experts therefore caution that drafters should be cognizant of land transaction costs when they design laws that affect land markets; the laws should attempt to minimize these costs.⁷⁶

As we saw earlier, for most individuals property-purchase transactions are infrequent. The infrequency means that the individual's personal knowledge of how best to perform a property transaction may be limited. Errors can be costly and irreversible; for example, a seller cannot generally recover from a buyer the loss suffered from a lower-than-market sale price after the sale has closed. Such factors help explain why individuals often seek expert third-party advice for matching, financing and transferring title to property.⁷⁷

75. *Discussion Paper: National Competition Policy Review of the Land Agents Act 1994 - Final Report*, issued December 1999, Government of South Australia, www.ocba.sa.gov.au.

In the wider land and property market, transaction costs can also include:

- cadastral survey, comprising pre-surveying expenses and actual survey costs;
- appraisal/valuation fees;
- conveyancer's fees;
- stamp duty, payable on transfers, leases, mortgages, etc;
- registration fees.

76. John W. Bruce, *et. al*, *Land Law Reform: Achieving Development Policy Objectives*, pp. 110, 123-125

77. *Improving Competition in Real Estate Transactions* – DAF/COMP(2007)36, OECD, 2008, at p.17-18

High transaction costs can cause market failure. Generally, in order for exchange to take place, the gains from the exchange must be significantly higher than the cost, otherwise market failure results. That is why an analysis of transaction costs is important to understanding markets. Low transaction costs are a success-indicator for property markets.

When market failure occurs, State intervention may become necessary.⁷⁸ Indeed, experience elsewhere shows that transaction costs bear a direct correlation to the intensity of legislative intervention. They are high when legislative intervention is low, and they decrease when legislative intervention increases.⁷⁹

The average fees charged by professional estate agents vary substantially from one country to another—from as low as 1% of transaction value, to as high as 15%. Unless fees are set by regulation, they are negotiable. However, evidence shows that negotiation downwards is unlikely when estate agents have exclusive representation of a buyer or seller. According to the *White Paper on Land Policy, South Africa*,⁸⁰ a major factor contributing to escalating transaction costs is the excessive fees levied by estate agents in concluding a deal between two parties. The White Paper complains that, although the part played by estate agents in a transaction may be limited, in South Africa they normally charge a service fee of about 7% of the purchase price. (The *White Paper* does acknowledge, however, that it is not compulsory for consumers to make use of estate agents' services and that their fees can be negotiated.)

In practice, estate agents generally charge on a commission basis. The commission is mostly expressed as a percentage of the purchase price, not on work actually done. This means that although they may carry out an extensive range of services (taking prospective buyers to view the property, telephone communications, searches of title, etc), they get paid only when the property is sold. Conversely, of course, they may do very little work and yet receive the same commission—for example, where a buyer is found quickly.

In Uganda, according to Mwebaza & Gaynor:⁸¹

The participation of brokers in the land market introduces added costs to land transactions. It was discovered during key informant interviews that brokers normally require the seller to pay a percentage of the selling price as a fee to the broker. The percentage varies from broker to broker but normally ranges from 5% to 10% of the selling price. These additional costs are sometimes transferred to buyers through increased sales prices. Although this means that buyers may in

-
78. *Property Rights, Land Markets and Poverty in Namibia's 'Extra-Legal' Settlements: An Institutional Approach*, by Dr. M M Mooya and C E Cloete, Paper Presented at the Third World Bank/IPEA Urban Research Symposium: Land Development, Urban Policy and Poverty Reduction 4-6 April 2005, Brasilia, Brazil.
79. *The Regulation of Conveyancing Services in Victoria*, The Allen Consulting Group, p.45.
80. <http://land.pwv.gov.za/White%20Paper/white8.htm#A%20comprehensive%20land%20information%20system>
81. *The Land Sector Analysis: Land Market, Land Consolidation, and Land Re-Adjustment Component*, by Rose Mwebaza and Richard Gaynor, Rural Development Institute/ Government of the Republic of Uganda, February 2002. GRANT NO. PHRD/02/04, at p.8.

some cases be paying more than the appraised value of the land, presumably they are willing to do so to help compensate brokers for their services in helping buyers and sellers find each other and in facilitating the transaction.

A variant is for agents to charge a fee equal to the part of the price achieved above an agreed reserve price. The practical problem that arises is in assessing what that reserve price should be and how long the property will remain on the market.

In some countries (such as Kenya), estate agency fees/charges are prescribed by law⁸². (This is the case for the remuneration of advocates in Uganda.) Tanzania, however, proposes to take a different route. Under Clause 56 (Scale of Fees) of the Tanzanian draft Land Market Practitioners Bill:

Any provision in any regulation or by-law of any association, institute, society or organization of estate agents, land brokers, land valuers, land surveyors providing for a minimum scale of fees for estate agency work shall not bind any member in relation to any estate agent work undertaken in Tanzania; and that provision in any regulation or by-law shall not be put forward by any member as a ground for claiming a particular level of fees at any arbitration of any dispute in relation to any fees.

According to the drafters of the Tanzanian Bill, the purpose is to prevent associations of estate agents, land brokers, or the like, from imposing predetermined levels of fees on the consumer—which the drafters regard as a classic example of anti-competitive behaviour.

This approach is not peculiar to Tanzania. Others, too, do not believe in prescribing a standard scale of commission, on the grounds that it tends to protect inefficiency at the expense of those estate agents who provide efficient service.⁸³

Under section 115 of our Draft Real Estate Agents Act 2010 (*Determination of fees*), the Minister has the discretion (but not the obligation) to determine estate agents' fees. That leaves it open to the Minister to fix fees by whatever standard (if any) the Minister thinks appropriate—whether by reference to a fixed scale, or by reference to work actually done, or by a combination.

ii) **Non-Voluntary Transactions**

By non-voluntary transactions, we mean transactions that are not entered into freely—such as transactions entered into under duress, unconscionable conduct, and the like. It goes without saying that non-voluntary transactions may not be mutually beneficial to the parties.

82. *Estate Agents (Remuneration) Rules*, 19 November, 2002.

83. *Report of the Working Group on Regulation of Estate Agents*, Hong Kong, August 1994. <http://www.cityu.edu.hk/hkhousing/pdoc/ReportofWorkingGrouponRegulationofEstate.htm#Chapter%2014>. In Hong Kong, a licensed estate agent and his or her client may refer a dispute between themselves (regarding commission or other fee in dispute) to the Authority for determination under the *Estate Agents (Determination of Commission Disputes) Regulation*.

Most societies have laws that limit the ability of individuals to coerce others. In Uganda, this falls under the general law of contract.

Markets for professional services may be a case for special protection in relation to non-voluntary transactions, given the opportunity for subtle coercion. Relationships of trust between the estate agency professional and the client can be abused. An expert always has an informational advantage over the client seeking advice. And so, for example, estate agents may mislead their clients by exaggerating the costs or difficulty of a solution, by providing unneeded services, or by distorting information for the expert's benefit. To illustrate: an estate agent may have strong incentives to sell a house quickly, even at a substantially lower price, and may persuade the client to accept a low offer too quickly.

iii) **Agent incompetence**

This may be manifested in many ways. Examples are ineffective marketing of property, poor advice over prices, omissions from or unsuitable terms in sale or lease documents, and misleading information

iv) **Misappropriation of trust funds**

Estate agents commonly hold trust funds on behalf of purchasers (such as sale deposits) and rental funds on behalf of property owners. We have already documented examples of defalcations of trust funds by estate agents.

v) **Failure to pass on offers**

This also affects the market, since it impedes genuine bargaining between parties.

vi) **Failure to declare a personal interest**

Estate agents, given their exposure to the industry, may have a conflict of interest with one or both parties to a property transaction.

vii) **Failure to provide required information to clients**

This is self-evident; but it also affects the market by impeding genuine bargaining between parties.

viii) **The practice of 'steering'**

Under this practice, brokers manoeuvre consumers away from property listings that match the consumer's criteria but that offer lower commissions to the broker. This also affects the market by impeding genuine bargaining between parties.

LRWG response to this part of earlier Draft Paper

The LRWG appeared to agree with our discussion of these points and our recommendations, and so our recommendation remains unchanged.

RECOMMENDATIONS

1. There is a wide divergence of opinion on whether estate agency fees should be regulated, and if so by what method (fixed scale, or fees for work for this actually done). We expect that the estate agency profession will have firm views on this, as will consumer groups. Therefore, we recommend that a decision be made *after consulting Stakeholders* on whether and/or how estate agents may charge consumers for their services. The decision can then be implemented by subsidiary legislation.
2. The proposed Estate Agents Law should provide at least the following protections to consumers:
 - a) compulsory disclosure of interest and conflicts of interest on the sale of property;
 - b) prohibiting estate agents and salespersons⁸⁴ from acting for both buyer and seller;
 - c) outlawing false representations to sellers or buyers, and false or misleading advertisements;
 - d) requiring agents or salespersons to substantiate their estimate of selling price;
 - e) disciplinary proceedings against offending agents and salespersons.

Our *draft Estate Agents Act 2010* includes all of these matters.

⁸⁴ We deal specifically with salespersons later in this Issues Paper.

4.2 Types of Occupational Regulation

We now survey various types of occupational regulation, and consider their appropriateness to the real estate industry in Uganda.

4.2.1 Entry Barriers

Many occupations have barriers on entry. They can take a variety of forms. Most are of a qualitative nature or require certain personal characteristics.

Qualitative entry restrictions include:

- minimum age, and minimum level and period of education and training (eg, the possession of certain degrees and diplomas);
- minimum level or period of professional experience (eg, an apprenticeship in an established practice);
- completion of professional examinations after a professional education.

Personal entry restrictions require entrants to have specific characteristics. They may include citizenship or residence, language competence, and good character.

Entry restrictions of both kinds help enhance the quality of the services provided. Qualitative entry restrictions particularly help guarantee a minimum level of quality of service.⁸⁵

Avenues for enforcing entry restrictions can include:

- Registration
- Certification (and sometimes accreditation)
- Licensing.

We will deal first with the registration of estate agents.

4.2.2 Registration

In its most basic form, a registration system could simply require the person's name and address to be entered on a register of estate agents. Registration of this kind would not limit who could provide the service. Anyone who sought to register, could do so. Registration would carry no implication of fitness for task; it would not suggest any level of competence or quality of service. It would essentially be a means of *identifying* those engaged in a particular activity, although when coupled with a de-registration process it could provide a means of banning those who engage in fraudulent or unacceptable practices.

85. *Theory and Evidence on the Regulation of the Latin Notary Profession: A Law and Economics Approach*, by Prof. Dr. Roger Van den Bergh, ECRI-report 0604, June 2006. www.ecri.nl. Accessible at: <http://media.seor.nl/files/law-and-economics-notaries.pdf>

Registration of this simple kind is appropriate where the threat to public health, safety or welfare is minimal. It has administrative benefits: for example, it can facilitate the dissemination of information through those on the list; and it can be used as a source of information to enforce legislation (just as a register of used-car dealers may help police investigate thefts).

If required, this simple registration process could be strengthened to include appropriate educational qualifications or membership of professional bodies, or to require candidates to pass certain integrity tests, such as the need to be a ‘fit and proper’ person to practise in the industry. However, this would go beyond registration: it would be more like “certification”, which we consider below. For present purposes, registration would merely require persons to place their names in an official register, usually on payment of a fee.

A registration scheme of this kind could be run by a government agency or by a self-regulating industry body.

The disadvantage of simple registration of this kind is that does not reduce any of the risks or temptations associated with practice in the real estate industry. And so it is unlikely to mitigate the risks faced by consumers of real estate agency services.

4.2.3 Certification

Under “certification”, persons possessing certain skills or qualifications are certified by a recognized authority (government or private). Certification is often, but not always, provided by some form of external review, education, or assessment. Sometimes, uncertified persons are allowed to participate in the industry as employees, but they are not permitted to hold themselves out as being certified.

In modern times, professional certification is common and is usually the function of industry or professional bodies. A person is certified as being able competently to undertake a professional task, usually after passing an examination, coupled with a course of professional training or a minimum duration of professional practice. An example is a certified public accountant.

4.2.4 Accreditation

This goes further than “mere” certification. Accreditation is a process in which a person is certified to have certain levels of competency, authority, or credibility. Accreditation usually certifies that a person has undergone a prescribed level of training or meets a prescribed standard of performance.

Like certification, accreditation is usually administered by a body responsible for keeping a ‘list’ of those practitioners who have reached the required level of competency. Accreditation schemes are usually non-legislative, fostered by industry bodies. In this sense they are “voluntary”: businesses or practitioners can seek accreditation, but a failure to be accredited generally does not prevent them carrying out their business, as long as they are registered or certified in some way.

The occupational group concerned decides upon the requirements for accreditation. These may include particular qualifications and may encompass different levels of accreditation. The system gives the public information about the quality of the service without usually restricting entry to the occupation.

4.2.5 Licensing

The final process is “licensing”. Under licensing, participation in an occupation is conditional upon persons satisfying a recognized authority that they are able to meet certain pre-determined criteria. Persons unable to meet the criteria are prohibited from engaging in the occupation. Entry barriers normally involve educational requirements and criteria related to character or fitness to practice.

Licensing is the least flexible form of occupational regulation, because those not meeting the entry requirements are unable to practise. But it minimizes the risk to the public from unskilled practitioners, by requiring all who practise to meet particular entry standards.

However, licensing does not always guarantee the *current* competence of practitioners. It may set standards at the time of a person’s entry into the industry, but without ensuring that they have kept up with changes in the industry. That is why, in some professions, licenses must be renewed, with standards to be met as a condition of renewal.

Licensing can, if desired, also restrict the range of activities that an individual can carry out. Licences can be issued by government agencies or by industry licensing boards.

As with certification, licensing regulation is generally accompanied by a disciplinary process which can result in transgressors having their licences suspended or revoked.

Licensing reduces consumer search costs in identifying competent practitioners. As stated earlier, a principal reason for regulating estate agents is to offset problems arising from *information asymmetry*, which exists whenever consumers have less information than providers about the quality of services. Licensing of estate agents would help overcome information asymmetry.

Criteria for license eligibility could be set to ensure that estate agents have a minimum level of qualifications, competence, industry experience, and personal probity.

In our view, of the various methods reviewed in this Paper, licensing provides the most effective way of ensuring competent standards and protecting consumers.

LRWG response to this part of earlier Draft Paper

The LRWG appeared to agree with our discussion on these points, and on our recommendations, and so our recommendations remain unchanged.

Recommendation:

The proposed Estate Agents Act should employ occupational licensing to regulate the estate agency profession in Uganda.

The Minister, in consultation with the real estate industry and other stakeholders, should set the criteria for issuing licences.

4.2.5.1 Further Aspects of Licensing.

i). Minimum Entry qualifications

In our view, the law should prescribe a minimum level of educational qualifications for persons who wish to be licensed in the real estate agency industry. Estate agency entails dealing with land transactions, which in turn entails a certain level of technicality. A competent estate agent must know basic principles of land law, landlord and tenant law, conveyancing, and contract law. He or she must also be sufficiently literate to understand land transaction instruments and titles office procedures.

ii). Restriction on using the title “Estate Agent”

Following the introduction of a licensing regime, it would be necessary to restrict the use of the title ‘Estate Agent’ to those persons who have been licensed. Unlicensed persons would be prohibited from holding out that they are ‘estate agents’.

This restriction would be crucial to the licensing regime. The estate agents legislation should set a baseline level of consumer protection. By guaranteeing minimum standards, the status of those who are licensed would be protected, and the standing of estate agents generally would be improved.

iii). Restriction of Certain Core Practices

This issue is related to the previous one, and flows from the regulatory licensing system. By way of background: estate agents do not usually work alone. They have office staff and other employees, to whom they delegate tasks connected with the running of the business, including having contact with clients. To what extent should these persons be licensed?

In our view, not all persons who work in estate agency businesses need to be licenced. Only certain “core areas” of estate agency practice should require a licence. The core areas are those that involve ethical, fiduciary or financial qualifications or standards, and those that involve exposure to risks of a contractual or financial nature.

This “core areas” concept will allow estate agents to employ unlicensed subordinates, without compromising the consumer protections that a licensing system will provide. It will also allow persons who do not have the necessary qualifications to find work in the industry, albeit of a subordinate kind.

iv). Administrative Organs

If a licensing regime is introduced, it will be necessary to establish an administrative body to oversee its day-to-day administration. Various models already exist, or are proposed, in countries comparable to Uganda.

In Kenya, the *Estate Agents Act* (Chapter 533 of the Laws of Kenya) established a board known as the Estate Agents Registration Board. The Board is charged with the responsibility of registering estate agents and of ensuring that the competence and conduct of practising estate agents are of a standard sufficiently high to ensure the protection of the public.

Under section 6 of the Kenyan Act, the Minister is empowered to appoint a public officer as Registrar of the Board. The Registrar's functions include keeping a Register containing the names of persons accepted by the Board for registration. The Board's secretariat is situated within the Kenya Ministry of Lands Headquarters.

The Board has nine members, comprised as follows:

- (a) A chairman, who is a member of the Institution of Surveyors of Kenya;
- (b) Two public officers, who are members of the Institution of Surveyors of Kenya appointed by the Minister;
- (c) Two members of the Institution of Surveyors of Kenya appointed by the Minister from the names of persons recommended by the Institution and who are in private practice;
- (d) Three persons appointed to represent the general public; and
- (e) One person who is an advocate appointed to represent the legal profession, nominated by the Attorney-General.

The draft Tanzania Bill likewise proposes the establishment of a Land Markets Practitioner Board. The Board's objectives are far-reaching. They are to create confidence in the operation of the land market by: extending the services of land market practitioners to as many people as possible; ensuring fair competition in the provision of services; protecting consumers of these services; increasing knowledge about the land market and rights and obligations in the land market; and prohibiting dishonest and unconscionable conduct by practitioners in the market.

The functions of the Board in the Tanzania draft law to some extent reflect those in the Kenyan Law, but are more detailed and forward-looking. They include three broad categories: registration and discipline of land market practitioners; their education and training; and public information.

The Consultant does not yet have clear information on the funding model for the proposed regulatory framework of real estate agents in Uganda. To create structures like the Kenyan and Tanzanian Boards carries a funding burden. This burden is not limited to establishment costs; once established, a board needs to be maintained. To cite an example from Uganda: it is known that there are continuing problems in trying to operationalize the Uganda Registration Services Bureau as successor to the Registrar of Companies. The transition from large government to regulation has seen the creation of a number of statutory authorities. Some of them, such as the Uganda Revenue Authority and the Uganda Wildlife Authority, have managed to sustain their existence and operations. But others, such as

National Environmental Management Authority (NEMA), which substantially depend on donor funding, continually face problems of closure, since they cannot sustain themselves. The same issues of funding and financial sustainability underpin the delay in implementing certain statutory frameworks proposed over the last few years by the Uganda Law Reform Commission.

Therefore, the issue of sustainability needs to be addressed before creating a structure to regulate estate agents.

Until clarity is obtained on funding availability, the Consultant tentatively recommends that the real estate agents legislation should set up an Office of Commissioner of Real Estate (or similar title), but that until that occurs the duties of Commissioner should be given to an appropriate official who already exists.

Otherwise, the Consultant considers that there is no difficulty in designing a regulatory structure based on an existing statutory authority.

As with other important recommendations, however, we add that input from stakeholders may be useful, and that any final recommendation should await that input.

LRWG response to this part of earlier Draft Paper

The LRWG stated that it agreed with our general discussion of these points, and recommended that the regulation of estate agents should be “under the land department”. We have no objection to that view, and have amended our recommendation accordingly. Our *Draft Real Estate Agents Act 2010* would accommodate that structure, or indeed any other that the Government may consider appropriate.

RECOMMENDATION:

The Real Estate Agents Act should set up an Office of Commissioner of Real Estate (or similar title), to be charged with the day-to-day regulation of real estate agents.

That office could be run within the Land Department. Alternatively, depending on the outcome of further consultations with stakeholders on the funding of the institutional framework for regulating estate agents, at the commencement of the Act the duties of Commissioner could be given to any appropriate official who already exists.

4.2.6. Self-regulation

We now consider whether the real estate industry in Uganda should be self-regulated.

Self-regulation would involve the formation of an industry body to take full responsibility for how the estate agency industry operates. Such a body would, for example, issue codes of conduct and practice, and could set up voluntary accreditation systems. A practising estate agent would have to be a member of the body. Members who breach the rules of self-regulation would risk losing their membership and their right to practice. An advisory or steering committee appointed by Government could be set up to advise on and monitor the body's operations.

4.2.6.1 Advantages of Self-regulation

Self-regulation has certain advantages:

- a) Regulation can be implemented with minimal legislation and financial burden on the State.
- b). Self-regulatory agencies characteristically possess a greater degree of expertise and technical knowledge than the Government. Industry bodies are better positioned than Government to guarantee quality. They are also better positioned to monitor breaches and enforce compliance.
- c). Self-regulation is more flexible than Government regulation. Self-regulatory bodies are likely to be less bureaucratic and can therefore draft and review regulations more quickly and flexibly. Flexibility is especially important in dynamic markets where consumer preferences regularly change.
- d) The costs of self-regulation are borne by the profession itself. They are not a burden on the public purse.

4.2.6.2 Disadvantages of Self-regulation

However, self-regulation also has disadvantages:

- a) Membership of self-regulatory bodies is generally voluntary. If that were the case in Uganda, some estate agents may refuse to join; and if outside the voluntary regulation, they are unregulated. Dishonest agents are unlikely to join a voluntary industry body, thereby depriving consumers of necessary protection.
- b) The public may lack confidence in self-policing and enforcement by an organization that comprises representatives from the trade alone. This could undermine the objective of promoting public confidence in the performance of real estate agency work, and, ultimately, in the real estate market.
- c) A governing body can establish rules, breach of which would subject a member to disciplinary action, including even expulsion from the trade. But the rules can only apply to members; voluntary codes cannot confer rights on clients or customers *vis-a-vis* estate agents.

- d) Since practising estate agents in Uganda do not currently belong to any trade associations, a self-regulating industry body would face a formidable task in recruiting members and imposing regulation. By comparison, legislation could compel all existing or eligible estate agents to comply with regulatory measures.
- e) Self-regulation would probably run counter to public expectations. The public would be sceptical about the impartiality and independence of a body that is chosen from its own members and lacks community and consumer representation. Self-regulating bodies may be seen as seeking to “bail-out” colleagues in trouble, perhaps at the expense of quality assurance.
- f) Self-regulation enables professions to restrict competition by imposing stricter entry requirements for new entrants, protecting the positions of those already in the profession.

In our considered view, the disadvantages of self-regulation for real estate agents far outweigh the advantages. However, of course, there would be no problem in allowing a *layer* of self-regulation over and above statutory regulation, if an industry body wished to depict its members as exceeding the statutory-minimum standards. This indeed might help the Ugandan real estate industry overcome its present tarnished image.

LRWG response to this part of earlier Draft Paper

The LRWG made no comment on this aspect of our earlier Paper. We take that to be agreement. Therefore, our recommendation remains unchanged.

RECOMMENDATION

We do not support industry self-regulation for real estate agents in Uganda. Instead, we recommend statutory regulation in the ways already detailed in this Final Draft Issues Paper.

4.3 Resolution of Disputes and the Pursuit of Redress

4.3.1 Disciplinary Organs and Procedures

The next issue is the enforcement of standards in the real estate industry.

In most jurisdictions where professions are subject to registration requirements, disciplinary processes are available to ensure that registered practitioners comply with the industry standards. They provide a range of sanctions, up to and including temporary or permanent withdrawal of licence or the right to practice.

In the Consultant's view, the performance of estate agents in Uganda should be monitored by a regulatory authority. That authority should have the power to invoke disciplinary action, including as the severest sanction, revocation of licensing.

In other countries, various models of disciplinary organs exist. The chief ones are as follows.

- **Tribunal**

In the various states of Australia, the discipline of estate agents is entrusted to formal tribunals. For example, legislation in Victoria charges the Victorian Civil & Administrative Tribunal (VCAT) with serious prosecutions against estate agents, resolving disputes regarding estate agents, and ruling on commissions and associated matters. The VCAT can also review the decisions of the Business Licensing Authority, which is responsible for licensing estate agents and maintaining records of agents' representatives. An interesting additional feature of the Victorian scheme is that the head of the Consumer Affairs organization for Victoria and the Chief Commissioner of Police may initiate inquiries before the Tribunal in relation to estate agents.

- **Administrative Board**

The Kenya *Estate Agents Act* (Chapter 533 of the Laws of Kenya) establishes an administrative Board (the Estate Agents Registration Board), charged with the responsibility of regulating the activities and conduct of registered estate agents. The Board may, either on its own initiative or on receipt of a written complaint, institute an inquiry into any act or omission of a registered estate agent that is contrary to the public interest or that amounts to professional misconduct. If a registered estate agent is convicted of an offence under the Act, or is found to be guilty of an act or omission contrary to the public interest or amounting to professional misconduct, the Board's powers include suspending registration for a time, cautioning the offender, or removing the offender from the register.

The Tanzania draft Bill for a *Land Market Practitioners Act* 2005 also establishes a Board, whose functions include the discipline of "land market practitioners". In the Tanzania Bill, "land market practitioner" means an estate agent, land broker, land valuer, land economist, mortgage broker, or any other person providing services connected with the operation of the land market. The Board can receive complaints against estate agents, investigate complaints, and conduct hearings into allegations of misconduct. A hearing into a complaint may be instituted by the Board on its own motion. Additionally, the Board is invested with power to issue summonses, and disobedience to a summons or refusal to give evidence is punishable

by criminal sanctions. The Board can take disciplinary action and can take further action to enforce that action.

- **Real Estate Council**

The *Real Estate Act* 2002 of the Alberta Province of Canada establishes the Real Estate Council of Alberta (RECA). The Council is an independent, non-government agency, responsible for the regulation of the real estate industry. Its mandate is to protect consumers and to provide services that enhance and improve the industry and the business of industry members. It is responsible for administering the *Real Estate Act*. Its functions include complaint investigation, licensing and education standards, and standards of conduct and business practice. It has ultimate authority for disciplinary action after a multi-tiered disciplinary process.

The Council is somewhat similar to the Uganda Law Council⁸⁶. The Uganda Law Council is statutorily charged with exercising (through the medium of the Disciplinary Committee) disciplinary control over advocates and their clerks.

- **Real Estate Agents Authority**

A New Zealand Consultation Paper published in May 2007 proposes a Real Estate Agents Authority⁸⁷ with a complaints and disciplinary function, in addition to the functions of licensing (including maintaining a public register), education, approving the educational criteria of agents and salespersons, setting industry standards, enforcement, and providing consumer information.

- **Ombudsman**

In the United Kingdom, the *Consumers, Estate Agents and Redress Act* 2007 (“CEARA”) provides that the Secretary of State may make an Order requiring every person who undertakes relevant estate agency work to be a member of an approved redress scheme for the purpose of dealing with complaints in connection with that work. ‘*Relevant estate agency work*’ is estate agency work in relation to residential property. A ‘*redress scheme*’ is a scheme that provides for complaints against members of the scheme to be investigated and determined by an independent person (‘*the ombudsman*’). An Order has been made under the Act, requiring persons who engage in estate agency work in relation to residential property, to join a redress scheme.⁸⁸

In our view, any of these structures would suffice for Uganda. However, on balance we would opt for a Tribunal. A tribunal carries the gravamen of authority but without necessarily being as formal (and as expensive to approach) as a court of law. The legislation could allow the Tribunal to dispense with unnecessary legal formalisms in its procedures, including dispensing with formal rules of evidence, in order to do impartial but speedy justice.

86. Established by the *Advocates Act* Chapter 267, Laws of Uganda Revised Edition 2000.

87. *The Government’s Preferred Options for Reform of the Real Estate Agents Act 1976*, Public Consultation Document, Ministry of Justice New Zealand, ISBN 978-0-478-29037-3, www.justice.govt.nz.

88. *Consumers, Estate Agents and Redress Act*, 2007, Chapter 17.

LRWG response to this part of earlier Draft Paper

The LRWG did not agree with our recommendation for a Tribunal. It considered that the department established to administer the regulation of estate agents could deal with disputes, and that recourse could then be had to the courts.

However, we respectfully differ. In our view, based on experience in other countries, some form of quasi-judicial oversight of estate agents is necessary. Departmental oversight is not enough; and resort to courts is generally too slow and expensive. A Tribunal can handle disputes expeditiously and with a minimum of legalism. With a competent and efficient Tribunal, few cases would need to be referred to the court system.

Accordingly, although we have considered the views of the LRWG, we have concluded that our original recommendation should remain unchanged.

RECOMMENDATION:

We recommend a Tribunal as the most appropriate form of disciplinary mechanism. The Tribunal could be a new body, or its powers could be given to an existing body.

The Tribunal should be charged with investigating alleged breaches by licensees or salespersons. Where it makes a finding of breach, the Tribunal should have the power to take disciplinary action against offenders. The disciplinary action should be in the discretion of the Tribunal, but should include the power to suspend or cancel licences.

As with certain other Recommendations in this Paper, this is an area where industry stakeholders will have views based on their own experience. Therefore, full details of the Tribunal structure—including the machinery of establishing and maintaining the Tribunal, its powers, and the disciplinary actions it can take—should await industry feedback. These details can then be incorporated into the draft Real Estate Agents Act.

4.3.2 Funding the Tribunal

At a meeting with the Client held at the Ministry of Lands, Housing & Urban Development Headquarters on Monday 19 November, 2007, the Client specifically raised the issue of funding the activities of a Tribunal of the kind we have recommended. In formulating our Recommendation on this matter, we have again looked at international comparative experiences.

The Kenya *Estate Agents Act*⁸⁹ allows the Minister, with the consent of the Treasury, to make grants to the Estate Agents Registration Board, out of moneys provided by Parliament, to enable the Board to discharge its functions under the Act.

In South Africa, under the *Estate Agency Affairs Act*, 1976, disciplinary matters are entrusted to the Estate Agency Affairs Board or to a Committee of Inquiry constituted by members of the Board⁹⁰. The Board's funding comes chiefly from prescribed levies paid by estate agents and moneys derived from the Board's own investments.

The Tanzania Draft Bill for a *Land Market Practitioners Act* 2005 provides that the funds of the Board (which is charged with both administrative and disciplinary functions) consists of (amongst other sources) registration fees and annual subscription fees paid by registered land market practitioners. The Tanzanian draft Bill, however, anticipates appropriations by Parliament, grants or loans from other persons, as well as borrowings. The Commentary on the Tanzania draft Bill states that this is a standard clause in Tanzanian legislation for these kinds of statutory authorities and is adapted from the Tanzania *Architects and Quantity Surveyors Act* 1997.

LRWG response to this part of earlier Draft Paper

The LRWG made no response to this part of the earlier Paper. We take this to constitute agreement with our recommendation, and so it remains unchanged.

RECOMMENDATION:

Our preliminary recommendation is that the funding of the Tribunal should come from licence fees from those who hold licences. However, as it will take some time for sufficient income to be generated from licence fees, there will be a need for start-up funding to establish the Tribunal. Therefore, the Tribunal will require an initial injection of funds from government.

However, this funding recommendation is preliminary only. Stakeholders, both in government and in the real estate industry, may have useful suggestions on the most appropriate funding model. Their views should be considered before finalizing arrangements on this point.

During the consultation process, a projection can be done of the possible receipts likely to accrue from levies paid by estate agents, to test whether the activity can be funded wholly from user fees.

89. Chapter 533 of the Laws of Kenya, section 27.

90. Members of the Committee of Inquiry may be chosen from the ranks of persons who have knowledge of the law about, or experience in, the resolution of disputes, or such other knowledge or experience as, in the Board's opinion, renders them suitable for appointment.

5.0 WHO SHOULD QUALIFY FOR LICENSING AS AN ESTATE AGENT?

5.1 Should the proposed statutory regulation of estate agents absorb all current (unlicensed) practitioners?

When any profession is brought under legal control for the first time, questions arise whether existing practitioners should be permitted to continue in their livelihood. Some will have demonstrated their capacity in that profession over many years; others will not. A key issue with adopting a new licensing regime for real estate agents is whether, and how, existing practitioners should be transitioned into the new regime.

The answer is difficult. Compromises may be needed and delicate changeover measures required. For instance, granting all existing practitioners automatic entry into the regime would not solve current problems of inadequate competence (although imposing continuing training or experience requirements may help alleviate this). On the other hand, if entry to the new licensing regime is not automatic, then the number of practitioners authorised to undertake estate agency work may be drastically reduced, particularly in the short-term.

One of the purposes of occupational regulation is to ensure that those who participate in an industry have at least a minimum level of competence. A licensing system that requires all practitioners to have certain educational qualifications and/or experience gives consumers some guarantee that the services will conform to a basic level of competence.

“... in the case of estate agents, ... in addition to competence in the handling of funds, estate agents need a basic knowledge of laws affecting real estate transactions, an understanding of how to determine property valuations and reasonable knowledge of structures and materials if they are to service their clients’ needs adequately. If persons act as estate agents without these skills, their clients and persons dealing with the clients may be disadvantaged through inaccurate advice, representations made without sufficient basis or contracts not being properly concluded. Civil remedies against the agent involve considerable cost and may not provide adequate relief because rights against the agent cannot be disentangled from the major transaction. Moreover, the basis of civil action may not become apparent until much later.”⁹¹

This might suggest that existing practitioners should not be allowed to continue in practice unless they first obtain a licence, including passing the educational requirements for a licence. On the other hand, existing industry practitioners may not be able successfully to pursue a real estate agents’ training programme. They may not have the basic educational background that such a course assumes (such as a required level of schooling or post-school study), or they may not be able to afford time away from their source of income.

The requirement of training itself carries additional difficulties. It demands commitment of time and money by aspiring entrants, and substantial government expenditure. At present there is no national curriculum for the real estate industry. Makerere University has degree courses in land economics, estate management and land management. Perhaps graduation from these courses could qualify persons as estate agents; this would be similar to the position in Kenya (see below).

91. *General Principles and Issues on Occupational Regulation*, A.P. Moore and A.A. Tarr, (1989) 1 Bond L R 119 at 122. Available at: <http://epublications.bond.edu.au/blr/vol1/iss1/7>

But many existing practitioners may not be able to pursue these degree disciplines. To require all aspiring estate agents to have basic qualifications in land economics and/or estate management, and (perhaps) to be registered by the Valuers Registration Board, seems too onerous. A better option would be a special course designed for training new estate agents and for imparting relevant academic knowledge to existing estate agents.

A comparison with the requirements in Kenya and Tanzania is informative. In Kenya, the *Estate Agents Act*⁹² requires in its *Conditions and Qualifications for Registration*:

- (a) full membership of the Institution of Surveyors of Kenya (in the chapters of Valuation and Estate Management Surveyors, Building Surveyors and Land Management Surveyors); or
- (b) corporate membership of the Royal Institution of Chartered Surveyors (in the General Practice or Land Agency or Agriculture sections), coupled with qualification for or actual membership of the Institution of Surveyors of Kenya (in the chapters of Valuation and Estate Management Surveyors, Building Surveyors and Land Management Surveyors); or
- (c) a degree, diploma or licence from a university or college or school which is recognized for the time being by the Kenya Estate Agents Board; or
- (d) a degree, diploma or licence of a university or college or school, or membership of an institution the membership of which the Board recognizes as furnishing sufficient evidence of adequate academic training for practice as an estate agent; coupled with practical post-qualification experience in estate agency practice of not less than two years, of which not less than six months has been acquired in Kenya (and which is to the Board's satisfaction).

Under the Tanzanian draft Bill, a person who seeks registration as an estate agent must be:

- (a) a registered surveyor; or
- (b) a graduate of the University College of Lands and Architectural Studies (UCLAS); or
- (c) the holder of a degree, diploma, or licence from any university or college or school which is recognised by the Board of Land Market Practitioners; or
- (d) the holder of a degree, diploma or licence from a university or college or school, or membership of an institution which the Board recognises as sufficient evidence of an adequate academic training for practice as an estate agent; this must be coupled with practical post-qualification experience in estate agency practice of not less than two years of which not less than six months has been in Tanzania (and is to the satisfaction of the Board).

In our view, Uganda could emulate the model whereby registered surveyors have automatic qualification for licensing as estate agents.

92. Chapter 533 of the Laws of Kenya, Section 13.

5.2 Transition Process: Grandfather Clauses

When legislation introduces new requirements into the practice of a profession or trade, it sometimes exempts those already involved in the profession or trade from having to comply with the new requirements. Such an exemption is called a “*grandfather clause*”.⁹³ A grandfather clause could exempt those already practising as estate agents in Uganda from having to meet the new educational requirements imposed under the new law. It would allow them to continue in practice, free of the entrance barriers that new agents would need to surmount.

However, such a grandfather clause could also pose problems. It would protect the position of existing practitioners, giving them an advantage over new entrants into the industry. In this way, regulation that is intended to improve services to consumers could become a means of restricting competition, limiting the entry of new players.

In our view, the presumption should be *against* grandfather clauses. But this is not to deny that their use in particular circumstances may be justifiable as a transitional tool.

5.3 Experience requirements

If grandfathering is to be allowed, in our view it would have to be on the basis of existing experience in the real estate industry. It would require the applicant to have worked in the real estate industry as (for example) an agent or an agent’s representative for a specified period.

According to our research, reliance on “experience” as a qualification for estate agency practice is becoming less common. In jurisdictions with more developed real estate agency regulation, an “experience” qualification remains only as an interim arrangement in the transition to new qualification requirements.⁹⁴ The emphasis on continuing professional development (CPD) puts a higher emphasis on “academic” qualifications than on practical ones.

To illustrate, we cite a study from New Zealand. At a public consultation on revision of the New Zealand *Real Estate Agents Act*, the Consumers’ Institute of New Zealand reported the following responses to a survey it conducted:⁹⁵

Q19 Should people need to be qualified to become a real estate agent?

We believe so. The money at stake in a real estate deal and the legal intricacies of land transactions make it important that real estate agents have a minimum degree of knowledge. A basic qualification would give some comfort to consumers.

93. *Chambers Dictionary*, New Ninth Edition.

94. *Issues Paper: Harmonisation of Estate Agent Regulation*, prepared for Consumer Affairs Victoria by Jaguar Consulting Pty Ltd with the assistance of Learning Australia Pty Ltd, July 2004.

95. *Submission on the Public Discussion Paper: “Renovating the Real Estate Agents Act – Reasonable Offers Considered”*, Consumers’ Institute’s submission to the Ministry of Justice, Consumers’ Institute New Zealand, September 2003.

Q20 Should qualifications be needed if a person is already experienced? If not, how much experience must they first have?

Experience should be gauged by the ability to attain the qualification.

We therefore conclude that:

1. existing estate agents in practice at the commencement of the proposed real estate legislation should be allowed to continue to practise until they have had a reasonable time to satisfy the registration body that they are of good character and have sufficient qualifications and experience to continue to practise; but that
2. within a specified time after the commencement of the new legislation they must obtain the same formal qualifications that new entrants must obtain.

We realise that the second requirement may create practical difficulties for many in current practice. However, it is in the public interest that eventually all agents possess the necessary academic training needed to provide a proper service to consumers. Otherwise, we will be perpetuating a two-tiered system, in which some agents get preferential treatment based purely on their date of entry into the industry, despite lacking the knowledge which the licensing authority sees as necessary for conducting real estate practice in a modern, developing economy.

Further, in our view, all “grandfathered” agents should be subject to the same regulatory controls on activities and conduct as regulate other estate agents. The “grandfathering” would allow them to continue for a while in the profession without formal qualifications. But it would not allow them to avoid industry-wide controls on professional conduct and ethics.

Both the Kenyan Act and the Tanzanian draft Bill provide that persons who are exempt from the requisite academic or professional qualifications, cannot be registered as estate agents unless they are of good character and unless they satisfy the Registration Board that they have not been convicted (whether in Kenya/Tanzania or elsewhere) of an offence involving fraud or dishonesty.

The draft Tanzania Bill goes on to prescribe what we believe is a good model. A person registered on the basis of good character and probity may be required by the Board (as a condition of registering) to take and complete within two years a part-time course in one or more subjects specified by the Board. However, no such requirement can be imposed unless the courses are available on a part-time basis and within a reasonable distance of the person's normal place of work.

5.4 “Fit and proper person” requirement

A ‘fit and proper person’ requirement is a normal entry requirement for occupational licensing.

The purpose is to prevent people with a history of dishonesty, demonstrated untrustworthiness or financial incompetence, from entering an industry which involves handling large amounts of other people’s money or property.

The “fit and proper person” requirement is commonplace in existing professional regulation statutes in Uganda. For example, it applies to the admission and enrollment of advocates: a person eligible for enrolment is also required to be a fit and proper person to be an advocate.

It also applies to the appointment of practising advocates as Commissioners for Oaths under the *Commissioners for Oaths (Advocates) Act*.⁹⁶ It is one of the criteria for the grant of a moneylenders licence under the *Moneylenders Act* Cap. 273. It applies to the registration of Surveyors under section 15 of the *Surveyors Registration Act* (Qualifications for Registration),⁹⁷ and to the registration of engineers under the *Engineers Registration Act*.⁹⁸ And it applies under the *Financial Institutions Act*, which prescribes criteria for determining whether a person is a fit and proper person to manage, control, or become a director or substantial shareholder in a financial institution.⁹⁹

Under both the Kenyan Act and the Tanzania draft Bill, the fact that a candidate for registration as an estate agent has sufficient academic and professional qualifications for registration does not entitle the person to automatic registration. The Registration Board can require evidence that the applicant's professional business and general conduct are such that he or she is a fit and proper person to be registered as an estate agent.

The Kenyan Act and the Tanzania draft Bill also allow for the possibility that a person who is honest and of good character may be registered as an estate agent despite having no formal qualifications at all, if the person has been operating as an estate agent for many years and has a proven satisfied clientele.

In our view, the fact that a person has sufficient academic qualifications or professional experience to be licensed ought not to entitle the person to automatic licensing. The licensing authority should still be able to require evidence that the applicant's business and general conduct are such that he or she is a fit and proper person to be an estate agent.

Our draft Estate Agents Act 2008 (and now the 2010 Draft) adopts the "fit and proper person" requirement. As a means of helping screen out inappropriate applicants, the draft Act requires persons who intend to apply for a licence to give public notice (in a local newspaper) of their intention to apply. Persons who object to the application may then do so. The draft Act gives the Commissioner the power to take an applicant's character into consideration when considering whether to grant a licence; and it gives the Commission power to disqualify persons from continuing to act as agents or salespersons if the Commissioner considers that they are not of good character or are not a fit and proper person to be an agent or salesperson (section 112). There is a right of appeal to the Tribunal.

LRWG response to this part of the earlier Draft Paper

The LRWG appeared to agree generally with our discussion on these points. However, they suggested that a distinction be drawn between a firm and an individual when it comes to obtaining a licence. We have considered that point, but have respectfully concluded that no such distinction should be drawn. It is not drawn in other professions—for example, no

96. Cap. 5, Laws of Uganda.

97. Cap. 275.

98. Cap. 271.

99. Section 10(8) and the Third Schedule to the *Financial Institutions Act*, 2004.

distinction is drawn in licensing requirements for lawyers, or doctors, or engineers. They are licenced according to their individual knowledge and competence, not on the knowledge or competence as a “firm”. In our view, estate agents should be regulated in the same manner. Estate agents may, of course, seek to trade as a firm or a company; but (in our view) they should be required to hold licences as individuals. They should first qualify as individuals. Accordingly on this matter our recommendation remains unchanged.

RECOMMENDATION:

We recommend a transition arrangement of licensing based on accumulated experience. Regulations should prescribe what qualifies as *sufficient experience*. We consider that the Kenyan legislation is a good model: a person aspiring for licensing on the basis of business experience should have been operating as an estate agent for a specified number of years and have a proven satisfied clientele.

However, this should be qualified by a requirement that the person so licensed also has to successfully undertake a continuing professional development (CPD) course in one or more subjects specified by the Commissioner (or other body regulating the estate agents industry). The licensing of that person would be provisional until the prescribed courses have been passed. There should be a set time within which to complete the course, but that time should take account of curriculum development arrangements and access to lectures.

Transitional licensing should be subject to probity and fitness requirements. Applicants for licences must give public notice of their intention to apply. A transitional licence would be revoked if the holder has been convicted (in Uganda or elsewhere) of an offence involving dishonesty or fraud, or has otherwise engaged in conduct which shows their lack of fitness to be an estate agent.

5.5 Regulatory Impact – Dalili – Bakayungirizi – “land and property brokers”

There has developed a class of land and property brokers who may not have formal education and who do not operate from formal establishments. There is also a class of rogue land and property brokers, as found by the Report of the Inspectorate of Government (IGG) on *Investigation into Alleged Mismanagement of the Land Registry in the Ministry of Water Lands and Environment*, who indulge in forgery and selling “paper” or “air” or non-existent property. And there are rogue brokers who, although aware of a client’s requirements or budget, take them to inspect property that does not answer the requirements or is clearly beyond the client’s budget, and then demand a “finder’s fee” or “search fee” for their time.

We have examined international comparative experience to see how other countries have dealt with these and similar problems. Below are some views from other jurisdictions.

The first is Ghana:

Box No. 5: CASE STUDY NO.3 – LAND AND PROPERTY MARKETS IN GHANA¹⁰⁰

There are many people operating as estate agents, many of whom have no formal training, and their professional conduct can leave a lot to be desired. The lack of adequate professional expertise has led to a high degree of informality in the land market. The informality has been the cause of the dearth of adequate and reliable records on activities in the market. The need to link up demand with supply has often created difficulties. Some general practice surveyors have established offices where they undertake estate agency functions in addition to other valuation and estate management functions.

These are, however, in the minority. It is also evident that the general public is often unaware of the functions of the general practice surveyors. The inability of the professional practitioners to perform estate agency functions has created a gap in the market, which has been filled by a number of people who have no training in estate agency. They are often individuals with no location identification who specialise in linking demand to supply in the property market. Owing to the fact that they are unorganised, they have often been the source of fraudulent activities in the market. Many do not keep records of their activities and this does not augur well for the development of the land market.

To improve the activities of estate agents in the market, the Ghana Institution of Surveyors has proposed the enactment of a law to regulate their activities. Under the proposed law, only people with professional qualifications in estate management and its related disciplines, such as land economy, law and planning, will be licensed by a Board of Estate Agency to practice the profession of Estate Agent. One of the conditions, which must be satisfied to obtain a licence, is the requirement for a performance bond to be obtained by the estate agent from a financial institution, which should be registered with the Estate Agency Board. The bond is a guarantee that, should anybody suffer financial or other loss as a result of the estate agent’s activities, the financial institution providing the guarantee would indemnify the agent. The proposed enactment also provides that all other persons who wish to operate as estate agents could do so under the agents licensed under the law. The proposed law has been outstanding for years.

100. *Land and Property Markets in Ghana*, a discussion paper prepared by the Royal Institution of Chartered Surveyors for presentation at the 2006 World Urban Forum, by Callistus Mahama and Adarkwah Antwi, www.rics.org. Similar views are echoed by Theodora Mantebea MENDS, *Property Valuation in Ghana: Constraints and Contradictions*, TS 24 – Valuations and Quantity Surveying, Promoting Land Administration and Good Governance, 5th FIG Regional Conference, Accra, Ghana, March 8-11, 2006; accessible at www.fig.net.

The next views are from Tanzania. We cite three in all. The first two predate the drafting of the Tanzania Draft Bill for a *Land Market Practitioners Act 2005*. In the first, the author describes the situation as follows:

“7.2 Estate Agents Act - in Tanzania

Estate prices are on the rise in the county after the overhaul of the land tenure framework. Lands and especially in urban areas are a rare commodity. Until recently property markets have been regulated informally by estate agents who are not established and controlled by any law. The government has now decided to formalize the business of estate agents ... [and] hired a firm of lawyers ... to draft a bill to regulate the operations of land markets and the practice of estate agents in the country.

*The effect of this other development in land tenure is hard to predict. However it is obvious that many of the present estate agents will be thrown out of business and the industry is going to be one for professionals in the same manner as are architects, valuers, lawyers and engineers. Some academic qualifications and amount of capital are going to be imposed by law for anybody who wants to register and operate as an estate agent. It will also hike property prices to be in pace with the stringent registration requirements and costs of operations on the part of the professional estate agents”.*¹⁰¹

The second view is by Prof. Lusugga Kironde¹⁰²:

At the same time, the government realises that there is an increase in market land transactions. While, for example, land transfers were outlawed during the socialist era, these are now on the increase. The land market needs expertise. This can be obtained from lawyers, surveyors, valuers and architects.

However, there is another body of persons that operate in most land markets. These are the estate agents. While the latter play a vital role in the operation of the land markets, most of their activities remain unregulated by any special law, or by any law at all. Estate agents do not have to have any special qualifications to practise, and there is no self-regulatory mechanism that applies to them. This is an undesirable situation, and the government of Tanzania has now hired a firm of lawyers ... to prepare a draft legislation to regulate the Operations of the Land Market and Practice of Estate Agency in Tanzania. ...

It may be too early to predict what will go into the envisaged Estates Agents Act. Nevertheless, there is a general feeling among Tanzanian property professionals that estate agency practice should be well-regulated and restricted to people with proper qualifications, and a business standing capable of handling the intricacies of property markets and property management, and of handling customers' monies confidently.

101. *Reforming Land Tenure In Tanzania: For Whose Benefit?*, by William Olenasha, Land Rights Research and Resources Institute (LARRRI/HAKIARDHI), Dar es Salaam, Tanzania, accessible at www.hakiardhi.org/reports.htm.

102. *Tanzania Moves to Implement the Law on the Land*, by Prof. Lusugga Kironde, The East African, Business Monday, January 31, 2005: <http://www.nationmedia.com/estafrican/31012005/Business/Business1.html>

The secretary general of the Tanzania Institution of Valuers and Estate Agents, Dr Medard Geho, hopes the new law will see the end of briefcase or barefoot estate agents, popularly known as madalali, many of whom operate on the street (vijiwe) without business offices or licences.

It may be impractical or even undesirable to ban madalali from all estate agency activities, particularly at the lower end of property market activities such as the hiring or renting of rooms. However, regulation is required when transactions involve medium to high-value properties, or involve substantial sums of money or require a high level of confidence.

The third view, derived from the Tanzania Draft Bill for a *Land Market Practitioners Act* 2005, is as follows:

Box No. 6: CASE STUDY- TANZANIA'S DALILI ¹⁰³

5. Key issues in draft Bill

There was vigorous debate in the workshop on what to do about *dalili* or briefcase agents -

- One view was that they were nothing but quacks and charlatans and should be chased out of the business; one of the principal objectives of any law should be just that.
- An alternative view was that they were a source of employment for persons in the informal economy who perhaps had little formal education but a flair for getting things done; they were providing a service for which there were many takers in all segments of the land market; and it would be better to recognise their existence and use the opportunity of a law to begin the process of encouraging them to follow certain basic rules of good practice and offering them the opportunity of some training to improve their skills and knowledge. Such persons it was suggested could be given the name of 'land brokers'. There was considerable support for this approach.
- A third view is that expressed in the Issues and Options paper; if such persons are engaging in dishonest conduct then they are committing a criminal offence and should be convicted and punished as such; otherwise they should be left alone as they are doing nothing wrong.

The purpose of the Business Environment Strengthening for Tanzania (BEST) Programme under which this assignment has been commissioned is –

to reduce the burden on businesses by eradicating as many procedural and administrative barriers as possible.

The BEST Programme notes that regulatory requirements can impose unwarranted compliance costs particularly on micro and small businesses which it is Government policy to nurture. Regulatory burdens can force such businesses to trade unlawfully because they are unable to meet the cost (authorised and authorised) of complying. One of the main thrusts of the BEST Programme is therefore to remove as much “red tape” for all businesses (and especially micro enterprises) as possible. The BEST Programme also seeks to ensure that new regulations are only introduced when necessary and that they are appropriate and effective.

103. *Draft Report - Consultancy for Drafting a Bill to regulate the Practice of the Real Estate Agency for Facilitation of the Operation of the Land market in Tanzania, Business Environment Strengthening for Tanzania (BEST) Programme.*

It is clear that the view expressed in the Issues and Options Paper - that the existing criminal law is sufficient to deal with any “mischief” and that otherwise *dalili* should be left alone as they are doing nothing wrong - is the one that best meets the aims of the Government of Tanzania as expressed in the BEST programme. However, the draft Bill provided with this Report reflects the compromise view of the workshop: that such briefcase agents should be registered and regulated as “land brokers”, but with a less onerous regime than is provided for estate agents.

As the last extract shows, the solution adopted in Tanzania is that *dalili* (briefcase agents) should be registered and regulated as ‘land brokers’, but with a less onerous regime than is provided for estate agents.

However, in our considered view, and after reviewing international practice, we do not recommend a lower layer of semi-regulated non-professionals. As we see it, the purpose of the regulatory framework is to create a category of competent land market professionals, as part of a wider land market development strategy.

We considered whether to allow, at least, a simple “finder’s fee”¹⁰⁴ arrangement for “land brokers” who help parties to find their requirements. However, in the end we concluded that such an arrangement would undermine the aim of transforming the real estate agency industry from an informal status to a formal status. That aim is implicit in the terms for legal reform as set out in the LSSP, namely:

*To recognise Estate Agents, regulate their conduct and fees to be charged for their services, provide for disciplinary procedures and professional control of standards.*¹⁰⁵

In our view, effective regulation of the real estate industry requires all estate agents and their employees to meet certain basic obligations. It also requires all participants to have a knowledge of basic land law, contract law, and fiduciary obligations. To legitimate the activities of a category of land brokers who do not, or cannot, meet these basic criteria would thwart the whole thrust of the move to encourage a formal, vibrant and confident land market.

Further, at least within the main cities of Uganda, it is obvious that those brokers who would be unable to comply with the formal requirements are the very ones who engage in fraudulent sales, land record falsifications, revenue evasion, and other forms of corruption.

A view from Lithuania strengthens our resolve to reject the authorization of a class of non-regulated or semi-regulated land-brokers.

BOX NO. 7: LITHUANIA - ACTIVITIES OF ILLEGAL AND NON PROFESSIONAL INTERMEDIARIES¹⁰⁶

Furthermore, the market is flooded with the so called black brokers or outside brokers quite a

104. A fee paid to someone who acts as an intermediary for a client in a transaction.

105. Land Sector Strategic Plan 2001-2011, at p. 29.

106. Source: *Improving Competition in Real Estate Transactions – DAF*, p.189, OECD, Publication No. DAF/COMP(2007)36, available at: <http://www.oecd.org/competition>

common phenomenon in an active and not yet matured RE¹⁰⁷ market. These are persons illegally engaging in the intermediation services who avoid paying any taxes to the State from their illegitimate proceeds. Such minor intermediaries often do not provide services professionally, fail to provide accurate data or documents, [and] they considerably create the confusion in the market. Not infrequently such agents engage in small profit making by selling a real estate item for a price much higher than has been agreed with the seller and, having found an interested buyer purchase the item from the seller at a lower price and resells it to an interested buyer.

The activities of the illegal and non professional intermediaries not restricted by any liability or obligations significantly impair the image of all professional real estate companies legally operating in the market. Upon a negative experience of doing business with the such agencies or agents customers tend to avoid having business even with the legal and professional agents which eventually prevents the market from maturing, conducting any more detailed market analysis or the provision to the market of any higher certainty or information. ... any market stabilization may be expected only when customers refer to and rely exclusively upon the honestly working and professional real estate intermediaries.

LRWG response to this part of earlier Draft Paper

The LRWG did not comment on this discussion in the earlier Paper, which we take to be consent. Accordingly, our recommendation remains unchanged.

RECOMMENDATION:

We do not recommend the recognition of a category of “land and property brokers”. To do so would undermine the aim of the proposed regulatory framework. That aim is to ensure the competency of all who work in the real estate industry as part of a wider land market development strategy.

Only persons licensed under the estate agents regime outlined in this Paper should be entitled to practise in the real estate industry.

107. Acronym for ‘*real estate*’.

5.6 Exempting Legal Practitioners from the licensing requirements of the Estate Agents Law

In some countries, lawyers work as real estate agents without having to be licensed under the real estate agents law. In those countries, statutes exempt lawyers from the restrictions on who may conduct estate agency business.

This exemption has not pleased estate agents. They argue that legal practitioners do not generally possess competency in the skills of property appraisal. They also argue that, if lawyers are able to freely practise estate agency, they can set up one-stop-shops, but that estate agents cannot reciprocate the competition, as they are not qualified to perform the legal aspects of a conveyance.

Despite these arguments, merits can also be made in favour of allowing lawyers to undertake real estate agency work:

- a) Lawyers generally possess sufficient competency to enable them to provide real estate services without increasing the risks to consumers. A lawyers' education involves extensive training in commercial, contract and property law.
- b) Parties to a property transaction would benefit from receiving legal advice early in the process. For most individuals, the purchase or sale of a home is one of the most significant contracts of their lifetime.
- c) Clients might prefer the services of a lawyer over the services of an estate agent to negotiate the terms of a property sale, to provide initial legal advice, and to draft the contract. It is commonplace that the real estate industry does a poor job of preparing real estate sale contracts, often resulting in unnecessary disputes.
- d) The public has confidence in the regulatory standards of the Law Society to ensure the competence of a lawyer's education, practice, ethics and financial responsibility.

LRWG response to this part of earlier Draft Paper

In our earlier Paper, we concluded that, on balance, the arguments favoured allowing lawyers to engage in estate agency work without the need to be separately licensed as real estate agents; their training and experience adequately qualified them. However, the LRWG did not agree. It saw no need to exempt advocates. On further reflection, we agree with the LRWG. Advocates should not be involved in selling real estate. If their clients wish to buy or sell, they can employ a real estate agent. A lawyer who wishes to act as a real estate agent should obtain the same formal qualification as anyone else. (And of course the Law Society might not wish lawyers to act as real estate agents, for reasons of conflicts of interest; but that is not something for discussion here.) We have revised our recommendation (below) accordingly; we have also revised the relevant provision (section 5) of the *Draft Estate Agents Act 2010*.

However, the LRWG did appear to agree with our further point that persons should be allowed to act for themselves in the sale or purchase of property without needing a licence. It also agreed with the other exemption(s) we discussed, which involved persons who are acting in a

purely representative capacity on behalf of another. We gave the examples of persons buying or selling on behalf of another in the following capacities:¹⁰⁸

- (a) an executor or trustee of a deceased estate as regards transactions arising in that role;
- (b) the public trustee;
- (c) an administrator, receiver or liquidator of a corporation;
- (d) a bailiff;
- (e) a court officer.

Our draft *Estate Agents Act* so provides.

5.7 Other land professions

What about other professionals who work in land-related areas and who wish to engage in real estate agency practice, such as registered surveyors and valuers?

We have reviewed international practice and legislation in Canada, New Zealand, and nearer home in Kenya and Tanzania. In these jurisdictions, registered surveyors and valuers are not exempted from the licensing requirements for real estate agents.

In the Kenyan Statute and in the Tanzanian draft Bill, registered surveyors and valuers have almost automatic entitlement to licensing—but not an exemption.

In New Zealand, the only persons permitted to provide real estate agency services without a licence are legal practitioners, conveyancing practitioners, and licensed auctioneers selling property by auction. Members of other professions (such as valuers) must obtain a licence. The New Zealand Government's view, reflected in the following comment, summarizes the issues¹⁰⁹:

“Some people consider that other professions involved in the real estate industry should be able to do the work of a real estate agent without being licensed under the new Act. One example might be valuers. However, selling property is not part of the day-to-day business of these professions and requires different skills. There is not a compelling case for allowing such professions to undertake real estate agency services.

There may be a case for allowing the qualifications of people in such professions to be cross-credited to those qualifications necessary for them to be licensed under the new Act. Similarly, there may be justification for taking their work experience into account when considering experience requirements in licence applications.

A compelling case needs to be made for it to be sufficient that persons doing some or all of the work of a real estate agent be licensed under another Act.

108. See section 5 (Application of Act) of the Draft Real Estate Agents Act, 2008.

109. *Government's Preferred Options for Reform of the Real Estate Agents Act 1976*: Public Consultation Document, Published May 2007, Ministry of Justice, Wellington, New Zealand, ISBN 978-0-478-29037-3, accessible at: www.justice.govt.nz

Leaving aside lawyers and conveyancing practitioners, and auctioneers, that case does not appear to be present for any other profession.”

RECOMMENDATION:

Advocates should not be exempt from the requirement to be licensed under the proposed Estate Agent’s Law.

The following persons should be exempt from the licensing requirements of the real estate law:

- (a) an executor or trustee of a deceased estate as regards transactions arising in that role;**
- (b) the public trustee in the course of his or her statutory duties;**
- (c) an administrator, receiver or liquidator of a corporation in the course of the administration, receivership or liquidation;**
- (d) a bailiff performing his or her duties under an order of court or when exercising statutory authority;¹¹⁰**
- (e) a court officer performing his or her duties under an order of court;**
- (f) a person acting for themselves in relation to their own interest in land.**

A person should not be exempted from the requirements to be licensed merely because he or she is providing estate agency services for free. The need for a licence should apply regardless of whether a charge is made for the service.¹¹¹

110. The *Distress for Rent (Bailiffs) Act*, Cap. 76; *Bankruptcy Act* Cap. 67.

¹¹¹ This reflects a comment made by the LRWG, on our earlier suggestion that persons acting for free should be exempt. On further consideration, we agree with the LRWG that no exemption should be made merely because a person offers services on a no-fee basis.

5.8 Training and Capacity-Building: Development of the Real Estate Profession

Adequate training and capacity-building is crucial to the development of a confident land market. The PSCP II, under which the present Project for Reform of Land Administration Laws is implemented, emphasizes the need for training and capacity-building for both the public sector and the private sector.¹¹²

An important element in this capacity-building is the setting of standards for education and training.

“[S]tandards determine who is capable of acting as a professional. Standards set the level of education deemed necessary, as well as the specific knowledge and skills that the professional must possess, and how these are to be assessed. Ethics and professional behaviour should be included, as well as technical skills. Standards are also set for maintaining training throughout the working life through continuing professional development. The standards may be enforced by government or by a professional association. In many countries, professionals need to pass a licensing exam before being allowed to practise or to become a member of a professional association.”¹¹³

In our view, compulsory training requirements for entrance into the real estate industry will increase both competence and professionalism, raising standards and reducing misconduct. It will ensure that knowledge is up-to-date. And it will encourage agents to commit themselves to a long-term career in the industry, discouraging the worst rogues and fly-by-night operators.

In addition to entrance-level requirements, we consider that ongoing training should be mandatory. It will improve the quality of service in the real estate industry, and should help reduce the number of complaints from the consumer public. Ongoing training can be made a prerequisite for the continuance of a licence.

Of course, as mentioned earlier, the requirement of mandatory training carries with it issues of curriculum development and availability of lectures. It also demands a commitment of time and money from aspiring entrants, and significant expenditure on education by government.

The requirement of training could be complemented by an apprenticeship system. Salespersons, as yet unlicensed, could train with licensed agents.

We appreciate that our recommendations for mandatory and continuing training will break new ground in Uganda. If our recommendations are accepted, the majority of estate agents currently in practise are unlikely to have the classic academic and professional qualifications for entry into the profession.¹¹⁴ We therefore propose for the inaugural licensees under the Act a mixture of experience requirements and minimum literacy requirements, but with a further requirement of continuing professional development (CPD) courses and training, so as to build up to an acceptable

112. *The Land Component of the Private Sector Competitiveness Project II: Moving From Analysis to Action in Uganda*, by Rexford Ahene, Senior Technical Advisor, PSCP II.

113. *Good Governance in Land Tenure and Administration* - FAO Land Tenure Studies 9, Rome, 2007.
http://www.fao.org/sd/LTdirect/ltstudies_en.htm

114. Such as the qualifications held by registered surveyors, registered valuation surveyors, building surveyors, and estate managers.

level of professional knowledge. The aim of the CPD courses and training should be to enable estate agency operators to acquire a basic knowledge in the following areas:

- land law and land transactions;
- business competence;
- negotiation skills and the ability to encourage offers that meet market values;
- proper disclosure obligations;
- the avoidance of conflicts of interest; and
- a grasp of the regulatory framework for the industry, including statutory obligations towards consumers.

LRWG response to this part of earlier Draft Paper

The LRWG appeared to agree with this discussion, and so our recommendation remains unchanged.

RECOMMENDATION:

The proposed Estate Agents Law (or subsidiary legislation made under it) should require that, as a condition of continuing in business as a real estate agent, existing real estate agents should acquire within a certain time specified educational qualifications in relation to the provision of real estate agency services.

Subject to any requirements for qualification under transitional licensing provisions, the proposed Law should also require real estate agents to undergo continuing professional development (CPD) courses and training in order to maintain an acceptable level of professional knowledge.

5.9 Should estate agency practice be available to non-citizens?

One issue that will arise if our recommendations about licensing are accepted, is whether non-citizens should be able to obtain a licence.

An examination of comparable jurisdictions in East Africa (particularly those with whom Uganda shares a legal tradition) shows that estate agency practice is generally restricted to citizens.

Thus, section 13 (1) of the Kenyan *Estate Agents Act*¹¹⁵ (Part IV concerning conditions and qualifications for registration) requires a person who wishes to be registered as an estate agent to be a citizen of Kenya.

Likewise, section 31(1) of the Draft *Land Market Practitioners Act* for Tanzania requires a person who wishes to be registered as an estate agent to be a citizen of Tanzania. Under section 32(1), a person who wishes to be registered as a land broker must be a citizen of Tanzania.

There is a precedent, then, for restricting the practice of estate agency to citizens. Interestingly, however, several estate agency firms owned by Kenyans are trading in Uganda.

A Right of Establishment¹¹⁶ for East Africans is prescribed under Chapter Seventeen (*Free Movement of Persons, Labour, Services, Right of Establishment and Residence*) of the *East African Community Treaty*. In Article 104 (Scope of Co-operation) the Partner States agree to adopt measures to achieve the free movement of persons, labour and services and to ensure the enjoyment of the right of establishment and residence of their citizens within the Community. In Article 104(2), the Partner States agree to conclude a Protocol on the Free Movement of Persons, Labour, Services and Right of Establishment and Residence at a time to be determined by the Council¹¹⁷.

If we were to be guided by European Union Law, where community jurisprudence has been actively developed, the right of establishment would:

- allow all citizens of the Community the right to move and reside freely within the territory of Member States, subject to the limitations and conditions laid down in the Treaty establishing the Community; and
- include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings.

115. Chapter 533 of the Laws of Kenya.

116. In the Ecowas Region, “*Right of Establishment*” means the right granted to a citizen who is a national of the Member State to settle or establish in another Member State other than his State of origin, and to have access to economic activities, to carry out these activities, and to set up and manage enterprises (in particular, companies) under the same conditions as defined by the legislation of the host Member State for its own nationals. Source: *Supplementary Protocol A/Sp.2/5/90 On The Implementation Of The Third Phase (Right Of Establishment) Of The Protocol On Free Movement Of Persons, Right Of Residence And Establishment*, <http://www.sec.ecowas.int/sitecedea0/english/asp020590.htm>

117. The Protocol was signed by the EAC Heads of State on 20th November 2009 in Arusha, Tanzania but is not yet in force. The Protocol will undergo the ratification process in the Partner States before entering into force on 1st July 2010. See *PRESS STATEMENT: Commencement of the East African Community Common Market Protocol*, available at <http://www.eac.int/component/content/351.html?task=view>.

We note that the Uganda *Investment Code Act*,¹¹⁸ does not prohibit the engagement by a “foreign investor” in “professional services”, but merely disqualifies foreign investors engaging in professional services from eligibility for investment incentives.¹¹⁹ The Act does not define professional services, but we can safely assume that it includes trades such as accountancy and (relevant to this Issues Paper) estate agency. The Act defines “foreign investor” to mean a person who is not a citizen of Uganda, or in the case of a company, one in which more than 50 percent of the shares are held by a person who is not a citizen of Uganda.

Also, the Ugandan *Trade (Licensing) Act*¹²⁰ deals with restrictions on trading by noncitizens in certain areas and goods (section 5). However, it applies mainly to trade in certain localities (such as outside a city, municipality or town) and to trade in specified goods which are not endorsed on the trader’s licence.

Clearly, the issue of licensing non-citizens is complex. Without engaging in a detailed discussion of all the surrounding issues, it is clear that Uganda should be able, in its estate agency legislation, to restrict the right to trade to Ugandan citizens, at least until all partner states of the East African Community harmonize their municipal legislation and enshrine in their laws a reciprocal right. In the context of the European Union, the European Commission has observed that, while freedom and right of establishment exists in principle under the EU Treaty, legal and administrative barriers remain for cross-border activities, including different requirements relating to professional regulation.¹²¹ This reflects the position in East Africa where, for example, Tanzania and Kenya have different qualifications for estate agents.¹²² Change would require a concerted effort to harmonize the internal market for services and establish mutually recognised qualifications or equivalency criteria. But the most important starting point would be the reciprocal removal of the citizenship entry barrier in all partner States.

We consider that non-citizens currently practising as estate agents in Uganda should not be licensed under the new Law, if their country of origin precludes Ugandans from practicing as estate agents. For the time being, at least, there is no risk of discrimination towards those other East African nationals whose own laws exclude Ugandans from estate agency practice on grounds of citizenship.

LRWG response to this part of earlier Draft Paper

The LRWG agreed with our views on this matter, and so our recommendation remains unchanged.

RECOMMENDATION:

118. Chapter 92, Laws of Uganda, Revised Edition, 2000.

119. Sections 22(2), 31(1)(b) and (e), and the Third Schedule.

120. Chapter 101, Laws of Uganda, Revised Edition, 2000.

121. Answer to WRITTEN QUESTION P-1519/02 given by Mr Bolkestein on behalf of the Commission, 14.11.2002, EN C277E/223, Official Journal of the European Communities.

122. In the EU, “*Right of establishment*” means that a professional established in another member state must meet the national requirements.

Only Ugandan natural or corporate citizens should be eligible to practise in the estate agency industry.

In the case of corporate citizenship, the required percentage of shareholding should be analogous to that prescribed by the *Investment Code Act*.

5.11 Salespersons

Up until now, our discussion has been limited to those who conduct real estate business as *principals* in real estate businesses. However, it would not be sufficient to regulate principals without also regulating their employees. On many occasions when consumers buy or sell property through a real estate agent, they deal with an employed salesperson rather than the principal(s) in the business.

In carrying out real estate functions, salespersons employed by real estate agents also pose risks to consumers. Salespersons take prospective buyers to inspect properties; they have physical contact with buyers and sellers, their families and their properties; they accept deposits; and they are often entrusted with the keys to a property to show it to interested buyers, often without the seller being present. All these activities justify the regulation of this class of service providers.

Ideally, transactions by salespersons should be supervised by a licensed real estate agent. But in reality this is not always possible. This lack of supervision can give rise to problems. For example, salespersons:

- may wrongly state the price or characteristics of a property;
- may have a conflict of interests with the client;
- may otherwise take advantage of their position—for example, by buying or leasing for themselves a property that their employing agent is commissioned to sell or lease;
- may practice other forms of dishonesty on buyers, sellers, landlords and tenants.

For these reasons, the licensing of salespersons should run parallel with the licensing of estate agents. For example, licensing procedures should ensure that people with a history of dishonesty do not become real estate salespersons. One way of helping to ensure this would be to require public advertising of a person's application to be a salesman. The advertising could include a notice in a daily newspaper circulating in the area in which they propose to be employed.

Likewise, salespersons should be subject to a disciplinary regime.

We would add an important qualification, however. Because of their status as employees and not principals in the business, the educational and professional requirements for salespersons should be less onerous than for real estate agents.

The draft Estate Agents Bill assumes that a salesperson is an employee of a real estate agent. It defines "salesperson" to mean a person who, as an employee, provides a real estate agent service. If a salesperson is not an employee, but an independent contractor, then the Bill treats him or her as a principal, needing a real estate agent's licence. This seems appropriate,¹²³ given that a real estate agent who uses the services of an independent contractor may be able thereby to avoid vicarious

123. *Estate Agents and their Employment Relationship to Sales Representatives*, by Kevin G Brown, School of Business Law, Curtin University of Technology, The Real Estate Industry - Volume 2, 2000. Available at <http://www.austlii.edu.au/au/journals/LegIssBus/2000/7.html>.

liability for the contractor's acts and omissions, which in turn could reduce the level of consumer protection.¹²⁴

The legal and regulatory framework relating to salespersons should require specified education and training requirements. This could be done either directly in the Act, or via regulation made under the Act. The regulatory regime should commence with minimum general education standards for salespersons currently employed in the (informal) estate agent industry – for example, that they have successfully completed the Uganda Advanced Certificate of Education. The regulatory process could also call for a minimum experience requirement, such as two years' experience with an estate agency business in the (say) 5 years before the Act came into force. Transitional provisions could require salespersons to complete a certain level of continuing professional development courses or training.

LRWG response to this part of earlier Draft Paper

The LRWG disagreed with our recommendation that salespersons (not themselves licensed as real estate agents) need not be separately licensed, as they would be employed by estate agents and therefore under the supervision and control of estate agents. The employing estate agent could be expected to regulate the activities of the salesperson; and (presumably) the agent would be responsible for a breach of the law by the salesperson. While we see the good sense of this argument, in our view the chief purpose of the law of estate agency is to protect the public—it is a consumer-protection statute. The public can be harmed by the activities of an unqualified or dishonest salesperson as much as by the activities of an unqualified or dishonest estate agent. Making the estate agent liable for the salesperson's acts does not, in our view, protect the public—except in an “after the event” manner. Also, we note that the LRWG agreed with our recommendation that salespersons should be subject to requirements of continuing professional education; but that assumes an underlying degree of professional knowledge and experience which, in our view, is best served by a licensing system that qualifies persons for admission to the occupation of salesperson.

Therefore, after serious consideration, our recommendation remains unchanged. It is reflected also in the *Draft Estate Agents Act 2010*.

RECOMMENDATIONS

The proposed Real Estate Agents Act should regulate the qualifications for salespersons, the terms of their engagement and employment, and the conduct of their duties.

The probity requirements for salespersons should be reinforced by a requirement that they publicly advertise their application for registration as a salesperson by public notice in a daily newspaper circulating in the area in which they propose to be employed.

124. *Review of the Land Agents Act 1994, Final Report* (December 1999), Government of South Australia.

6.0 THE REGULATORY REGIME: DUTIES AND OBLIGATIONS OF AN ESTATE AGENT

6.1 Common Law and fiduciary duties

At the present time in Uganda, the practice of estate agency is governed almost exclusively by the common law. That common law is the common law of England, although as time goes on the common law of Uganda may develop and differ from the common law of England. The common law is made by judges sitting in courts, applying their common sense and knowledge of legal precedent¹²⁵ to the facts before them. It is dependent on the hierarchical structure of the courts, such that a decision of a higher court binds the lower courts in the hierarchy.

Some countries regulate estate agency duties and liabilities by adopting the common law as a starting point, but then adding a layer of additional protection for consumers. Other countries attempt to codify all duties and liabilities. We favour the former approach.

Under the common law, an agent owes certain duties and responsibilities to the principal and has certain rights against the principal.

An agent's duties at common law include *fiduciary duties*. An estate agent is, at least to some extent, a *fiduciary*. A fiduciary is a person who has undertaken to act for or on behalf of another in circumstances which give rise to a relationship of trust and confidence.¹²⁶ The term "fiduciary" encompasses duties of good faith, confidence, candour and trust.

The chief duties of an estate agent at common law, stemming largely from this fiduciary relationship between agent and principal, are:

(i) *To be loyal*

Estate agents owe their clients a duty of loyalty, to avoid conflicts of interest, and to act only in their clients' interests. According to Lord Justice Millett in *Bristol & West Building Society v Mothew*,¹²⁷ the critical obligation of a fiduciary is loyalty. From this core obligation flow several other constituent duties: to act in good faith; not to make a profit out of the relationship; not to place themselves in a position where their duty and interest may conflict; and not to act for their own benefit or the benefit of a third person without the principal's informed consent.

(ii) *To avoid conflicts of interest*

Estate agents have a duty to avoid conflicts of interest. This encompasses duties:

- a). not to act for both parties on a sale and purchase—although this is commonly breached and in remote communities may be difficult to avoid;

125. A "*precedent*" is a judgment or decision of a court, normally recorded in a law report, and that is used as an authority for reaching the same decision in subsequent cases.

126. *White v Jones* [1995] 2 AC 706.

127. [1997] 2 WLR 436, [1996] 4 All ER 698; accessible via URL:
<http://www.bailii.org/ew/cases/EWCA/Civ/1996/533.html>

- b). not to make a secret profit;
- c). not to buy the client's property (or a property in which the client is interested) without the client's informed consent;
- d). not to sell his or her own property to a client;
- e). not to act for parties whose interests conflict.

A *conflict of interest* is an incompatibility between one's private interests and one's fiduciary duties. For estate agents, a conflict of interest can also arise from an incompatibility between the interests of different clients, such that the agent must not represent both clients if to do so would adversely affect either client (unless the clients give prior informed consent).¹²⁸

(iii) *Not to misuse confidential information*

Fiduciary relationships are confidential in nature. Estate agents are under a duty to preserve the confidentiality of any information that may be used to prejudice their clients' interests. In general, an agent must not disclose to a third party information concerning the principal or information entrusted to the agent by the principal, unless the principal consents. Confidential information includes any information which is not readily available to the public. Simple examples are: from a seller, the lowest price that the seller will entertain; and from a buyer, the highest price that buyer is prepared to pay. Information readily available to the public does not fall within the prohibition—such as information that is kept at government departments and is open for inspection by the public, such as the Land Registry.

In addition, an agent must not use information to his or her advantage to make secret profits. To do so is a breach of the agent's fiduciary duty to the principal.

(iv) *To disclose all personal or business conflicts of interest*

An agent must disclose all conflicts of interest, whether actual or potential, whether personal or professional.¹²⁹ Examples are conflicts between the client's interests and those of the estate agency business, or the interests of designated agents actually handling the transaction, or the interests of buyers.

Failure to fully disclose actual or potential conflicts is a breach of the agent's fiduciary duty. The principal is entitled to recover any profit the agent makes from the transaction, in addition to other remedies the principal has for an agent's breach of duty.

However, if the agent fully discloses such interests to the principal and obtains the principal's informed consent, there is no breach of duty.

128. *Black's Law Dictionary*, 7th Edition.

129. The agent's duty to avoid a conflict of interest applies regardless of whether the agent personally stands to gain, or whether his or her close relatives stand to gain.

The fiduciary obligations discussed above are ‘inflexible’ and ‘fundamental’.¹³⁰ The principal is entitled to the fiduciary’s single-minded loyalty.¹³¹

Our draft Real Estate Agents Act 2010 reflects the view that a fiduciary’s duties should not be left to the common law. Rather, they should be spelled out, so that a reader can find them on a reading of the Act, rather than having to research the common law through law textbooks or the law reports. Thus, as stated in the draft Act,¹³² the duties include:

- (a) to act in the client’s best interests;
- (b) to disclose all relevant information to a client;
- (c) not to delay the presentation of an offer or counter-offer to a client for the purpose of obtaining another offer or counter-offer;
- (d) not to accept compensation from any other party to a transaction without first obtaining the client’s written consent;
- (e) where there are multiple offers, to disclose to all potential buyers or their agents that there are multiple offers, but not to disclose to any other person the specific terms and conditions of other offers;
- (f) to disclose, at the earliest practical opportunity, any direct or indirect interest the agent may have as a result of a business or family association with a potential buyer or seller;
- (h) where an agent enters into a real estate transaction with a client, not to take advantage of the client and to ensure the transaction is fair in every respect. The estate agent must disclose the conflict of interest and, more importantly, the client must be given a reasonable opportunity to obtain independent advice.

6.2 Non-fiduciary duties of an Estate Agent

Not all duties owed by an estate agent are fiduciary duties. The most common non-fiduciary duties are:

- Duties under the law of negligence. These require providers of professional services or advice to apply a standard of care to their work that is reasonable having regard to the qualifications and expertise they purport to possess; and

130. Per Lord Herschell in *Bray v Ford* [1896] AC 44 at 51; Lord Upjohn in *Phipps v Boardman* [1967] 2 AC 46 at 123.

131. *When is a Professional Person a Fiduciary?* by David Halpern, paper given at a Chancery Bar Association seminar in February 2003, accessible at www.4newsquare.com/Files/PDF/Article/article.01.02.2003.dhalpern.doc; *The Nature of Fiduciary Liability in English Law*, by Sukhninder Panesar, Coventry Law Journal, December 2007, Vol 12 (2); *Agency Law Monograph*, Hong Kong Estate Agents Authority's (EAA); *Licensee Duties within the Real Estate Industry Regulatory Frameworks: A Review of the Obligations Owed Clients and Customers and Incidental Issues*, Canadian Regulators Group, Supplementary Paper No. 2, by William Foster, Faculty of Law, McGill University, March 2003; *Report of the Agency Task Force*, Canadian Regulators Group, June 2004; *Crypto-Fiduciary Duties*, by Justice R P Meagher, Judge of Appeal, Supreme Court of New South Wales and Adrian Maroya, <http://www.austlii.edu.au/au/journals/UNSWLJ/2003/30.html>.

132. See Part 5 — Conduct of Licensed Real Estate Agents and Registered Salespersons (Division 4 — Disclosure of interest and conflicts of interest on sale of land).

- Duties under the law of contract. These include a contractual duty to apply due skill and care.

Breach of these duties renders the agent liable to the principal. But the breach does not render the agent liable for breach of *fiduciary* duty. The distinction between fiduciary and non-fiduciary duties is illustrated by the following observation:

*“The various obligations of a fiduciary merely reflect different aspects of his core duties of loyalty and fidelity. Breach of fiduciary obligation, therefore, connotes disloyalty or infidelity. Mere incompetence is not enough. A servant who loyally does his incompetent best for his master is not unfaithful and is not guilty of a breach of fiduciary duty.”*¹³³

6.3 Obligations to consumers generally

The Consultant takes the view that, to promote a confident and vibrant land market, it is necessary not only to regulate agents’ duties towards their clients but also their duties towards consumers as a whole. Thus, we consider that it is necessary to include obligations owed to consumers generally, irrespective of whether they are clients or customers.¹³⁴ To avoid ambiguity, we describe these duties as “licensee obligations” or “licensee duties”. They relate to such matters as the standard of conduct expected of licensees, the preparation and delivery of documents,¹³⁵ the disclosure of transaction costs¹³⁶ and the handling of transaction moneys.¹³⁷ Expressed positively, these duties include:

i). ***To act fairly, honestly and with integrity.***

Estate agency regulation should provide appropriate mechanisms to ensure the integrity of the real estate transaction process. Regulation should not only promote and protect the interests of consumers, but also promote public confidence in the performance of real estate services. That is why our draft Estate Agents Act imposes entry barriers—to ensure that estate agents meet certain minimum standards, thereby helping to maintain the integrity of the profession and protect consumers from malpractice. That is also why the draft Act requires specific expertise, and why it demands integrity by means of a “fit and proper person” test. There is grave risk of fraudulent conduct in the real estate industry. Agents hold large amounts of money on trust and they deal with valuable property. For most people, property is their single biggest financial asset, and they enter a property transaction only once or twice in a lifetime. Our draft Estate Agents Act tries to address the risk of unfair, dishonest or fraudulent transactions, starting by preventing those with a history of

133. **Mothew (t/a Stapley & Co) v Bristol & West Building Society** [1997] 2 WLR 436, [1996] 4 All ER 698, accessible via URL: <http://www.bailii.org/ew/cases/EWCA/Civ/1996/533.html>

134. See for example, Part 5 — Conduct of Licensed Real Estate Agents and Registered Salespersons, (Division 4 — Disclosure of interest and conflicts of interest on sale of land), of the Draft Real Estate Agents Act, 2008.

135. See for example, section 65 Draft Estate Agents Act 2008.

136. Section 70 Draft Estate Agents Act 2008, requiring that expenses must first be provided for in the Agreement.

137. Section 94 Draft Estate Agents Act 2008 (concerning receipts), and Part 6, Division 2 (Sections 74-80) of the Draft Estate Agents Act 2008.

dishonesty from entering the industry, and ending by ejecting those who have engaged in fraudulent or other unacceptable conduct.

ii). ***To account for moneys.***

Most legislative frameworks require licensees to maintain trust accounts, pay transaction moneys into these trust accounts, and disburse moneys only to the party entitled to them. In essence, licensees are made trustees. Our draft Estate Agents Act is to the same effect.

From the duty to account follows a duty to keep proper records of the moneys received in the course of the agency and to render the accounts to the principal on request. Legislative frameworks commonly top-up this with a requirement for the estate agent to periodically submit accounting records for audit. Our draft Act is to the same effect.¹³⁸

iii). ***To avoid errors and refrain from misrepresentation, etc.***¹³⁹

(a) *Errors and inaccurate information*

Estate agents furnish prospective purchasers with essential information about properties. That information may include details of tenure, term of lease, age of building, size of property, permitted use, and the status of any encumbrances. Estate agents need to take care that the information is adequate and correct. In legal terms, they must exercise reasonable care and skill to ensure the accuracy of information conveyed to customers.

According to a Canadian treatise on estate agency practice,¹⁴⁰ a reasonable estate agent will verify the accuracy of information that is to be used to market a property, particularly where there is reasonable cause to doubt its accuracy or where the information is of particular importance in the transaction.

In Hong Kong, the Estate Agent's Authority (EAA) encourages estate agents to do a Land Registry search for the properties they handle and to provide prospective buyers with basic information in writing about the property. The EAA produces instructional material for teaching agents the techniques of property searches,¹⁴¹ as well as a

138. See section 77-84 of the Draft Estate Agents Act 2008. The Kenyan act provides for the Minister to make subsidiary legislation regarding audit, while the South African *Estate Agency Affairs Act* also contains rigorous provisions (enforced by the Estate Agency Affairs Board) on audit of estate agency records.

139. See for example, section 63 Draft Estate Agents Act 2008, prohibiting *False representations to sellers or buyers* and section 65 outlawing *False or misleading advertisements*.

140. *Agency Law and Real Estate Brokerage: Current Issues. A Review of the Case Law and Some Industry Practices*, Canadian Regulators Group, Supplementary Paper No. 2, by Prof. William Foster, Faculty of Law, McGill University, January 2003.

141. Part 4: *Introduction to Land Registration, Land Search and Property-related Information Systems*, Hong Kong Estate Agents Authority, *A Study Guide to Estate Agency Law and Practice*, July 2007. <http://www.eaa.org.hk/publications.htm>; http://www.eaa.org.hk/development/doc/course_content.pdf

dedicated form¹⁴² for imparting particular property information. This helps avoid later contractual problems.

(b) *Misrepresentation*

Misrepresentation is one of the most common complaints received by estate agency governance bodies.¹⁴³ Usually a remedy is available at common law or under statute. Most major common law jurisdictions have dedicated misrepresentation laws, in addition to a layer of consumer protection law. For example, the United Kingdom has a *Property Misdescription Act*, with criminal sanctions; and all the Australian jurisdictions have legislation outlawing misrepresentation in trade or commerce.

Uganda has no substantive consumer protection legislation. However, Chapter XXIX—False Pretences—of the *Uganda Penal Code Act* provides in section 310:

“310. *Frauds on sale or mortgage of property.*

Any person who, being a seller or mortgagor of any property, or being the advocate or agent of any such seller or mortgagor, with intent to induce the purchaser or mortgagee to accept the title offered or produced to him or her, and with intent to defraud—

- (a) *conceals from the purchaser or mortgagee any instrument material to the title or any incumbrance;*
- (b) *falsifies any pedigree on which the title depends or may depend; or*
- (c) *makes any false statement as to the title offered or conceals any fact material to the title,*

commits a misdemeanour and is liable to imprisonment for two years.”

However, the enforcement of penal provisions of this kind is the province of the police and public prosecutors, who may not exercise sufficient diligence or vigilance in prosecuting offenders. Also, even if the offenders are punished, victims may not recover their loss, as the proceedings are criminal, not civil.

Civil remedies for misrepresentation offer a better remedy for the victim. In many cases, damages will be appropriate; in others, rescission of the contract. For a purchaser, the loss from the misrepresentation may be substantial, as where the purchaser has paid a higher price for the property than he or she otherwise would have offered; or where the misrepresentation has induced the purchaser to buy the property with a particular use in mind, and that use is in fact not possible.

142. *Property Information Form - Form 1*, for use in the sale and purchase of residential properties in Hong Kong. The Form is prescribed by the Estate Agents Authority in accordance with the *Hong Kong Estate Agents Ordinance*. Part 1 of the Form is completed by the licensed estate agent and Part 2 is completed by the vendor or the licensed estate agent.

143. *Report of the Working Group on Regulation of Estate Agents* (Consultative Document), Planning, Environment and Lands Branch, August 1994, Hong Kong.

For a vendor, the consequences of misrepresentation may be even worse. A misrepresentation made by the agent to induce the purchaser to enter the contract may render that contract voidable. A vendor, who believes that he or she had sold the property, may find that the contract is set aside. Moreover, that vendor may have purchased another property, in the expectation of using the proceeds of the sale; if the sale is set aside, the vendor may be in a dire financial situation. The vendor could be liable for two sets of mortgage payments while searching for a new purchaser to buy the property. In some situations, it may be difficult for the vendor to find a purchaser within a reasonable time or on similar terms as the initial contract.

But even civil remedies are worthless unless they are enforced in court, and court action takes time and money. A person disadvantaged by an estate agent's misrepresentation may not have the funds or the ability to pursue the agent through the courts. In addition, rights against the agent may not be able to be disentangled from the property transaction, adding complexity to any action against the agent. And so a better option would be to regulate the practice of estate agents in ways that are likely to reduce the incidence of misrepresentation. That is what the Draft Estate Agents Act tries to do.

In the Draft Real estate Agents Act 2010, the following provisions are proposed to reduce the incidence of misrepresentation:

- Agents and salespersons must not make false representations about their estimate of the selling price of land (sections 63, 64).
- Regulations may require agents or salespersons to provide specified information to buyers about the land (section 65).
- Agents and salespersons must not publish false or misleading advertisements about properties (section 67).
- Agents and salespersons must not "lend" their licenses or registrations to others (sections 68, 69).

6.4 Duties/Obligations with regard to the Agency Agreement

International best practice leans towards prescribing the form and minimum requirements of agency agreements.¹⁴⁴ The key reason is that consumers should have the agent's duties, and their own rights and obligations, clearly stated in writing at the time the agent is commissioned to act. Clear statements of the duties and rights are important. An example is the need to distinguish between 'general' agencies (where the seller chooses several different agents to sell the house) and

144. See for example section 133 of the *Property Agents and Motor Vehicle Dealers Act* 2000 (Queensland); section 24 of the *Auctioneers and Real Estate Agents Act* 1991 (Tasmania); section 49A *Estate Agents Act* 1980 (Victoria); section 60 *Real Estate and Business Agents Act* 1978 (Western Australia). In Canada, the jurisdictions of Nova Scotia and Saskatchewan also have this requirement. The United Kingdom does not.

‘exclusive’ or ‘sole’ agencies (where the seller chooses only one agent to sell the house).¹⁴⁵ A clear agreement also reduces the possibility of arguments over the scope the agency agreement, including disputes over the extent of the agent’s authority.

The following are common provisions prescribed by legislation for agency agreements:

- the need for the agreement to be in writing;
- the service the agent will provide and how the agent will provide it;
- the likely fees and commission;
- the likely advertising costs and other expenses;
- any rebates or commissions agents may receive for expenses they incur.

Part 6 of the Draft Estate Agents Act reflects these requirements. In this it is similar to clause 42 of the draft Tanzania Bill,¹⁴⁶ in particular in its requirement that estate agents furnish information on prospective liabilities. This helps sellers understand the service they will receive and how much it will cost.

Under our draft Real Estate Agents Act, the agency agreement must be in writing, setting out the relevant information. Without a written agreement, the agent cannot recover commission.¹⁴⁷

6.4 General aspects of Agent’s duty

We conclude this discussion with a brief outline of several other aspects of an agent’s rights and duties. In our view, these are so well established at common law that express provision in the Draft Estate Agents Act 2010 is unnecessary.

- *Duty and Standard of Care*

Estate agents owe clients a duty of care. They must exercise their profession in accordance with standards that have their basis in sound industry practice. The standard of care is an objective one – that of the “reasonable” or “prudent” estate agent. That standard applies to all agents; but, additionally, a higher standard is expected of those who possess or purport to possess special expertise.

- *Vicarious Liability*¹⁴⁸

Estate agency principals are vicariously liable for the misconduct of their employees. They are also responsible for running the real estate agency business and supervising any salespeople who

145. *Renovating the Real Estate Agents Act: Reasonable Offers Considered, A Public Discussion Paper*, published by the Ministry of Justice, Wellington, New Zealand, www.justice.govt.nz, ISBN 0-478-20183-4.

146. According to the Tanzania Draft Bill for a *Land Market Practitioners Act* 2005, it is important that clients should know what they are letting themselves in for when they engage an agent to undertake estate agency work on their behalf. However, the Tanzania Bill does not require a written agreement.

147. Section 70 of the Draft Real Estate Agents Act 2010.

148. Liability that a supervising party, such as an employer, bears for the actionable conduct of its subordinate (such as its employee) because of the relationship between the two parties.

work for them. In international practice, the trend is for the legislative framework to prescribe the specific responsibilities and liabilities for salespersons.

- *Agent's rights against principal*

The estate agent has certain rights against the client (the principal) and the client has certain obligations to the agent. These rights and obligations include:

- *Right to remuneration*
An agent is entitled to remuneration for the services performed as an agent if the terms of the agency agreement so provide.
- *Perform specific obligations in agency agreement*
The principal (that is, the client) must perform those obligations which the agency agreement imposes on the principal.
- *Right to reimbursement and indemnity*
Generally speaking, an agent has a right to be reimbursed by the principal for expenses and to be indemnified against losses and liabilities incurred in the performance of his or her duties to the principal. To curb possible abuse of this right to reimbursement, statutes often require that the agreement set out an estimate of the possible expenses.

6.5 Regulatory aspects of Conduct of Estate Agency Business

In our view, other aspects of the real estate industry need regulating if Uganda is to develop a vibrant and effective land market. These relate specifically to the way that agents conduct their business. In particular, it is necessary to:

- *Regulate the keeping of trust accounts and other moneys.* Our Draft Real Estate Agents Act 2010 contains important provisions in this regard. Under Part 7, estate agents must keep trust accounts (sections 73, 74). Trust moneys must be used only for the purposes for which they are held (section 75). Agents must prepare quarterly statements of their trust account balances (section 77) and must notify the Real Estate Agents Commissioner (or similar official) if trust funds are overdrawn (section 76). Trust funds must be audited each year (sections 78-83). Part 7 also provides a mechanism for disbursing unclaimed trust moneys, via the public trustee's office (sections 84-91).
- *Require proper record-keeping.* Our Draft Act also deals with these matters. Under Part 8, agents must keep proper records of all transactions (sections 92, 93). They must give receipts for trusts moneys received (section 94). Importantly, the Commissioner can "freeze" trust accounts, where he or she considers that trust moneys are at risk of being, or have been, stolen, misappropriated or misapplied (section 96).
- *Provide financial protection for consumers, if estate agents encounter financial difficulties or have their licences revoked.* Here too our Draft Act provides for such events. Part 9 (sections 102-106) provides for the appointment of administrators to the business of licensed

real estate agents. The appointment is made by the Commissioner (sections 103, 104). The administrator must carry out the agent's obligations under the Act (section 105).

- *Provide a complaints procedure* to accept and adjudicate on complaints about estate agents' conduct. We have already mentioned this.

In a modern economy, it is also necessary to allow for investment in real estate businesses by “sleeping partners”, who may part-own a real estate business without personally practising as an estate agent. Such persons should not need a licence, as long as they do not participate in the day-to-day running of the business (in which case, a licence would be required). This is covered by Part 2 of the Draft Act. Under section 7, “passive” or “sleeping” partners in real estate businesses do not need to be licensed. Thus, for example, a partner who supplies “equity” for carrying on a real estate business, but does not personally act as an agent, is not required to have a real estate agent's licence.

6.6 Business licensing

In some jurisdictions, including in Uganda, a business cannot be carried on without a business licence. This applies to estate agency businesses. We do not propose changing this. It adds a further layer of bureaucracy to an estate agency business; but it is no more onerous than the registration requirements for businesses in general. Business licensing of this kind is intended to ensure the proper regulation of prescribed businesses and, in doing so, to protect members of the public who use those businesses and their products or services. This is compatible with the general thrust of our recommendations, which is to promote a legitimate, safe and sustainable real estate industry—one that serves consumers, ensures standards and contributes to the economy.

In Uganda, the business licensing of estate agents has been in force for many years. Section 8 of the *Trade (Licensing) Act*, Chapter 101, Laws of Uganda 2000, prohibits trading in or carrying on any business specified in the Schedule to the Act, without a trading licence. The Act then goes on to prescribe in part C of the Schedule the *License Fees for Estate Agents* as follows:-

- Land and estate agent — — — 50,000.00

Estate agents are also required to register with the Uganda Revenue Authority for the purpose of Value Added Tax. The *Value Added Tax (Amendment) Act* 2002 requires an estate agent to register to pay Value Added Tax. None of this, in our view, requires change.

6.7 Regulation of Property Developers

To conclude: it might be suggested that regulation should extend to others in the land market, particularly property developers. Developers engage in practices of a real estate nature and their activities are inherently part of the real estate market. Therefore, as with estate agents, it might be argued that their activities need regulating to provide protection for consumers. For example, regulation might include such matters as:

- requiring approved subdivision and/or development plans before developers can sell subdivided lots;

- subdivision and physical planning of estates;
- selling property off-the-plan;
- assurance of title for subdivided lots and off-the-plan purchases;
- sunrise and sunset obligations;
- handling and use of purchaser's deposits for purchases off-the-plan;
- barring property developers from real estate agency services, save for direct matches;
- outlawing misrepresentation by property developers;
- creating a framework for mortgage finance for off-the-plan purchases.

However, we make no recommendations in relation to such matters. The regulation of developers involves far-reaching issues—issues that go far beyond the scope of our Terms of Reference. We simply take the opportunity here to note that at a future time the Government may wish to investigate the issues.

LRWG response to this part of earlier Draft Paper

The LRWG made no comments on the foregoing sections of the Paper, in its earlier form, and so we have left our discussion basically unchanged.

Final comments of LRWG

The LRWG made the following three comments at the end of their discussion of the earlier version of the Paper:

1. Real Estate Agency should clearly be defined in the context of Uganda.
2. Qualifications should be emphasized.
3. That the discussion is futile until the consultants comes up with clear definition of real estate.

With regard to comment (1): we hope that our Final Draft Issues Paper sufficiently covers this concern. We have been careful to examine the Ugandan context in considerable detail; in addition, we have in many places also compared the Ugandan position with the position in other countries, so as to make our examination of the Ugandan position as up-to-date and useful as possible.

With regard to comment (2): we have in fact given detailed consideration to the question of qualifications. This includes the nature of required entry qualifications; the educational opportunities available to obtain those qualifications; the need for continuing education to ensure that estate agents are kept up-to-date.

With regard to comment (3): it is true that our Paper does not attempt to define “real estate”. That is a topic that has filled whole law books. However, we presume that the reason for the

LRWG's concern is that any scheme for regulating estate agents must try to define the ambit of its operation. We have in fact attempted to do this in our draft *Estate Agents Act 2010*. That Act is drafted to regulate the provision of "real estate services". Section 6(2) defines "real estate service" as follows:

6(2) Each of the following is a real estate agent service:

- (a) buying, selling, exchanging, leasing, assigning or otherwise disposing of land;
- (b) negotiating with, or inducing or attempting to induce, a person to:

- (i) buy, sell, exchange, lease, assign or otherwise dispose of land; or

- (ii) enter into, or make or accept an offer to enter into, a contract to buy, sell, exchange, lease, assign or otherwise dispose of land;

- (iii) provide any other service prescribed by regulation for the purposes of this section.

We trust this answers the LRWG's concerns on this issue.

BIBLIOGRAPHY

1. *Project Appraisal Document on a Proposed Credit to the Government of Uganda for a Second Private Sector Competitiveness Project*, The World Bank, Private Sector Unit, Africa Region, July 2, 2004.
2. *The Importance of Land Administration in the Development of Land Markets - A Global Perspective*, by Peter Dale, Department of Geomatic Engineering, University College London, England, in *Land Markets and Land Consolidation in Central Europe IV*, © TU Delft - UDMS 2000.
3. John W. Bruce, Renee Giovarelli and others, "*Land Law Reform: Achieving Development Policy Objectives*", The World Bank, Legal Vice-Presidency, 2006;
4. *The Distributive Impact of Land Markets in Central Uganda*, by Jean-Marie Baland, Frederic Gaspart, Frank Place and Jean-Philippe Platteau, December 2000.
5. *Reforming Land and Real Estate Markets*, Volume 1, by Galal, Ahmed; Razzaz, Omar; Policy, Research Working Paper No. WPS2616, The World Bank, Private Provision of Public Services Group, Private Sector Advisory Services, June 2001, downloadable from Permanent URL: <http://go.worldbank.org/A6S3N09PZ0>.
6. *The Effects of Land Registration on Financial Development and Economic Growth – A Theoretical and Conceptual Framework*, by Dr. Frank Byamugisha, World Bank Policy Research Working Paper 2240, November 1999, downloadable from the World bank Website via: <http://go.worldbank.org/9WCMGWLNK0>.
7. *The Benefits of Land Registration and Titling: Economic and Social Perspectives*, by Gershon Feder and Akihiko Nishio, World Bank, Paper published in *Land Use Policy*, Vol, 15, No.1, pp.25-43, 1998.
8. *Comparative Analysis of Land Administration Systems*, Global Synthesis of Critical Issues and Future Challenges, Version: 19 March 2003, Report prepared for the World Bank by Tony Burns, Chris Grant, Anne-Marie Brits and Kevin Nettle of Land Equity International Pty Ltd under a contract with the World Bank, March 2003.
9. *Comparative Analysis of Land Administration Systems, Asia Regional Paper With special reference to Thailand, Indonesia and Karnataka (India)*, by Anne-Marie Brits, Chris Grant and Tony Burns of Land Equity International Pty Ltd.
10. *Land Administration Reform - Indicators of Success, Future Challenges*, Land Equity International, October 2006 at p.165.
11. *The Case for Refocusing & Re-Engineering Land administration to better meet Contemporary and Future Needs in Property Rights and Markets*, by Dr Ken Lyons, Ed Cottrell, and Kevin Davies, Presented at the Joint AURISA and Institution of Surveyors Conference, Adelaide, South Australia, 25 – 30 November 2002.

12. *The Land Sector Analysis: Land Market, Land Consolidation, and Land Re-Adjustment Component*, by Rose Mwebaza and Richard Gaynor, Rural Development Institute/Government of the Republic of Uganda, February 2002, GRANT NO. PHRD/02/04.
13. *Key Note: Impact of Land Policies and Legislation on the Land Market*, by Ninel Jasmine Sadjadi, Project Manager Research, Center of Legal Competence (CLC), Vienna, FAO Regional Workshop, Development of Land Markets and Related Institutions in Countries of Central and Eastern Europe (Topic B: Legal framework and support policies to develop land markets), Nitra, May 6-7 2005.
<http://www.fao.org/regional/seur/events/landmark/docs/sadjadi.pdf>
14. *Research on Land Markets in South Asia: What Have We Learned?* by Rashid Faruquee and Kevin Carey, POLICY RESEARCH WORKING PAPER No. 1754 (WPS 1754), The World Bank, South Asia, Country Department I, Agricultural and Natural Resources Division April 1997.
15. *The Role and Function of Urban Land Markets in Market Economies* by David E. Dowall, Professor of City and Regional Planning, University of California at Berkeley; presented at Workshop on Privatization of Land in Ukraine Sponsored by Ministry of Construction and Architecture, State Committee on Land Resources, and United States Agency for International Development Kiev, Ukraine, May 12-14, 1993.
16. *World Bank Support for Land-Related Projects in Developing Countries- Experiences and Implications for International Cooperation*, by Frank Byamugisha & Wael Zakout, Rural Development and Natural Resources Sector Unit, East Asia and Pacific Region, The World Bank, Paper Prepared for the UN Regional Cartographic Conference for Asia and the Pacific (UNRCC-AP), with a Conference Theme on Sustainable Development Kuala Lumpur, Malaysia, April 11-14, 2000.
17. *The Role and Function of Urban Land Markets in Market Economies* by David E. Dowall, presented at Workshop on Privatization of Land in Ukraine Kiev, Ukraine, May 12-14, 1993.
18. *Building Land Markets*, by Jude Wallace and Ian Williamson, Department of Geomatics, The University of Melbourne, Australia, July 2004.
19. *Regulatory Policies and Reform: The Case of Land Markets*, by Antonio Salazar P. Brandao and Gershon Feder, Private Sector Development Department Occasional Paper No. 15, (PSD Occasional Paper No. 15), The World Bank, January 1996.
20. *Review of the Status of Land Information Systems: Status Report, Version 1.0*, by SIVEST, GoU/MWLE, Date: 8th September 2003.
21. *A Diagnostic Checklist for Land Markets*,
siteresources.worldbank.org/INTEXPCOMNET/Resources/Industry_Checklist_-_Land_Market.doc

22. *Land Management Information Systems in the Knowledge Economy: Discussion and Guiding Principles for Africa*, Document ECA/ISTD/GEO/2007/01E, Economic Commission for Africa, Addis Ababa, Ethiopia, December 2007.
23. *Emerging Market Economies and Government Promotion of Securitization* by Douglas Arner, 12 *Duke J. of Comp. & Int'l L.* 505.
24. *Good Governance in Land Administration*, by Keith Clifford Bell, FIG Working Week, Hong Kong, China SAR, May 13-17, 2007 (Plenary Session III – Responding to the Global Agenda – Policies and Technical Aspects). Available at: www.fig.net
25. *Towards Effective Pro-poor Tools for Land administration in Sub-Saharan Africa*, by Paul van Asperen and Jaap Zevenbergen, TS 35 – Informal Settlements: Policy, Land Use and Tenure, XXIII FIG Congress, Munich, Germany, October 8-13, 2006.
26. *Guidelines for the Improvement of Land-Registration and Land- Information Systems in Developing Countries*, (with special reference to English-speaking countries in Eastern, Central and Southern Africa), United Nations Centre for Human Settlement (HABITAT), Nairobi, 1990.
27. *Securing and Upgrading the Land Registry and Implementation of a Land Information System in Uganda - Baseline Evaluation Report*, Geo-Information Communication Ltd/MLHUD, Kampala, Uganda – May, 2007.
28. *International Experience with Land Administration Projects: a Framework for Monitoring of Pilots*, by Tony Burns, Land Equity International Pty Ltd, Australia. Paper presented at the National Workshop on Land Policies and Administration for Accelerated Growth and Poverty Reduction in the 21st Century (Jan 5-6, 2006, New Delhi, India).
29. *Sustainable Development and Land Administration Infrastructure Reforms: the Role of Markets and Land Valuation Systems – Agenda for Change?* by Paul Munro-Faure, FIG Commission 7, Cadastre and Land Management,
30. *Creation of Land Markets in Transition Countries - Implications for the Institutions of Land Administration*, by J. David Stanfield, Land Tenure Center, University of Wisconsin-Madison.
31. Enemark, S. and Ahene, R. (2003): *Capacity Building in Land Management – Implementing Land Policy Reforms in Malawi*. *Survey Review*, Vol. 37, No 287, pp 20-30.
32. OFT693c, March 2004: www.oft.gov.uk
33. *The Intricacies of Land Markets - Why the World Bank Succeeds in Economic Reform through Land Registration and Tenure*, by Gershon Feder.
34. *Workshop on Land Markets: Report prepared by the delegation of Hungary in cooperation with the secretariat*, UN Economic Commission For Europe, Committee On Human Settlements, HBP/1999/1, 23 April 1999.

35. *Report – Commission 7 Working Group 3 on Land Markets Activities 1998-2002*, Jan Sonnenberg and András Osskó.
36. *Land Reform - The Ugandan Experience*, by Margaret Rugadya, Program Officer, Uganda Land Alliance.
37. *World Development Report 2002 (Full Report)*, available at http://www.wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2001/10/05/000094946_01092204010635/Rendered/PDF/multi0page.pdf.
38. www.reiv.com.au/openaccess/eac_allenconsulting.pdf
39. *Enforcement of Property Rights—Comparative Analysis of Institutions Reducing Transaction Costs in Real Estate*, Bergh, R.J. Van den (2006).
40. *Improving Competition in Real Estate Transactions*, proceedings of a Roundtable on Improving Competition in Real Estate Transactions, held by the Competition Committee of the Organisation for Economic Co-operation and Development, Document No. DAF/COMP (2007) 36, 08-Jan-2008.
41. http://www.dtf.wa.gov.au/cms/uploadedFiles/FinalReport_30August%20with%20letter%20of%20transmital.pdf
42. *Issues Paper: Harmonisation of Estate Agent Regulation*, Prepared for Consumer Affairs Victoria by Jaguar Consulting Pty Ltd/ Learning Australia Pty Ltd, July 2004.
43. *Licensing of Estate Agents, Submission to the Estate Agents Council*, The Allen Consulting Group, 6 March 2006, www.reiv.com.au/openaccess/eac_allenconsulting.pdf
44. *Towards Efficient Self-Regulation in Markets for Professional Services*, by Roger Van den Bergh, Erasmus University Rotterdam and University of Bologna, European University Institute, *European Competition Law Annual 2004*.
45. *Occupational Regulation*, by Professor Allan Fels, and David Parker, Blair Comley and Vishal Beri, APEC Regulatory Reform Symposium, Ministry of Commerce, New Zealand/Government of Malaysia/The APEC Committee on Trade & Investment, Kuantan, Malaysia, 5-6 September 1998.
46. Department of Justice, *NCP Review of Legal Practitioners Bill*, 20 May 2004.
47. *Annexure C of Estate Agency Market in England and Wales: International Comparisons*, Office of fair Trading, United Kingdom, March 2004, Document No. OFT693c .
48. *Criteria for an Economic Analysis of the Latin Notary Profession*, by Prof. Dr Roger Van den Bergh, Professor of Law and Economics at the Erasmus University of Rotterdam, Visiting Professor of Law and Economics at the University of Bologna.

49. *Renovating the Real Estate Agents Act: Reasonable Offers Considered*, A Public Discussion Paper, Ministry of justice of New Zealand, August 2003.
50. *Models of Self Regulation: An Overview of Models in Business and the Professions*.
51. *Licensing of Estate Agents - Submission to the Estate Agents Council* (of Victoria), The Allen Consulting Group 2006, p.3.
52. *General Principles and Issues of Occupational Regulation*, by A P Moore, University of Adelaide, South Australia and A A Farr, Professor of Law, Bond University, Queensland, (1989) 1 Bond L R 119.
53. *Consumers, Estate Agents and Redress Bill [HL]*, Bill 61 of 2006-7, United Kingdom.
54. *Securing and Upgrading the Land Registry and Implementation of A Land Information System in Uganda: The Baseline Evaluation Report*, Final Draft v.1.1, Geo-Information Communication Ltd/ Ministry of Land, Housing and Urban Development, Kampala, Uganda, May, 2007.
55. *Market and Institutional Determinants in the Regulation of Conveyancers* by Benito ARRUÑADA, Department of Economics and Business, Universitat Pompeu Fabra. Barcelona, Spain.
56. *Reforming Land Tenure In Tanzania: For Whose Benefit?*, By William Olenasha, accessible at www.hakiardhi.org/reports.htm.
57. *Land Administration in the UNECE Region: Development Trends and Main Principles*, ECE/HBP/140, United Nations, Economic Commission for Europe, Geneva, 2005.
58. *Key Note: Impact of Land Policies and Legislation on the Land Market*, by Ninel Jasmine Sadjadi, Project Manager Research, Center of Legal Competence (CLC), Vienna, FAO Regional Workshop, Development of Land Markets and Related Institutions in Countries of Central and Eastern Europe (Topic B: Legal framework and support policies to develop land markets), Nitra, May 6-7 2005.
<http://www.fao.org/regional/seur/events/landmark/docs/sadjadi.pdf>
59. *Thinking outside the Triangle – Taking Advantage of Modern Land Markets*, by Ian Williamson, Centre for Spatial Data Infrastructures and Land Administration, The University of Melbourne.
60. *Developing Cadastres to Service Complex Property Markets*, by Jude Wallace and Ian Williamson, Australia.
61. *Overcoming Gender Biases in Established and Transitional Property Rights Systems*, by Renee Giovarelli, and *A Framework for Land Market Law with the Poor in Mind*, by Leonard Rolfes, Jr., both in John W. Bruce, Renee Giovarelli and others, “*Land Law Reform: Achieving Development Policy Objectives*” The World Bank, Legal Vice-

- Presidency, 2006; sections 31 and 39 *Land Act*, Cap. 227, Laws of Uganda, Revised Edition, 2000.
62. *A Concept for a National Land Information System in Uganda*, Swedesurvey, at p.44 (65); LIS Baseline Evaluation Report – Final Report – May 2007; *Land Sector Strategic Plan 2001-2011* (4.9 Women And Vulnerable Groups – Actions).
 63. *Multilingual Thesaurus on Land Tenure*, FAO, 2003.
 64. *Improving Competition in Real Estate Transactions 2007*, Organisation for Economic Co-operation and Development (OECD), DAF/COMP (2007) 36.
 65. *Land Markets and the Modern Economy*, by Peter Dale, Robert Mahoney, Robin McLaren, RICS Christmas Lecture, University College London, December 2007, available via www.rics.org and www.fig.net.
 66. *Development of a Cadastral and Land Management Model for Existing Informal Land Rights in South Africa*, by Mark van den Berg and Peter Hoffmann, South Africa.
 67. *The New Land Act and Its Possible Impacts on Urban Land in Tanzania*, by J.M. Lusugga Kironde, © 2003 Lincoln Institute of Land Policy, Conference Paper, Lincoln Institute Product Code: CP98A08 O.
 68. *Property Rights, Land Markets, and Poverty in Namibia's 'Extra-Legal' Settlements: An Institutional Approach*, by Manya M. Mooya and Chris E. Cloete, Global Urban Development Volume 3 Issue 1, November 2007.
 69. *Poverty Eradication Action Plan (2004/5-2007/8)*, Ministry of Finance, Planning and Economic Development.
 70. *Guidelines on Real Property Units and Identifiers*, Economic Commission for Europe, Geneva, 2004.
 71. *Agriculture Investment Sourcebook* (Module 10: Investments in Land Administration, Policy, and Markets), May 2006, available from www.worldbank.org/agsourcebook.
 72. *Report of the Workshop on Land Tenure and Cadastral Infrastructures for Sustainable Development*, 18 - 22 October 1999, Bathurst Australia, Final Edition, <http://www.geom.unimelb.edu.au/UNConf99/>
 73. *Land Administration Reform: Economic Rationale and Social Considerations*, by Gershon Feder, The World Bank, Presented at the UN-FIG Conference on Land Tenure and Cadastral Infrastructures for Sustainable Development, Melbourne, Australia, 25-27 October 1999.
 74. *Regulatory Policies and Reform: The Case of Land Markets*, by Antonio Salazar, P. Brandao, and Gershon Feder, The World Bank, Private Sector Development Department, PSD Occasional Paper No. 15, January 1996, p.22.

75. Hernando de Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (Basic Books, 2002).
76. The World Bank's view on Land Markets, in *Question & Answer on Land Issues at the World Bank*, accessible at:
<http://lnweb18.worldbank.org/ESSD/ardext.nsf/PrintFriendly/99D70AAF3D039DAF85256D5E00621DAE?Opendocument#view> .
77. *World Development Report 2002 - Building Institutions for Markets*, published by the World Bank.
78. *Land Policies for Growth and Poverty Reduction, Volume 1*, A World Bank Policy Research Report, by Klaus Deininger, co-published by the World Bank and Oxford University Press, ISBN 0-8213-5071-4, 2003.
79. *Unlocking Dead Capital: How Reforming Collateral Laws Improves Access to Finance*, by Mehnaz Safavian, Heywood Fleisig, and Jevgenijs Steinbuks, The World Bank Group, Private Sector Development Vice Presidency, March 2006.
80. *Reforming Land and Real Estate Markets*, by Ahmed Galal and Omar Razzaz, World Bank.
81. John W. Bruce, Renee Giovarelli and others, *Land Law Reform: Achieving Development Policy Objectives*, The World Bank, Legal Vice-Presidency, 2006.
82. *Making Urban Land Markets Work for the Poor: Policy, Practice and Possibility*, by Manya M. Mooya and Chris E. Cloete.
83. *Land Sector Strategic Plan 2001-2011: Utilizing Uganda's Land Resources For Sustainable Development*.
84. *Land Administration Guidelines: With Special Reference to Countries in Transition*, Publication ECE/HBP/96, United Nations, Economic Commission for Europe (UNECE), Geneva, 1996, p.14.
85. *Land Administration in the UNECE Region: Development Trends and Main Principles*, Publication ECE/HBP/140, United Nations, Economic Commission for Europe (UNECE), Geneva, 2005.
86. *Building Land Markets*, by Jude Wallace and Ian Williamson, Department of Geomatics, The University of Melbourne, Australia, July 2004.
87. *The Importance of Land Administration in the Development of Land Markets - A Global Perspective*, by Peter Dale, Department of Geomatic Engineering, University College London, England, Land Markets and Land Consolidation in Central Europe IV, © TU Delft - UDMS 2000.

88. *Draft Report - Consultancy for Drafting a Bill to regulate the Practice of the Real Estate Agency for Facilitation of the Operation of the Land Market in Tanzania*, Business Environment Strengthening for Tanzania (BEST) Programme, Dar-es-Salaam.
89. *The Regulatory Review: Issue 3 - April 2005*, Ministry of Economic Development of New Zealand, http://www.med.govt.nz/templates/MultipageDocumentTOC_26681.aspx
90. *Study Report on Selected Trade Laws - Consumer Protection Law*, Uganda Law Reform Commission. (Law Com Pub. No. 27 of 2004). Accessible at:
<http://www.ulrc.go.ug/rep&pubs/studyReps/Consumer%20Protection%20law%20body.pdf>
91. *Competition and Consumer Protection Scenario in Uganda*, CUTS Centre for Competition, Investment & Economic Regulation D-217, Bhaskar Marg, Bani Park, Jaipur 302 016, India/ Consumer Education Trust, Desai House, Plot 4 Parliament Avenue, GPO Box 1433, Kampala, Uganda: accessible at
siteresources.worldbank.org/INTCOMPLEGALDB/Resources/UgandaMonograph.pdf
92. *Policy Framework for Occupational Regulation: A Guide for Government Agencies Involved in Regulating Occupations*. Accessible at:
<http://www.med.govt.nz/templates/MultipageDocumentTOC9112.aspx>
93. *Deep Information: The Role of Information Policy in Environmental Sustainability*, by John Felleman, Peter Hernon, *Political Science* – 1997.
94. *The Benefits of Land Registration and Titling: Economic and Social Perspectives*, by Gershon Feder and Akihiko Nishio, World Bank, Paper published in Land Use Policy, Vol, 15, No.1, pp.25-43, 1998.
95. *The Effects of Land Registration on Financial Development and Economic Growth – A Theoretical and Conceptual Framework*, by Frank Byamugisha, World Bank Policy Research Working Paper 2240, November 1999.
96. *Asymmetric Information and Market Failure*, by John Sloman, Economics Network, University of Bristol, UK.
97. *Market Failure and the Objectives of Regulation: Review of the Property, Stock and Business Agents Act 2002*,
<http://www.fairtrading.nsw.gov.au/About us/Legislation/Comment on proposed legislation/Market failure and the objectives of regulation.html>
98. *Theory and Evidence on the Regulation of the Latin Notary Profession, A Law and Economics Approach*, ECRi-report 0604, June 2006, by Prof. Dr. Roger Van den Bergh.
99. *Towards Efficient Self-Regulation in Markets for Professional Services; The Regulation of Conveyancing Services in Victoria*, Final Report June 2005, Prepared for the Victorian Department of Justice by the Allen Consulting Group Pty Ltd.

100. West H.W. (1965), *The Mailo System in Buganda*, Government Printer, Entebbe.
101. Bosworth, J., 2002, *Country Case Study of Uganda* - World Bank Seminar.txt
102. *A submission from the Property and Environmental Law Section of the Law Institute of Victoria*, (LIV) in response to the discussion paper titled, *The Regulation of Conveyancing in Victoria*, Allen Consulting Group/Department of Justice of Victoria, Australia, 20 May 2005. At https://www.liv.asn.au/members/sections/submissions/20050520_47/index.html.
103. [http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV Publications Annual Report 2005/\\$file/AnnualReportChapter1.pdf](http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Publications_Annual_Report_2005/$file/AnnualReportChapter1.pdf).
104. *The Subprime Mortgage Crisis of 2007: Anatomy of a Market Failure*, by Kenneth A. Posner, Morgan Stanley, accessible at [http://www.ieor.columbia.edu/seminars/financialengineering/2007-2008/spring/Posner Kenneth/seminar.html](http://www.ieor.columbia.edu/seminars/financialengineering/2007-2008/spring/Posner_Kenneth/seminar.html)
105. www.igg.go.ug/docs/investigate.pdf
106. *Towards Beneficial Competition in the Legal Professions - Lessons from England-Wales and the Netherlands*, by Roger Van den Bergh, Faculty of Law, Erasmus University Rotterdam, Rotterdam.
107. The World Bank & Klaus Deininger, *Chapter Three, Land Transactions, Land Policies for Growth and Poverty Reduction*, Vol. 1, World Bank Policy Research Paper (World Bank & Oxford Univ. Press 2003).
108. *Legislative Council Brief* (Hong Kong): Estate Agents Practice (General Duties and Hong Kong Residential Properties) Regulation and Estate Agents (Determination of Commission Disputes) Regulation. See http://www.legco.gov.hk/yr98-99/english/hc/sub_leg/sc09/general/sc09_brf.pdf
109. *Discussion Paper: National Competition Policy Review of the Land Agents Act 1994 - Final Report*, Issued December 1999, Government of South Australia; see www.ocba.sa.gov.au
110. *Kenya Estate Agents (Remuneration) Rules*, 19th November, 2002.
111. *Report of the Working Group on Regulation of Estate Agents*, Hong Kong, August 1994. <http://www.cityu.edu.hk/hkhousing/pdoc/ReportofWorkingGrouponRegulationofEstate.htm#Chapter%2014>.
112. *The Government's Preferred Options for Reform of the Real Estate Agents Act 1976*, Public Consultation Document, Ministry of Justice New Zealand, ISBN 978-0-478-29037-3, www.justice.govt.nz.
113. *Consumers, Estate Agents and Redress Act*, 2007, UK.

114. *Issues Paper: Harmonisation of Estate Agent Regulation*, prepared for Consumer Affairs Victoria by Jaguar Consulting Pty Ltd with the assistance of Learning Australia Pty Ltd, July 2004.
115. *Submission on the Public Discussion Paper: "Renovating the Real Estate Agents Act – Reasonable Offers Considered"*, Consumers' Institute's submission to the Ministry of Justice, Consumers' Institute New Zealand, September 2003
116. *Financial Institutions Act*, 2004, Uganda.
117. *Land and Property Markets in Ghana*, A discussion paper prepared by the Royal Institution of Chartered Surveyors for presentation at the 2006 World Urban Forum by Callistus Mahama and Adarkwah Antwi, www.rics.org.
118. *Property Valuation in Ghana: Constraints and Contradictions*, Theodora Mantebea Mends, Promoting Land Administration and Good Governance, 5th FIG Regional Conference, Accra, Ghana, March 8-11, 2006; accessible at www.fig.net.
119. *Tanzania Moves to Implement the Law on the Land*, by Prof. Lusugga Kironde, The East African, Business Monday, January 31, 2005: accessible at <http://www.nationmedia.com/eastafrican/31012005/Business/Business1.html>
120. *Draft Report - Consultancy for Drafting a Bill to regulate the Practice of the Real Estate Agency for Facilitation of the Operation of the Land market in Tanzania*, Business Environment Strengthening for Tanzania (BEST) Programme.
121. *The Government's Preferred Options for Reform of the Real Estate Agents Act 1976*: Public Consultation Document, Published May 2007, Ministry of Justice, Wellington, New Zealand, ISBN 978-0-478-29037-3, accessible at: www.justice.govt.nz
122. *Distress for Rent (Bailiffs) Act*, Cap. 76, Uganda.
123. *Bankruptcy Act* Cap. 67, Uganda.
124. *The Land Component of the Private Sector Competitiveness Project II: Moving From Analysis to Action in Uganda*, by Rexford Ahene, Senior Technical Advisor, PSCP II.
125. *Good Governance in Land Tenure and Administration - FAO Land Tenure Studies 9*, Rome, 2007. Accessible at http://www.fao.org/sd/LTdirect/ltstudies_en.htm
126. Supplementary Protocol A/Sp.2/5/90 On The Implementation Of The Third Phase (Right Of Establishment) Of The Protocol On Free Movement Of Persons, Right Of Residence And Establishment. See <http://www.sec.ecowas.int/sitecedeo/english/asp020590.htm>
127. *Updates and Timelines of EAC Common Market Negotiations*. Accessible at: http://www.bilaterals.org/article.php3?id_article=14040 .

128. Answer to WRITTEN QUESTION P-1519/02 given by Mr. Bolkestein on behalf of the European Commission, 14.11.2002, EN C277E/223, Official Journal of the European Communities.
129. *Estate Agents and their Employment Relationship to Sales Representatives*, by Kevin G Brown, School of Business Law, Curtin University of Technology, The Real Estate Industry - Volume 2, 2000.
130. *Review of the Land Agents Act 1994, Final Report* (December 1999), Government of South Australia.
131. *When is a Professional Person a Fiduciary?* by David Halpern, paper given at a Chancery Bar Association seminar in February 2003, accessible at www.4newsquare.com/Files/PDF/Article/article.01.02.2003.dhalpern.doc.
132. *The Nature of Fiduciary Liability in English Law*, by Sukhninder Panesar, Coventry Law Journal, December 2007, Vol 12 (2).
133. Hong Kong Estate Agents Authority (EAA): *Agency Law Monograph; Introduction to Land Registration, Land Search and Property-related Information Systems (Part 4); A Study Guide to Estate Agency Law and Practice*, July 2007 (see <http://www.eaa.org.hk/publications.htm>; http://www.eaa.org.hk/development/doc/course_content.pdf).
134. *Licensee Duties within the Real Estate Industry Regulatory Frameworks: A Review of the Obligations Owed Clients and Customers and Incidental Issues*, Canadian Regulators Group, Supplementary Paper No. 2, by William Foster, Faculty of Law, McGill University, March 2003.
135. *Report of the Agency Task Force*, Canadian Regulators Group, June 2004.
136. *Crypto-Fiduciary Duties*, by Justice R P Meagher and Adrian Maroya. Accessible at <http://www.austlii.edu.au/au/journals/UNSWLI/2003/30.html>.
137. *Agency Law and Real Estate Brokerage: Current Issues. A Review of the Case Law and Some Industry Practices*, Canadian Regulators Group, Supplementary Paper No. 2, by Prof. William Foster, Faculty of Law, McGill University, January 2003.

Acknowledgements

Business Environment Strengthening for Tanzania (BEST) Programme, Dar-es-Salaam.