



## Auctioneering/Estate Agency Review Group

### *Report to the Minister for Justice, Equality and Law Reform*

To carry out a review of all aspects of the auctioneering profession in Ireland and equivalent services in appropriate comparable jurisdictions. Arising from such review, and on the basis of broad consultation with interested parties, to make recommendations for any changes necessary in terms of structure or legislation to ensure a proper and appropriate auctioneering and property letting service to the public in terms of house purchase, house sale, property purchase, property sale and property letting.

*Report of the  
Auctioneering/Estate Agency  
Review Group\**

*July 2005*

*Acknowledgements*

The Group wishes to acknowledge the considerable assistance given to it by a wide variety of persons and organisations. The total of 34 written and 2 oral submissions reflected a significant willingness to assist the Group in its deliberations on what was a far-ranging and complex topic.

In particular, the Group wishes to thank those organisations who gave so freely of their time and expertise in assisting it to explore this very wide and complex area. A full list of those organisations is in Appendix H.

\*Note: Referred to as 'the Group' throughout the text.

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*\*\* Auctioneers, Estate Agents, and Letting Agents are collectively referred to as 'auctioneers' throughout the text.*

## Chapter 1

# *Terms of Reference*

*July 2004*

To carry out a review of all aspects of the auctioneering profession in Ireland and equivalent services in appropriate comparable jurisdictions.

Arising from such review, and on the basis of broad consultation with interested parties, to make recommendations for any changes necessary in terms of structure or legislation to ensure a proper and appropriate auctioneering and property letting service to the public in terms of house purchase, house sale, property purchase, property sale and property letting.

To make specific recommendations in relation to the:

1. qualification requirements (if any) necessary or desirable for acting as an Auctioneer or Estate Agent or Property Letting Agent;
2. need for the introduction of a code of ethics and professional standards for the auctioneering/estate agency profession and for property letting agents;
3. need for an appropriate body to regulate the professional conduct of auctioneers/estate agents/property letting agents;
4. desirability of establishing a system to facilitate the investigation of complaints in relation to auctioneering/estate agency/property letting transactions.

Chapter 2

*Executive Summary*

## *Executive Summary*

The Irish property market encompasses sale, purchase, financing and letting transactions involving land, commercial and industrial property, and domestic dwellings. The majority of commercial transactions are on a business-to-business basis, whereas most residential property transactions, whether auctions or private treaty sales, are undertaken by private individuals.

The Review Group concentrated its efforts primarily on the residential property sector, both in deference to its terms of reference and the fact that it is in this area that most problems are perceived to exist. However it is recognised that many auctioneers and estate agents are active both in the residential and in other sectors of the market.

A market with total assets of some 1.5 million residential properties, worth over €400bn at the end of 2004, and with many transactions exceeding €500k, plus related fees and costs, should operate, and be seen to operate, in an efficient, transparent and proper manner.

This market is regulated under the terms of the Auctioneers and House Agents Act, 1947. The Act has been amended on two occasions. The operation of the Act simply awards or refuses a licence. There is no ongoing official supervisory, disciplinary, or redress system. There is no provision for guiding or informing the public in dealings with the auctioneering profession.

The Group considers that the current regulatory system set up by the Auctioneers and House Agents Act, 1947, (as amended), is outdated, inappropriate and inadequate for the present day market in Ireland.

The Group accepts that most auctioneers act in a professional and ethical way, and participate in industry-led codes of conduct and indemnity procedures. They are, however, concerned that there is

no appropriate system to control entry to, or set or maintain practice standards in this market. They also consider that existing protections for client monies are inadequate. New forms of property marketing, including the Internet, franchising and cross-border selling, need to be taken into account when considering the future operation and control of this market.

While recognising the contribution to regulation of their members made by the representative bodies in the auctioneering profession, the Group has concluded that there is a compelling need to establish an Auctioneers and Estate Agents Regulatory Authority in order to achieve uniformity and transparency in licensing, regulation and information provision. This Regulatory Authority would licence and control all entities providing auctioneering and estate agency, property letting and property management services in the State, and would subsume the functions and powers currently carried out by the Courts and the Revenue Commissioners. The Regulatory Authority would also have an important role in informing and educating the public in the operations of this market and on getting best value and service from providers.

The Group recognises that Governments can stifle markets when they over-prescribe how businesses should operate in their particular market. The Regulatory Authority should operate on a principles-based approach, with the objective of allowing the market to function in a dynamic way, while at the same time ensuring that it operates to high standards of probity.

The Group recommends that the Auctioneers and Estate Agents Regulatory Authority should be established as a matter of urgency.

### **Recommendation No.1**

Auctioneers should continue to be regulated through an annual licensing system.

### **Recommendation No.2**

The current Courts-based licensing system should be replaced by a statutory Regulatory Authority that will take responsibility for the licensing and regulation of all trading entities (PLCs, limited companies, sole traders, partnerships, co-operatives) providing auctioneering, estate agency, property letting and/or property management services. The Regulatory Authority will also be responsible for developing an ongoing, adequately resourced, consumer awareness and advisory programme.

### **Recommendation No.3**

Applicants for a licence should be required to:

- demonstrate competence by way of relevant educational qualifications and/or experience in respect of the activities to be conducted by their practice;
- have appropriate professional indemnity cover at a level and of a nature to be determined by the Regulatory Authority in

consultation with relevant bodies;

- provide an external accountant's certificate that client funds have been handled in a proper fashion (or that systems are in place and the necessary resources are available to run a practice in the event of a first application).

### **Recommendation No.4**

The Regulatory Authority should apply a test of 'fitness and probity' when awarding licences. The Regulatory Authority should be empowered to require applicants for a licence to disclose any criminal convictions held by them, or their senior staff, particularly in respect of offences involving fraud, dishonesty, breach of trust or other relevant serious offences. The Regulatory Authority should be empowered to check such disclosures with An Garda Síochána.

### **Recommendation No.5**

The Regulatory Authority should be responsible for ensuring that auctioneers comply with their obligations under money laundering legislation.

### **Recommendation No.6**

All licence holders will contribute to a Fidelity Fund to be operated by, or with the approval of, the Regulatory Authority.

### **Recommendation No.7**

The existing provisions of the 1967 Act concerning the holding of client funds in designated client accounts should be retained and updated and incorporated into new legislation as appropriate. All client monies including deposits, all rents and services charges (including Sinking Funds held by letting or management agents) should be held in client accounts.

### **Recommendation No.8**

The statutory distinction between Auctioneers and House Agents should be abolished. Auctioneers' Licences and House Agents' Licences as currently constituted should also be abolished.

### **Recommendation No.9**

Builders and developers who engage in property sales on their own behalf, whether through holding companies or otherwise, should be required to provide the same or a similar level of consumer protection as that required of auctioneers under this report.



**Recommendation No.10**

Individuals and trading entities wishing to engage in the business of auctioneering in the State, wherever the property is situated, must hold a licence in one or more of the following classes:

- A. licence to auction personal property
- B. licence to buy or sell real property
- C. licence to act as a property letting agent
- D. licence to act as a property management agent.

**Recommendation No.11**

The Regulatory Authority should be established as a statutory agency, with a Board comprising a Chairperson and not more than eight members, appointed in a personal capacity. Appointments to the Board should be made by the Minister for Justice, Equality and Law Reform, in consultation with relevant Government Departments and other bodies. The Board would be responsible for appointing the chief executive, for annual budgets and levy structures, and for the preparation of annual reports and accounts.

**Recommendation No.12**

The profession should fund the Regulatory Authority. However start-up costs and interim arrangements - including an Interim Board - should be provided for by government to ensure that the Authority can become active at the earliest possible date.

**Recommendation No.13**

The Regulatory Authority should have powers to carry out an investigation on foot of a written complaint from the public, while encouraging the use in the first instance of industry-based avenues of complaint that are already in place.

**Recommendation No.14**

The Regulatory Authority should be empowered to recruit inspectors and have powers of inspection, including access to premises, files, practice accounts and all bank accounts. Powers to question current or former principals or employees, auditors, accountants, or consultants to a practice should be provided.

**Recommendation No.15**

The Regulatory Authority should have powers to impose sanctions including the withdrawal of a

licence, and to publish details of adverse findings if it considers it appropriate.

**Recommendation No.16**

The Regulatory Authority should be empowered to compensate parties who can evidence that they have lost money as a direct consequence of the misappropriation of client funds by a licence holder, and for reasonable costs incurred in attempting to recover those funds, but should not be empowered to compensate those who suffer loss through the actions of a non-licence holder. Principals, partners and/or directors of licence holders should be personally liable to the Fidelity Fund for losses incurred by the Fund through their dishonesty.

**Recommendation No.17**

It should be a criminal offence to operate without an appropriate licence.

**Recommendation No.18**

The Regulatory Authority should take steps to identify and act against unlicensed operators.

**Recommendation No.19**

The Regulatory Authority should, in co-operation with the

auctioneering profession and other interests, actively promote better consumer awareness of the process involved in property transactions, and of the nature and levels of service provided by auctioneers.

#### **Recommendation No.20**

The Regulatory Authority should set up liaison structures with other relevant Regulatory agencies, professional and consumer bodies.

#### **Recommendation No.21**

The Regulatory Authority should promote the availability of information on residential sale prices in particular and on the residential property market in general.

#### **Recommendation No.22**

The Regulatory Authority should encourage fair and ethical practice on the part of sellers and buyers in the conduct of any property transaction.

#### **Recommendation No.23**

All builders and developers should stand over conditionally agreed sale prices. The Home Purchase Protection Pledge issued by members of the Irish Home Builders Association provides a model for appropriate behaviour

between buyer and seller and should be enforced across the entire home-building sector.

#### **Recommendation No.24**

The only price level that may be published by an auctioneer in respect of a property being offered for sale by auction, private treaty or tender shall be the 'Advised Minimum Value'. The Advised Minimum Value is the auctioneer's true opinion of value at the commencement of the marketing campaign as given in writing by the auctioneer to the seller on an obligatory basis.

#### **Recommendation No.25**

The Regulatory Authority should sanction licence holders who exhibit a pattern of providing factually inaccurate particulars, for example measurements, property orientation, distance to nearest school, average commuting times, etc.

#### **Recommendation No.26**

Where new homes are being sold off plan, scalable drawings and/or measurements must be given and justifiable estimates of service charges provided. The basis of measurement must be stated and explained.

#### **Recommendation No.27**

The Regulatory Authority should issue directions on the measurement of residential property that is offered for sale and to this end the Group commends the IAVI/SCS Measuring Practice Guidance Notes, aimed at ensuring that there is a uniform approach to measurement.

#### **Recommendation No.28**

The Regulatory Authority should at a future date review the case for mandatory seller packs, having regard to the proposed establishment of the Property Registration Authority, computerisation of Local Authority records and the development of e-conveyancing. The impact of Home Information Packs on the UK property market should also be taken into account, as well as the differing characteristics of the Irish and UK residential property markets.

#### **Recommendation No.29**

The Regulatory Authority should require all licence holders to issue an appropriate letter of engagement to clients. A list of matters that should be included in such a letter is in Appendix I.

**Recommendation No.30**

The Regulatory Authority should require licence holders quoting percentage fees to also give an indication of the likely absolute amount (including VAT) based on the Advised Minimum Value.

**Recommendation No.31**

The Regulatory Authority should maintain a Register of Licence Holders by trade name and business address (with the legal name shown in brackets) which should be readily accessible to the public.

**Recommendation No.32**

Each licensed trading entity should have a distinctive Registration Number that they must publish in all advertisements, sales brochures and other stationery, in their office and on signs erected outside properties.

**Recommendation No.33**

The Regulatory Authority should promote the operation of Codes of Ethics and Practice and encourage their adoption by all licence holders. The Authority should identify those licence holders who subscribe to approved Codes on its Register of Licence Holders.

**Recommendation No.34**

The Regulatory Authority should be empowered to require that licence holders demonstrate that their principals and staff keep abreast of changing legislation and practice, better to serve the public.

**Recommendation No.35**

The current legislative provision, reflected in the Law Society's Standard Conditions of Sale, permitting a seller of real property to bid up to the reserve at an auction, or have such a bid made on his behalf, should be replaced by a provision outlawing the making of bids by or on behalf of a seller.

**Recommendation No.36**

In sales other than by auction, the Regulatory Authority should require auctioneers to retain on file or electronically, in a standard format, details of the identity of all parties who make offers for real properties, the level of offers and any conditions attaching thereto. Conditional acceptances of any offers should be retained in a similar manner, but in a format that does not create a Memorandum of Understanding for the purpose of the Statute of Frauds, so as not to bind either principal to a transaction before

formal contracts are executed and exchanged.

**Recommendation No.37**

If and when an interest arises on the part of an auctioneer, or a close relative or business associate, in a property that the auctioneer is selling, any such interest should be made clear to the seller in writing immediately, and the seller's written consent for the continuation of the agency obtained.

**Recommendation No.38**

If a conflict of interest exists or arises on the part of an auctioneer in relation to a property being sold, the auctioneer must immediately withdraw from the sale.

**Recommendation No.39**

Auctioneers should provide a clear statement of any involvement they may have in the provision of financial services. The tying of property transactions and financial services products by auctioneers should be prohibited.

**Recommendation No.40**

The Regulatory Authority should, in co-operation with the Law Society of Ireland and the auctioneering profession as well as

consumer interests, actively promote better consumer awareness of:

- the duties of auctioneers to sellers and buyers;
- the roles and responsibilities of sellers and buyers and their solicitors;
- the duties and entitlements conferred on sellers and buyers by payment of a deposit;
- the duties and entitlements conferred on sellers and buyers by the issue of a draft contract;
- the process and timescales involved in property conveyances; and
- the issues arising from the ownership and management of multi-unit developments.

### **Recommendation No.41**

The practice whereby an auctioneer charges the purchaser/lessee/tenant a fee or expenses or a registration fee in respect of a sale/lease/letting should continue to be unlawful, except in a situation where an auctioneer is specifically retained to act as agent for a

buyer/lessee/tenant in such a transaction.

### **Recommendation No.42**

The Regulatory Authority should licence and regulate property management agents undertaking multi-unit management functions.

## Chapter 3

# *Overview of the Market and Methodology*

## *Overview of the Market and Methodology*

This is the first comprehensive review of the Irish auctioneering/estate agency profession undertaken to consider the adequacy and quality of the service it provides. In making such an assessment it is inevitable that some reforms are indicated. Against this background, the Group took the view from an early stage that it should constructively examine key aspects of the property market as currently organised and operated and look for solutions that would satisfy a requirement of transparency, accountability and consumer interest as well as facilitate the efficient functioning of the market.

### **3.1 Overview of the Market**

Ireland has one of the highest levels of home ownership of any state of the European Union, if not the wider world. The purchase of a home has come to be one of the most significant life events for most Irish people, and in that context can be one of the most satisfying and at the same time stressful experiences.

The Irish property market has witnessed an unprecedented demand for housing in recent years, fuelled mainly by rapid economic growth and demographic changes. Factors driving this demand include increasing population (particularly in the key household formation age group 25-34), immigration, changes in household formation as Ireland has moved closer to the EU average, rapid economic growth which has brought rising disposable incomes and historically low interest rates. These factors were set against a background of low overall housing stock, as the total housing stock in Ireland in 2000 was approximately 1,406,000 dwellings, which was a rate of 371.3 per 1000 population compared to the EU average of 447. The Irish preference for home ownership has also played a role in the demand for property and in the 1990's, Ireland had the highest rate

of owner-occupation in the EU at 82% (Source: Department of the Environment, Heritage and Local Government Housing Unit's Housing Policy Review 1990-2002).

The Irish property market has also witnessed the delivery of record housing completions with 76,954 house completions in 2004, an increase of 11.8% on 2003. This was the tenth consecutive record year for completions and Ireland is now building houses at the fastest rate in Europe – approximately 19 units per 1,000 population. This unprecedented demand for housing has been the major driver of house prices in recent years.

While it is recognised that the rate of house price increase has moderated significantly - current Permanent TSB house price data shows that average national house prices rose by just 3.3% over the first seven months of 2005, which is the lowest price increase for the first seven months of the the year recorded by Permanent TSB in nine years of recording house price data - the Irish housing market has witnessed significant house price inflation since 1997. One market commentator estimated that the value of the Irish housing stock stood at some €480bn at the end of 2004.<sup>1</sup>

It is recognised that this increase in house prices has also impacted on the experience of auctioneers in the residential market, many of whom charge fees on a percentage basis, and as a result have benefited from higher fees in monetary terms. Notwithstanding increased competition, in real terms fees are likely to have increased well ahead of inflation.

Until relatively recently, most Irish homeowners engaged with or used the services of an auctioneer once or twice in a lifetime only. More recently, with growing prosperity, these interactions have become more frequent with the purchase of second homes or holiday

<sup>1</sup> Bank of Ireland's "The Irish Property Review. A Quarterly Analysis – July 2005".

homes in Ireland and abroad and indeed commercial property investment is now within the reach of many more people than at any time in the past. However, during 2004, first-time buyers represented around a third of all buyers in the housing market, which also demonstrates the proportion of buyers entering into property transactions who may have limited or no experience of the property purchasing process. With approximately 100,000 mortgage-based transactions in the housing market in 2004, there has been an inevitable increase in the level of interest in all aspects of the property market and the players within it.

At the same time, growing consumer awareness of rights and entitlements, of protection and transparency, has inevitably brought the practice of auctioneering/estate agency into the spotlight, as indeed it has with many other service providers.

### *Sales by Public Auction*

In Ireland less than 10% of real properties are sold by public auction. When engaged to offer a property for auction, an auctioneer will advise the seller on value, prepare and have the seller approve the brochure, agree the advertising programme and other promotional activity with the seller and arrange same, arrange the auction date and venue, liaise with the seller's solicitor regarding title and preparation of conditions of sale, arrange and supervise viewings (both public and by prior appointment), conduct all negotiations, auction the property on the appointed date and, if required, normally conduct ongoing negotiations and promotion for a calendar month if the property fails to sell at auction.

For the most part, property sellers appear to be happy with the auction process. Property buyers on the other hand are somewhat less so. The most common problems cited by property buyers relating to auctions

are inaccurate/misleading Guide Prices and the real or imagined existence of 'phantom' bidders who drive up the price.

### *Sales by Private Treaty*

Some 90% of all private properties are sold by private treaty. The private treaty sale does not have the immediacy or transparency of the auction, where all the bidding is open and public. In a private treaty sale, the auctioneer will do all that is set out under Public Auctions above, save that negotiations take place over a period and there is no specific date envisaged where prospective buyers are brought together to bid in competition with each other, as at an auction. Buyers remain in competition, but without the deadline imposed on bidders at auction. Bids will be relayed to the seller and the seller's instructions will be followed by the auctioneer. Contracts are rarely executed until well after negotiations conclude.

A number of submissions to the Group referred in some detail to unhappiness by sellers as well as buyers in certain Private Treaty transactions.

## **3.2 Methodology**

### *Meetings*

The inaugural meeting of the Review Group took place on 7 July 2004 and its deliberations extended over a period of 12 months. A full list of members is in Appendix A.

### *Submissions*

Invitations for submissions to the Group were advertised publicly in July, 2004 and thirty four submissions in total were received. The Group also heard a further two oral presentations. Although no anonymous submissions were accepted, the Group agreed to keep the identity of the submitter

confidential where it was requested to do so. A full list of submissions received is shown in Appendix C.

The Group considered a number of issues that were brought to its attention through the various submissions, had been the subject of Oireachtas debates or had been highlighted in various media. The Group also had the benefit of the considerable experience of several of its members in the auctioneering, consumer competition and legal spheres.

### *Research*

The Group reviewed the licensing and regulation of auctioneers, estate agents and house agents under current Irish legislation, the process of buying and selling of residential property, the operation of the market, its national and international operating environment, and examined real estate procedures and practices in other states, both in Europe and worldwide.

Members of the Group visited a number of organisations representing consumers, auctioneers, and regulatory and government interests in the UK and Europe, and had discussions with licensing authorities in New Zealand via the internet. A full list of organisations contacted is shown in Appendix H.

### *Better Regulation*

The Group also took account of the principles of better regulation set out in the Government White Paper 'Regulating Better' i.e. whether a proposed measure would be necessary, effective, proportionate, transparent, accountable and consistent, in formulating its proposals.





## *Licensing Auctioneers*

The number of auctioneers' licences in 2004 was 2,103. This represents an increase of 15% over the 2003 figure. A number of auctioneers and estate agents may be operating in Ireland currently without a licence.

### **4.1 Regulating Entry**

Current statutory regulation of entry to the auctioneering profession effectively commenced with the Auctioneers & House Agents Act 1947 ('the 1947 Act') which was amended by two further Acts of 1967 ('the 1967 Act') and 1973 (the 1973 Act'). (The relevant legislation is listed in Appendix D.)

The 1947 Act forbids the carrying on of auctioneering or house agency without a licence. These licences are currently issued by the Revenue Commissioners on foot of a certificate of qualification issued by the District Court in the area where the person intends to carry on business.

One of the first issues considered by the Group was whether or not regulating entry to the profession was in the best interests of property sellers and buyers and whether or not they would be better served by regulating, instead, the services to be provided and/or how they are provided.

Given the nature of auctioneering transactions the Group believes that some regulation of entry to the profession is necessary to protect consumers.

Firstly, the process of selling or buying property can be complex and because sellers and buyers are usually individuals with limited experience the expertise of the auctioneer can be crucial. The Group believes, therefore, that it is appropriate and proper to require persons wishing to operate as auctioneers to demonstrate that they have the necessary qualifications and/or experience to act competently. The 1947 Act attempts to address this by identifying certain suitability requirements that must be met; however, none of these relate to competency.

Secondly, the process of selling or buying property frequently involves very large sums of money. The Group believes, therefore, that it is also appropriate and proper to require persons wishing to operate as auctioneers to demonstrate that they have the necessary financial safeguards in place to protect their clients. The 1967 Act attempts to address this by providing for the Auctioneers' High Court Bond and defining certain accounting practices that must be followed.

Having considered a number of options, the Group believes that the simplest way to protect property buyers and sellers with regard to both of the above is to continue operating an annual licensing system.

### *Recommendation No.1*

*Auctioneers should continue to be regulated through an annual licensing system.*

While reaching this conclusion, the Group considers that there are a number of shortcomings with the current licensing system that need to be addressed.

Firstly, there is little uniformity across different court districts in the interpretation of the suitability requirements set out in the 1947 Act as well as what the court is entitled to have produced to it during the licensing hearing.

While these issues could be addressed by introducing more detailed legislation and/or District Court guidelines for adjudicating on licence applications, the Group believes that a better solution would be achieved if responsibility for licensing auctioneers was to be transferred from local District Courts into a centralised licensing unit. Such a unit could provide for the application of subject matter expertise and uniformity of practice that is very much harder to achieve within a decentralised system.

Secondly, the only sanction against misconduct available under the current licensing system is the

extreme one of a court refusing an application to renew a licence. Thus where a complainant fails to receive satisfaction through one of the professional bodies' complaints procedures, assuming the auctioneer complained against is a member of one of the bodies, they will have very limited practical recourse unless the auctioneer has behaved contrary to either civil or criminal law which will only arise in the most serious cases of misconduct.

The Group believes that most members of the public, even if they are aware of the possibility of objecting to the renewal of an auctioneer's licence, will be unaware of when, where and how to go about doing such a thing in practice and, should they be able to find out, could be intimidated by the legal and evidentiary requirements involved.

The Group also believes that even where a member of the public manages to overcome the different hurdles and correctly raise a valid objection, the courts will understandably be reluctant to exercise the 'nuclear option' of refusing a licence renewal and thereby depriving the applicant and employees of their livelihood.

While these issues could be addressed by introducing legislation that provides for a wider range of sanctions the Group does not believe that the District Court, or any other court, is the appropriate forum for dealing with complaints relating to professional misconduct that does not amount to a breach of any law.

The Group believes that, like adjudicating on license applications, dealing with such complaints would be much better done by a centralised licensing unit that could provide for the application of subject matter expertise and uniformity of practice that is very much harder to achieve within a decentralised system. It would also allow for greater flexibility around when and how complaints can be made and the sanctions that can be imposed.

### *Recommendation No.2*

*The current Courts-based licensing system should be replaced by a statutory Regulatory Authority that will take responsibility for the licensing and regulation of all trading entities (PLCs, limited companies, sole traders, partnerships, co-operatives) providing auctioneering, estate agency, property letting and/or property management services. The Regulatory Authority will also be responsible for developing an ongoing, adequately resourced, consumer awareness and advisory programme.*

The Regulatory Authority's second - and equally important - consumer awareness role included in this recommendation is addressed in more detail in Chapter 6 Promoting Consumer Interests. The Group believes that this second role is as essential as the first and reinforces the case for establishing an independent Regulatory Authority.

The Group envisages that, once established, the Regulatory Authority will formalise and standardise the criteria by which licence applicants' competence is judged, ensuring that all licence holders will meet a minimum uniform standard. Thus property sellers and buyers can be assured of a minimum level of service when they engage a licensed auctioneer.

### *Recommendation No.3*

*Applicants for a licence should be required to:*

- *demonstrate competence by way of relevant educational qualifications and/or experience in respect of the activities to be conducted by their practice;*
- *have appropriate professional indemnity cover at a level and of a nature to be determined by*

*the Regulatory Authority in consultation with relevant bodies;*

- *provide an external accountant's certificate that client funds have been handled in a proper fashion (or that systems are in place and the necessary resources are available to run a practice in the event of a first application).*

#### **Recommendation No.4**

*The Regulatory Authority should apply a test of 'fitness and probity' when awarding licences. The Regulatory Authority should be empowered to require applicants for a licence to disclose any criminal convictions held by them, or their senior staff, particularly in respect of offences involving fraud, dishonesty or breach of trust or other relevant serious offences. The Regulatory Authority should be empowered to check such disclosures with An Garda Síochána.*

#### **Recommendation No.5**

*The Regulatory Authority should be responsible for ensuring that auctioneers comply with their obligations under money laundering legislation.*

## **4.2 Fiduciary Requirements for Licence Holders**

The Auctioneers' High Court Bond was introduced by amending legislation in 1967 and the bond level was first set at £2,000 (€2,540). Its introduction reflected concerns about the high volume of client monies held by auctioneers. The 1967 Amendment Act also provided for the opening and keeping of client accounts and for auditor certification that such accounts are properly administered annually, as part of

the licensing procedure. Further amending legislation in 1973 increased the High Court Bond to £10,000 (€12,700).

There appears to be an anomaly in that while property booking deposits must be placed in client accounts, there is no requirement under the legislation to place rents (other than deposit rent) and service charges in such accounts. As the property management area is one where fiduciary difficulties have arisen in some other jurisdictions and as the sums involved can be very high, particularly for large commercial complexes, this anomaly needs to be addressed by way of legislative change.

There has been substantial inflation in property prices since 1973, when the bond was last increased. Were the bond to be adjusted merely in line with such inflation, it would today be not less than €300,000. For many smaller practices in the auctioneering and estate agency sector, the creation of a mandatory single bond at such a high level could create an unjustifiable barrier to trade. On the other hand, for a number of larger auctioneering and estate agency practices, even this level of cover could prove inadequate.

Voluntary Compensation Funds were established by IAVI and IPAV that provide cover to parties paying over deposits to their respective Member Firms at a level substantially higher than the existing statutory High Court bond.

The Group believes that the current bond level is totally inadequate and that practices should have fiduciary cover in place at a level equal to the average sums held on behalf of clients in the immediately preceding trading year. Trading entities should be required to have cover for this sum as part of an approved Fidelity or Compensation Fund.

***Recommendation No.6***

*All licence holders will contribute to a Fidelity Fund to be operated by, or with the approval of the Regulatory Authority.*

The Fund will replace the current High Court Bond and the contributions payable by such licence holders will be determined annually by the Regulatory Authority. The Fund should operate in a similar manner to that of the Law Society of Ireland. The Group envisages that a tiered method of contributions would apply that would reflect the amount of client funds held by licensees in any given financial year.

***Recommendation No.7***

*The existing provisions of the 1967 Act concerning the holding of client funds in designated client accounts should be retained and updated and incorporated into new legislation as appropriate. All client monies including deposits, all rents and services charges (including Sinking Funds held by letting or management agents) should be held in client accounts.*

**4.3 Regulating the Services to be Provided**

Having concluded that some regulation of entry to the profession is in the best interests of property sellers and buyers and having considered how that might best be done, the Group then considered whether or not the service to be provided should also be regulated.

Currently the service to be provided is largely unregulated although legislation does recognise a number of different activities that may be conducted. While no definition of auctioneer is to be found in the current legislation, a distinction is made between an auctioneer who is a person authorised to conduct various types of auction, and a house agent who may

conduct private treaty sales only. Solicitors may sell real property other than by auction without requiring a licence.

The Group examined the distinctions between the two designations, and having regard to established practice in the market, which is verified by the respective number of licences issued, concluded that there is no reason why the distinction should be maintained, and recommends its abolition.

***Recommendation No.8***

*The statutory distinction between Auctioneers and House Agents should be abolished. Auctioneers' Licences and House Agents' Licences as currently constituted should also be abolished.*

While recommending that the above, largely obsolete, distinction should be abolished, the Group notes that in today's property services market there are other new designations that should be made to reflect the wider range of property services being provided, some of which are relatively new. Not all of these are currently licensed and the Group believes that they should be.

**Builders/developers** - currently, the owner of a property does not require an auctioneering licence to sell that property. The Group believes that this is appropriate for individuals selling a single property. However the Group believes that, insofar as possible, buyers who purchase properties directly from builders/developers should be afforded the same protections as buyers who purchase through a licensed intermediary.

***Recommendation No.9***

*Builders and developers who engage in property sales on their own behalf, whether through holding companies or otherwise, should be*

*required to provide the same or a similar level of consumer protection as that required of auctioneers under this report.*

**Sellers of Overseas Properties** - the Group notes the ever increasing number of overseas residential properties being marketed in Ireland and believes that, insofar as possible, buyers of overseas residential properties should be afforded the same protections as buyers of Irish residential properties. The Group believes that where money changes hands in Ireland, or is contracted in Ireland to change hands, the party offering the property for sale should be required to hold an appropriate licence. This is reflected in Recommendation No.10.

#### **4.4 Classes of Licence**

Given the wide range of property services being provided the Group believes that having a single class of licence and a single set of competence criteria that the applicant must meet would give rise to an impractical situation where applicants wishing to engage in only one type of auctioneering - for example, fine art auctioneering - would be required to demonstrate competence in all areas.

The Group has identified four different classes of licence which it believes should be subject to different competence criteria. Individuals and trading entities may hold more than one class of licence.

#### ***Recommendation No.10***

*Individuals and trading entities wishing to engage in the business of auctioneering in the State, wherever the property is situated, must hold a licence in one or more of the following classes:*

*A. licence to auction personal property*

*B. licence to buy or sell real property*

*C. licence to act as a property letting agent*

*D. licence to act as a property management agent.*

#### **4.5 Regulating how the Services are Provided**

Insofar as possible, the Group does not wish to prescribe how services should be provided believing that this is for the proposed Regulatory Authority and/or service providers to determine as long as basic standards are met.

To the extent that the Group believes it is useful to be prescriptive, such prescriptions are part of recommendations in the chapters below.

#### **4.6 Establishing a Regulatory Authority**

The Group examined practice in other professions, both in Ireland and overseas. The majority of professional regulation is carried out, whether by the profession itself or by Government organisations on a no- or low-cost basis to the consumer of the professional service. There was support from the two main professional bodies for the idea that a Regulatory Authority should be funded by the profession. The Group accordingly concluded that the Regulatory Authority should be funded by the profession, but to encourage its effective operation at the earliest possible time, government start-up funding should be made available. The Group considers that start-up costs should not exceed €1m.

***Recommendation No.11***

*The Regulatory Authority should be established as a statutory agency, with a Board comprising a Chairperson and not more than eight members, appointed in a personal capacity. Appointments to the Board should be made by the Minister for Justice, Equality and Law Reform, in consultation with relevant government departments and other bodies. The Board would be responsible for appointing the chief executive, for annual budgets and levy structures, and for the preparation of annual reports and accounts.*

***Recommendation No.12***

*The profession should fund the Regulatory Authority. However start-up costs and interim arrangements - including an Interim Board - should be provided for by government to ensure that the Authority can become active at the earliest possible date.*

Chapter 5

*Imposing Sanctions on  
Misconduct*



## *Imposing Sanctions on Misconduct*

The public is largely sceptical of any business or service that deals with complaints on a basis of self-regulation. No matter how many assurances are given of tough disciplinary procedures, there is always a suspicion that any professional body will ultimately 'protect one of their own'. There is also the matter of auctioneers who are not members of one of the professional bodies and so are not subject to the bodies' complaints procedures.

Chapter 4 Licensing Auctioneers recommends that the Regulatory Authority should take responsibility for the licensing and regulation of auctioneers. It follows, therefore, that the Regulatory Authority must have powers to carry out investigations into complaints and impose sanctions where complaints are upheld.

### *Recommendation No.13*

*The Regulatory Authority should have powers to carry out an investigation on foot of a written complaint from the public, while encouraging the use in the first instance of industry-based avenues of complaint that are already in place.*

### *Recommendation No.14*

*The Regulatory Authority should be empowered to recruit inspectors and have powers of inspection, including access to premises, files, practice accounts and all bank accounts. Powers to question current or former principals or employees, auditors and accountants, as well as other current or former employees or consultants to a practice should be provided.*

### *Recommendation No.15*

*The Regulatory Authority should have powers to impose sanctions including the withdrawal of*

*a licence, and to publish details of adverse findings if it considers it appropriate.*

The Group recognises that the main professional bodies already have established complaints and disciplinary procedures and have shown that they are prepared to act against members when the need arises. The Group believes that the Regulatory Authority should encourage complainants to explore these avenues in the first instance. The Group also believes that the Regulatory Authority should, in consultation with the professional bodies, determine when and if it may be appropriate for the Regulatory Authority and the professional bodies to notify each other in respect of complaints received.

Chapter 4 Licensing Auctioneers recommends that all licence holders who handle client funds will contribute to a Fidelity Fund to be operated or approved by the Regulatory Authority. The Group believes that the Regulatory Authority should be able to direct payments to be made from this fund without recourse to the High Court. However, there should be an onus on the claimant to establish that a valid claim exists. This is an area that would have to be discussed and agreed by the Regulatory Authority with bond underwriters in advance of any Regulations that may be introduced to govern this area.

### *Recommendation No.16*

*The Regulatory Authority should be empowered to compensate parties who can evidence that they have lost money as a direct consequence of the misappropriation of client funds by a licence holder, and for reasonable costs incurred in attempting to recover those funds, but should not be empowered to compensate those who suffer*

*loss through the actions of a non-licence holder. Principals, partners and/or directors of licence holders should be personally liable to the Fidelity Fund for losses incurred by the Fund through their dishonesty.*

The Group notes that a licensing system will only protect the public if it is properly enforced. Enforcement must include eliminating or preventing, insofar as possible, the activities of unlicensed operators.

*Recommendation No.17*

*It should be a criminal offence to operate without an appropriate licence.*

*Recommendation No.18*

*The Regulatory Authority should take steps to identify and act against unlicensed operators.*

The allocation and compulsory use of registration numbers by licensees will further assist in the identification of unlicensed operators.

Because it is in the interests of their members, the Group believes that the professional bodies, their individual members and other licensed auctioneers can and will play a significant and valuable role in the reporting of unlicensed operators.

## Chapter 6

# *Promoting Consumer Interests*

## *Promoting Consumer Interests*

The Group received submissions on a wide range of issues relating to the buying and selling of residential property. Where the Group identified a problem that it believed needed to be fixed, and could be fixed by a change in licensing practices or a change in the way that services are regulated, a recommendation to that effect has been included in the report.

However, the Group also identified a number of issues which it believes could be greatly alleviated simply by the provision of better information to the public. The reality is that there is a general deficit in the public's knowledge of the roles and responsibilities of the different parties involved in a property transaction. The Group believes that few members of the public know, or indeed wish to know, much about the auctioneering profession until they find themselves face to face with it nor do they care to investigate the professional qualifications of an auctioneer until a problem has arisen.

For example, the Group believes that there is a basic, and widespread, misunderstanding on the part of the public as to the role and, in particular, the responsibilities of auctioneers in residential property sales. Many buyers view auctioneers as impartial brokers with equal responsibilities to both sides in the transaction. However, auctioneers in fact only represent the interests of the seller who is their client and who has contracted to pay them a fee.

It is the responsibility of anyone about to engage in a major transaction to educate themselves as fully as possible about what is involved in the transaction, the types of things that may go wrong and the consequences of things going wrong. However, the Group recognises that it is not always so simple for many people to find accurate, objective, easily understandable information that will help them to educate themselves as fully as they should. Often they

will have to rely on incomplete advice from interested parties or something they read in the media that may or may not be accurate in the first place and may or may not apply to their circumstances, or second-hand advice that may be based on poor information in the first place.

Chapter 4 Licensing Auctioneers recommends that, in addition to taking over responsibility for licensing auctioneers, the Regulatory Authority should also be responsible for developing an ongoing and well resourced consumer awareness and advisory programme.

The Group believes that the ready availability of accurate, objective, easily understandable information offers some of the best protection for buyers and sellers. Buyers and sellers are entitled to make any decisions they want, including bad decisions, but the Group believes that any decisions should at least be well-informed.

For example, the Group believes that buyers and sellers do not generally properly understand that paying a deposit and/or unilaterally signing a contract confers no real rights or entitlements on them.

### *Recommendation No.19*

*The Regulatory Authority should, in co-operation with the auctioneering profession and other interests, actively promote better consumer awareness of the process involved in property transactions, and of the nature and levels of service provided by auctioneers.*

*Recommendation No.20*

*The Regulatory Authority should set up liaison structures with other relevant Regulatory agencies, professional and consumer bodies.*

The Group believes that the Regulatory Authority should also make it a priority, as part of its consumer information role, to educate buyers and sellers to ask the right questions which otherwise they might not ask at all. For example, in the case of multi-unit developments buyers should be educated in the why and how of asking detailed questions about the service charge and what exactly it is required to cover, the status of the sinking fund, management company structures, etc.

The Group believes that the Regulatory Authority should encourage anyone purchasing foreign property - an ever increasing number of people in recent years - to exercise particular caution and ensure that they check out all relevant legal, planning, foreign ownership and jurisdictional issues, etc. before they make any commitments.

The Group recognises that there is much valuable information already in the public domain, for example, on the Department of Environment, Heritage and Local Government's website and the professional bodies' websites. In many cases, it will be enough for the Regulatory Authority to promote the existence and location of such information. In other cases it may be desirable to abridge or synthesise the information, or to work with the originating body to see if it is possible to present the information slightly differently in the first place.

*Recommendation No.21*

*The Regulatory Authority should promote the availability of information on residential sale prices in particular and on the residential property market in general.*

The availability of such information would allow auctioneers, sellers and buyers better to estimate the value of a property in which they have an interest. Simple statistical analysis of the information would also allow sellers, buyers and the Regulatory Authority to identify readily the varying accuracy of different auctioneers' valuations. As a result, sellers will be better informed in their choice of auctioneers, buyers will be better informed in their dealings with auctioneers, and the Regulatory Authority will be better able to assess the quality of service being offered by auctioneers.

Lastly, having considered all of the issues raised in the submissions and anecdotally, the Group believes that when property transactions become problematic the behaviour of individual buyers and sellers can be just as much at fault. The Group would like to believe that this is due to buyers' and sellers' relative inexperience of how they should conduct themselves during property transactions.

*Recommendation No.22*

*The Regulatory Authority should encourage fair and ethical practice on the part of sellers and buyers in the conduct of any property transaction.*



## *Protecting Property Buyers*

The most common issues cited by property buyers relate to gazumping, sellers pulling out of sales after a deposit has been paid and/or a contract has been signed, misleading guide prices, inaccurate particulars, real or imagined 'phantom' bidders and conveyancing delays, particularly when the sale eventually falls through. These last two are addressed in Chapter 10 Increasing Transparency and Chapter 11 Property Conveyancing, respectively.

### **7.1 Gazumping and Gazundering**

The issue of gazumping has generated an enormous amount of comment in the media in the past decade and much of the comment shows a misunderstanding of the causes of the problem. It is sellers who gazump and buyers who gazunder.

Many buyers wrongly believe they have secured a one-way option to buy the property, once their offer has been accepted, i.e. they believe that they can withdraw, but do not accept that the same right attaches to the seller. Auctioneers are legally obliged to pass on all reasonable offers for a property to the seller regardless of when the offer is received, providing contracts have not been signed by both parties and exchanged.

Because the market has been on a continuous upward trend in recent years, all references have been to gazumping. If there is a sustained downturn in the market we will also hear of gazundering, whereby buyers reduce or withdraw an accepted offer.

The Group is aware of various calls for Government action to outlaw or prohibit gazumping. Barring any changes to the Law of Contract, any such ideas are unrealistic. It will always be the right of the individual sellers to raise or lower their price demands or indeed to withdraw their property from sale, and of individual buyers to reduce purchase offers or to back away from an intended purchase.

In its 'Report on Gazumping' (LRC59-99), the Law Reform Commission, after extensive examination of the issue, concluded that 'the only practicable reforms are to take steps to inform buyers and, in that way, to protect them'.

The Group concurs with the Law Reform Commission's view on the need to promote consumer understanding of this issue, and recommends that the Regulatory Authority addresses this, as a priority, as part of its consumer information role.

### **7.2 Paying Deposits and Signing Contracts**

Auctioneers usually request that a person whose offer in a private treaty sale is accepted pays a deposit of 5% of the agreed price to the auctioneer. This deposit is held in a client account under the auctioneer's control. The deposit is fully refundable if the transaction does not proceed.

Prospective buyers are usually happy to pay over this deposit, since it signals their interest and commitment. However many buyers believe, wrongly, that paying a deposit and/or unilaterally signing a contract secures the property for them. In fact they have not secured the property until contracts have been signed by both parties and exchanged. The deposit does not bind either party and merely gives the buyer, the seller and the auctioneer an expectation that the sale will be completed.

While the auctioneer normally stops promoting the property, changes the sign to read 'Sale Agreed', and declines to show the property to new parties (or surveyors other than the buyer's surveyor) this is all subject to the overriding instructions of the seller whose instructions the auctioneer is obliged by contract to follow. The auctioneer is still obliged to pass on any superior offers received up to the execution and exchange of formal contracts.

The Group believes that the Regulatory Authority should make it a priority, as part of its consumer information role, to ensure that buyers and sellers understand exactly what rights and entitlements - effectively none - that paying a deposit and/or signing a contract confers on each party.

The Group believes that if buyers and sellers properly understand that paying a deposit and/or signing a contract confers no real rights or entitlements on them then they can make an informed decision to remain active or become inactive in the market while they wait for the sale to complete.

Pulling out of sales and refunding deposits is a particular problem when the party pulling out of the sale is a developer who has accepted a large number of deposits creating an expectation in the minds of many - often first time buyers - that they have secured a property even if they will not be able to move in for many months. The developer does this so that the scheme can be 're-launched' at a higher price. This is a reprehensible practice which the Group believes should cease.

### *Recommendation No.23*

*All builders and developers should stand over conditionally agreed sale prices. The Home Purchase Protection Pledge issued by members of the Irish Home Builders Association provides a model for appropriate behaviour between buyer and seller and should be enforced across the entire home-building sector.*

The Group recognises that the Irish Home Builders Association has the power to impose sanctions on any of their members who break the Home Purchase Protection Pledge and believes that such sanctions should be imposed. The Group also notes that a minority of builders are not members of the Irish

Home Builders Association and believes that the Regulatory Authority should, as part of its consumer awareness role, encourage buyers to check whether or not the builder/developer they are buying from is a member of the Irish Home Builders Association, with the protection that confers on them.

Some submissions to the Group questioned the validity of auctioneers holding deposits and proposed that the seller's solicitor should hold all deposits. Because the taking of deposits by the auctioneer helps speed up the sale process, the Group believes that this practice should be allowed to continue, provided that the auctioneer holds all deposits in a client account and that sums held are protected by a Fidelity Fund.

### **7.3 Stage Payments**

While recognising that the issue is largely beyond its remit, the Group is aware that the Minister for Housing and Urban Renewal is considering initiating a consultation process with relevant interests in relation to the practice of stage payments in house purchase contracts with a view to clarifying issues and identifying how they could best be addressed by relevant public or private sector agencies.

It is understood that a guiding principle in this context would be that house buyers should not be obliged by contract terms to make stage payments as part of a house purchase transaction where there is not a compelling reason on objective grounds for such an arrangement; for example, in the case of most, if not all, speculatively built new housing.

The Group would generally support this objective and encourage relevant parties including the construction industry, the professions dealing with house purchase and relevant Government agencies, as appropriate, to work towards its achievement.



## 7.4 Guide Prices

The Group acknowledges that the issue of guide prices for auctions is a matter of considerable comment, confusion and negative views among the public. Two private submissions received referred to this topic.

In the course of any selling campaign, several different prices can arise:

1. Valuation – the valuation advised to the seller by the auctioneer.
2. Guide Price – the price published in promotional material, newspaper advertisements etc. and understood by the public as an indication of the likely selling price.
3. Reserve Price – the price below which the seller is not prepared to sell. This figure can vary up to and during an auction, as the interest in the property becomes evident.
4. Selling Price – the price eventually achieved for a property.

There have been many instances where the price actually achieved at auction (the selling price) greatly exceeds the published guide price, and of consequent allegations that the guide price was intentionally understated in order to generate interest for the auction. The Group believes that this does in fact happen sometimes but also recognises that those houses that go to auction are usually by their nature those that are hard to value and that the auctioneer believes may go for a premium given the right auction conditions on the day.

The Group considered a number of options for addressing the issue of guide prices. Most of these

involved in some way tying the guide price to the reserve as has been suggested in some parts of the media. However, the Group concluded that this was impractical and unfair for a number of reasons:

- the reserve is set after the guide price, usually on the day of the auction;
- the reserve is set in the light of interest expressed in the property during the sales campaign which may have been much greater than expected;
- the reserve is set by the seller who has a right to change the reserve up until the moment the property is put on the market during the auction;
- the seller has a right to get the highest possible price for their property.

Other options the Group considered included in some way ‘forcing’ auctioneers to provide an ‘honest’ guide price. However, the Group quickly concluded that such an approach was unenforceable, since there would be no way of establishing whether or not any guide price offered was genuine.

The Group believes that the best way to ensure that the price advised to potential buyers is as realistic as possible is for the Regulatory Authority to monitor discrepancies between prices advised to potential buyers and eventual selling prices and to impose sanctions on those auctioneers who consistently produce discrepancies that are outside certain norms and/or the industry average.

Recognising that the price advised to potential buyers can, and usually does, change during the course of a sales campaign, the Group believes that the most appropriate discrepancy to monitor is the discrepancy

between the first price advised to potential buyers and the final selling price. The Group further believes that the first price advised to potential buyers should be the auctioneer's true opinion of the property's value provided to the seller, and should be the only price advised to potential buyers. To avoid confusion the term 'guide price' should cease to be used and should be replaced by the more precise term 'Advised Minimum Value'.

#### *Recommendation No.24*

*The only price level that may be published by an auctioneer in respect of a property being offered for sale by auction, private treaty or tender shall be the 'Advised Minimum Value'. The Advised Minimum Value is the auctioneer's true opinion of value at the commencement of the marketing campaign as given in writing by the auctioneer to the seller on an obligatory basis.*

The Group believes that the Regulatory Authority should make it a priority, as part of its consumer information role, to ensure that buyers and sellers understand what the Advised Minimum Value means, and its limitations, and to understand also that the eventual price will still be dictated by the normal market forces of supply and demand, particularly by buyers in competition with one another.

The Group recognises that the public may be sceptical about whether or not the introduction of Advised Minimum Values will actually improve the situation. However, the Group believes that the combination of pressure from sellers for auctioneers to provide accurate valuations and oversight by the Regulatory Authority will ensure that the situation improves over time.

## **7.5 Accuracy of Information**

The Group recognises that while most auctioneers make a good effort to ensure that any particulars they provide are accurate, there is a small minority of operators who are at best careless and at worst engaging in sharp practice.

While acknowledging that the auctioneer represents the interests of the seller who will expect them to 'talk up' the property, and recognising that genuine mistakes can be made, the Group believes that the buyer is entitled to assume that particulars provided to them are by and large accurate.

#### *Recommendation No.25*

*The Regulatory Authority should sanction licence holders who exhibit a pattern of providing factually inaccurate particulars, for example measurements, property orientation, distance to nearest school, average commuting times, etc.*

In the case of second hand properties the buyer at least has the opportunity to verify measurements and other particulars. In the case of new homes being sold off plan this is not possible. Given that detailed plans already exist by the time a scheme is launched, the Group believes it is not acceptable that a buyer should receive a property that once built is smaller than the property they expected and have paid for.

***Recommendation No.26***

*Where new homes are being sold off plan, scalable drawings and/or measurements must be given and justifiable estimates of service charges provided. The basis of measurement must be stated and explained.*

***Recommendation No.27***

*The Regulatory Authority should issue directions on the measurement of residential property that is offered for sale and to this end the Group commends the LAVI/SCS Measuring Practice Guidance Notes, aimed at ensuring that there is a uniform approach to measurement.*

**7.6 Seller Packs**

Some submissions to the Group proposed that as a way of speeding up the transaction process and reducing the opportunity for gazumping, and to save prospective buyers unnecessary costs, all sellers offering properties for auction or private treaty should prepare a 'Seller Pack'. This pack would contain a surveyor's report, title search, local authority search, and draft contract.

Other submissions have argued that such a pack would add to the cost of the process and surveys undertaken for sellers would not be fully trusted by buyers. They contend that sellers would shop around to get a favourable survey and buyers would insist on undertaking their own survey.

A proposal to introduce seller packs [Home Information Packs] in the United Kingdom, although initially voted down by the House of Lords as being an unnecessary cost to the home sale process, has now been approved and this system will be introduced in 2006.

The Group is not convinced that the case for the introduction of seller packs in Ireland has been proven

at this time. However, it believes that this conclusion should be reviewed by the Regulatory Authority at a future date in the light of forthcoming changes in the way conveyancing in Ireland is conducted and the experience of Home Information Packs in the UK.

***Recommendation No.28***

*The Regulatory Authority should at a future date review the case for mandatory seller packs, having regard to the proposed establishment of the Property Registration Authority, computerisation of Local Authority records and the development of e-conveyancing. The impact of Home Information Packs on the UK property market should also be taken into account, as well as the differing characteristics of the Irish and UK residential property markets.*

The Group believes that efficiency in the sales process can be improved without the introduction of seller packs, by means of improved communication between principals, auctioneers and solicitors. In particular, the Group believes that the speedy issue of draft contracts once a sale has been agreed would reduce the time lag between agreement and a binding agreement coming into existence. It would also help control the admittedly limited incidence of gazumping and gazundering.



## *Protecting Property Sellers*

Property sellers are affected just as much as property buyers by several of the issues addressed in the previous chapter, for instance the other party pulling out of sales after a contract has been signed and/or a deposit paid, conveyancing delays, particularly when the sale eventually falls through, and gazundering. Therefore many of the recommendations in the previous chapter will benefit sellers just as much as buyers.

Property sellers have other issues that affect them only; for example, choosing a competent auctioneer, understanding and agreeing the exact nature of the services to be provided, getting value for money, and ensuring that they are covered in the event of financial irregularities. Property sellers also want to be confident that the auctioneer will represent their interests to the utmost. Chapter 10 Increasing Transparency contains recommendations in this regard.

### **8.1 Competency Requirements for Auctioneers**

Chapter 4 Licensing Auctioneers recommends that auctioneers should continue to be licensed annually and recommends that applicants for a licence should be required to demonstrate competence by way of relevant educational qualifications or experience in respect of the activities to be conducted by their practice. This will ensure that property sellers receive a minimum standard of service.

In addition, auctioneers may signal to would-be property sellers that they provide a superior standard of service. For example, membership of a professional body requires adherence to certain codes of ethics and practice and may indicate a higher level of service. The Group believes that such codes raise standards and should be encouraged. Chapter 9 Promoting Quality Service includes a recommendation to this effect.

Over the course of a number of years the property

market can change quite significantly; for example the huge growth in the number of multi-unit properties over the past decade has created a whole new range of issues for property buyers in particular. The Group believes that continuing professional development is essential for auctioneers. Chapter 9 Promoting Quality Service includes a recommendation to this effect.

### **8.2 Agency Contracts/Letter of Engagement**

Before offering any real property to the market, all auctioneers should have to issue a letter of engagement to their client, the seller. This letter of engagement should be signed by both parties before any marketing commences and should set out and clarify the basis of agency, its duration, the fee basis agreed (including the cash value of the fee if the Advised Minimum Value is secured) and the basis on which a fee becomes payable. The letter will also deal with the cessation of agency and clarify the right to a fee or part fee after termination in certain identifiable circumstances.

This simple process should reduce significantly the complaints made by consumers who frequently do not understand the conditions and costs under which they have entered into an agency agreement.

#### *Recommendation No.29*

*The Regulatory Authority should require all licence holders to issue an appropriate letter of engagement to clients. A list of matters that should be included in such a letter is in Appendix I.*

### **8.3 Value for Money**

A review of auctioneers' fees in other markets shows that only the United Kingdom has lower fees than Ireland. Currently fees in Ireland range from 0.5% to

3%. In most European Union markets the agency fees are 8% and above. In the United States fees start at about 6%. It is hard to make direct comparisons because auctioneering practices vary from country to country and overlap to varying degrees with conveyancing practices. However, the figures would seem to suggest that, prima facie, auctioneers in Ireland probably provide reasonable value for money.

Auctioneers usually prefer to operate on a percentage fee basis. Some commentators argue that percentage-based fees do not offer value for money on the grounds that it cannot possibly take four times more effort to sell a house for €1,000,000 in today's market than it did to sell the same house for €250,000 five or six years ago. The Group believes that percentage fees have reduced in recent years through developing competition.

Whether or not it is true, sellers who believe that a percentage fee basis does not offer good value for money are free to negotiate a flat fee (or any other sort of fee structure) if they wish, and increasing numbers of sellers are doing this. In doing so they must weigh up the arguments for and against percentage-based fees offering auctioneers a greater incentive to get the best price.

The Group believes that it is largely up to sellers to ensure that they get good value but in the interests of transparency, recommends that where agents are quoting percentage fees they be required to give an indication of the likely absolute amount by referring to the Advised Minimum Value.

*Recommendation No.30*

*The Regulatory Authority should require licence holders quoting percentage fees to also give an indication of the likely absolute amount (including VAT) based on the Advised Minimum Value.*

The Group believes that this may prompt more sellers to negotiate flat fees which may save them money, especially if the selling price is well in excess of the Advised Minimum Value.

## Chapter 9

# *Promoting Quality Service*

## Promoting Quality Service

### 9.1 Safeguarding Minimum Standards

Chapter 4 Licensing Auctioneers recommends that auctioneers should continue to be regulated by an annual licensing system and, in order to be granted a licence, must demonstrate competence by way of relevant educational qualifications or experience in respect of the activities to be conducted by their practice. The Group envisages that the Regulatory Authority will formalise and standardise the criteria by which such competence is judged ensuring that all licence holders will meet a minimum uniform standard. Thus property sellers and buyers can be assured of a minimum level of competency when they engage a licensed auctioneer.

Chapter 5 Imposing Sanctions on Misconduct recommends that unlicensed auctioneers should be identified and prosecuted. Because it is in the interests of their members, the Group believes that the professional bodies, their individual members and other licensed auctioneers will play a significant and valuable role in the reporting of unlicensed operators.

The very real threat of prosecution will undoubtedly act as a deterrent to unlicensed operators. However, the Group does not believe that it will eliminate the problem entirely. In this regard, the Group believes that the best protection for property sellers and buyers is to be able to readily identify whether or not the auctioneer they are dealing with holds an appropriate licence.

#### *Recommendation No.31*

*The Regulatory Authority should maintain a Register of Licence Holders by trade name and business address (with the legal name shown in brackets) which should be readily accessible to the public.*

#### *Recommendation No.32*

*Each licensed trading entity should have a distinctive Registration Number that they must publish in all advertisements, sales brochures and other stationery, in their office and on signs erected outside properties.*

### 9.2 Creating Quality Competition

In addition to providing for a minimum quality of service, the Group believes that the Regulatory Authority should actively promote and encourage higher levels of service quality throughout the profession. The Group believes that this can best be done by promoting the operation of voluntary Codes of Ethics and Practice and encouraging their adoption by all licence holders. The Group believes that this approach will be more effective than the introduction of a mandatory, uniform Code of Ethics and Practice, since it allows the different professional bodies to differentiate themselves through quality of service offered by their members. The Group believes that such 'quality competition' will benefit property sellers and buyers.

#### *Recommendation No.33*

*The Regulatory Authority should promote the operation of Codes of Ethics and Practice and encourage their adoption by all licence holders. The Authority should identify those licence holders who subscribe to approved Codes on its Register of Licence Holders.*

### 9.3 Providing for Continuous Professional Development

Changing trends, sometimes quite significant, affect the property market. For example, the shift over the past decade towards multi-unit properties has given



rise to a whole new set of issues in the area of property ownership and property management structures. Chapter 14 Property Management contains some recommendations in this regard.

Changes in legislation also regularly impact the property market. For example property-based tax relief schemes, tax law, capital acquisitions provisions, etc. The Group believes that auctioneers cannot provide good quality service if they do not keep abreast of such changes and suggests that demonstrating currency in the property market should be one of the criteria applied by the Regulatory Authority in considering licence renewal applications.

#### *Recommendation No.34*

*The Regulatory Authority should be empowered to require that licence holders demonstrate that their principals and staff keep abreast of changing legislation and practice, better to serve the public.*

The Group recognises that many auctioneers already do undertake continuing professional development.

## **9.4 European Union Developments**

Two draft EU Directives are relevant to the quality of service offered by auctioneers operating in Ireland.

### *Directive on the Mutual Recognition of Professional Qualifications*

This draft Directive addresses the equivalence of professional qualifications across the EU. The EU is not seeking to make any level of qualification mandatory in any profession. Rather, the aim of the draft Directive is to facilitate the comparability of qualifications and thus the free movement of labour.

### *Directive on Services in the Internal Market*

The aim of the Directive on Services in the Internal Market is to further integrate markets for services in the EU. The latest draft involves:

- Member States setting up a single point of contact for service businesses wishing to set up shop in a new Member State, to make the process of registration and application for relevant permits etc. as straightforward as possible, and
- businesses wishing to supply services across borders, without establishing a physical premises in the second country, would not have to be authorised to operate in the second country (where they don't have a physical presence) but will continue to be regulated solely by the Member State in which they have an office or premises.

Currently, foreign property transactions represent about 0.5% - 1.5% of auctioneers and estate agents' transactions. It is likely that this activity will grow over the next decade.

The Directive is under negotiation at present.

Chapter 10

*Increasing Transparency*

## Increasing Transparency

### 10.1 Increasing Transparency of Sales by Auction

A concern expressed by buyers at auctions - the preferred method in just under 10% of residential property sales - is that they are competing against phantom bidders acting on behalf of the seller who have the effect of driving up the eventual selling price. The Group believes that there is some confusion in the minds of the public surrounding this area.

Current legislation regulating the conduct of auctions permits sellers, or persons acting on their behalf, to bid up to but not past the reserve price. However, the bidder or auctioneer must disclose that the bid is on the seller's behalf. These disclosed bids are called Seller's Bids.

Phantom Bids on the other hand are undisclosed bids made for the purpose of driving up the sale price. Such bids are illegal and should remain so.

The Group believes that it would be wrong to infringe on the right of a seller to get the best price possible for their property, but that greater transparency in the process would alleviate buyers' concerns in this regard.

#### *Recommendation No.35*

*The current legislative provision, reflected in the Law Society's Standard Conditions of Sale, permitting a seller of real property to bid up to the reserve at an auction, or have such a bid made on his behalf, should be replaced by a provision outlawing the making of bids by or on behalf of a seller.*

### 10.2 Increasing Transparency of Sales by Private Treaty

The same concern is expressed by buyers in private treaty sales - the preferred method in roughly 90% of

residential property sales - who feel that they may be competing against non-existent parties. While the Group again has some sympathy for buyers who find themselves in this situation, in the case of private treaty there is no restriction against an auctioneer going back to the buyer and encouraging them to raise their offer. Indeed, they would not be representing their client properly if they failed to do this. However in doing so they are prohibited from holding out that a higher offer has been received from a third party if this is not the case.

The Group recognises that there is a very fine ethical line between insinuating that a higher offer has been received from a third party and actually coming out and saying it. However, also recognising that one person's memory of a conversation will often be different from another person's, the Group believes that the only way to provide certainty in this area would be to require all exchanges between the auctioneer and bidders to be in writing and that this would be impractical.

Aggrieved buyers will always have the option to raise a complaint against the auctioneer if they believe, or discover, that they have been misled. The Group believes that requiring auctioneers to keep written records of all offers received, and of conditional acceptances, will greatly assist the investigation of such complaints, particularly if the buyer has also kept a written note of their offers which the Regulatory Authority, as part of its consumer information role, should encourage them to do.

The biggest concern expressed - though not often - by sellers in private treaty sales is that all offers are not passed on to them and so the offer they accept may not have been the highest one. Just as aggrieved buyers will always have the option to raise a complaint against the auctioneer if they believe, or discover, that they

have been misled so too will aggrieved sellers. Once again the Group believes that requiring auctioneers to keep written records of all offers received and of conditional acceptances, will greatly assist the investigation of such complaints.

*Recommendation No.36*

*In sales other than by auction, the Regulatory Authority should require auctioneers to retain on file or electronically, in a standard format, details of the identity of all parties who make offers for real properties, the level of offers and any conditions attaching thereto. Conditional acceptances of any offers should be retained in a similar manner, but in a format that does not create a Memorandum of Understanding for the purpose of the Statute of Frauds, so as not to bind either principal to a transaction before formal contracts are executed and exchanged.*

**10.3 Increasing Transparency of Sales by Tender**

Residential properties are rarely sold by way of Formal Tender. The process is similar to that for a public auction, except that bids are not sought in open competition in an auction room. The bidders must complete formal tender documents that are attached to draft contracts and submit them by a stipulated time, together with a percentage deposit. There is no guarantee that the highest offer will succeed or that any offer will be accepted. If an offer is not accepted, negotiations may continue with parties in an effort to agree a sale.

Informal Tenders, or Best & Final Offers (BFOs), are used on occasion by auctioneers conducting Private Treaty negotiations where more than one party is willing to exceed the indicated price. Contracts are not

normally prepared, but a specific time and date is stipulated by which all bidders must submit their best and final offer to the selling auctioneer. The seller is not obliged to accept the highest or any offer and all offers and acceptance, if any, remain subject to formal contract execution and exchange.

A number of the specific complaints made in submissions to the Group referred to prospective buyers' unhappiness with the practice of auctioneers setting up a closed bidding process for a private treaty sale. This is usually done when the auctioneer is experiencing a lot of interest in a property. The unease expressed by buyers relates to the unknown process whereby they are unsure if their offers have been considered and/or if they have been encouraged to offer more than necessary to secure the property.

It is difficult to see how the practice can be restrained since the seller will make the final choice as to which offer to accept. This may not necessarily be the highest offer. It is reasonable to point out that in every sale of a second hand home in Scotland all offers are made on a tender basis, with no guarantee of acceptance, even if a tender over the 'offers above' figure is made.

The Group accepts the arguments made by the professional bodies that for prospective buyers to be present or represented at the opening of sealed bids would create problems, in that such bids are not binding on any of the parties. It is clear that offers could be bettered on the spot after the opening of the sealed bids or that the best bid could be reduced if it were well ahead of the next best offer.

The Group believes that the combination of the requirement to record all offers made and the Regulatory Authority's powers of inspection should assuage any public unease about the process involved in this part of private treaty selling.

#### 10.4 Flagging Conflicts of Interest

It happens from time to time that an interest may arise on the part of an auctioneer or a relative or associate in a property that the auctioneer is selling.

It is important for all concerned that any such interest is made clear to the seller no later than when the initial bid from that party is being put to the seller. The seller must be advised to secure independent professional advice, both from their own solicitor and from an independent valuer and if, and only if, the seller wishes to proceed, the seller's informed written prior consent should be secured by the auctioneer and retained on file, with a copy on the seller's solicitor's file. It is acknowledged that in certain circumstances the optimum price may be paid by an auctioneer or someone connected to the auctioneer and a seller cannot be denied the opportunity to achieve the best price for their property – providing their consent is informed, independently advised on and obtained in advance.

##### *Recommendation No.37*

*If and when an interest arises on the part of an auctioneer, or a close relative or business associate, in a property that the auctioneer is selling, any such interest should be made clear to the seller in writing immediately, and the seller's written consent for the continuation of the agency obtained.*

##### *Recommendation No.38*

*If a conflict of interest exists or arises on the part of an auctioneer in relation to a property being sold, the auctioneer must immediately withdraw from the sale.*

Some auctioneers also act as financial services intermediaries, often as separate or distinct legal

entities, or recommend specific financial institutions or intermediaries in particular for mortgages and mortgage protection insurance. This is not objectionable; difficulties may arise, however, in two respects.

From the property seller's point of view, the auctioneer may have less incentive to ensure the sale of his/her property at the highest price possible. Furthermore, the auctioneer may face an ethical dilemma and conflict of interest. That is, in the circumstances where an auctioneer can earn two commissions on a property transaction - i.e. the property is sold to a potential buyer who is using the auctioneer as an intermediary for his/her mortgage - the auctioneer has an incentive to direct the sale towards that particular buyer, as opposed to seeking further potential buyers who may be willing to pay more for the property but have already chosen their mortgage provider.

The Group's recommendations above, regarding the disclosure of all offers received and keeping of records re same, are sufficient to ensure that such a situation will not lead to the auctioneer failing to pass on higher offers from potential buyers who do not wish to avail of the financial intermediary services of the auctioneer, or aligned company. They are not sufficient to address the concern that sellers might not have full information when choosing an auctioneer.

The Group thus believes that licensed entities should be required to disclose to all prospective clients any interest they have in a financial institution or intermediary, whether financial or otherwise. This should form part of the standard letter of engagement. Such a measure would give property sellers the opportunity to either bind the auctioneer to a situation whereby they would not direct buyers to any particular financial institution or intermediary, or to negotiate a lower fee, or to use another auctioneer if they were

concerned that an auctioneer would make less effort to secure a favourable sale for their property than would otherwise be the case. This issue should also be addressed by the consumer information function of the Regulatory Authority.

The second difficulty arises on the buyer's side of the property transaction. A prospective property buyer may believe that their offer on the property will not be accepted, or is less likely to be accepted, if they do not also use the financial institution or intermediary recommended by the auctioneer acting for the property seller. Furthermore, the auctioneer's knowledge of a prospective buyer's net worth may place that buyer at a disadvantage - in relation to the seller - in the normal bargaining process which occurs in property transactions. Buyers need to be aware of this potential disadvantage.

The Group believes that any tying of financial services and property transactions by auctioneers, whereby buyers are obliged to purchase their financial services through a particular supplier, should be made illegal. The Group also believes that auctioneers should be prevented from implying to prospective buyers that their interest in a property may be jeopardized by their choice of financial service provider. This issue should also be addressed by the consumer information function of the Regulatory Authority.

*Recommendation No.39*

*Auctioneers should provide a clear statement of any involvement they may have in the provision of financial services. The tying of property transactions and financial services products by auctioneers should be prohibited.*



## Property Conveyancing

The Group recognises the complexities involved in the conveyancing process, particularly given the limited extent of registration of ownerships in the Land Registry, and the current lack of any centralised database of information in relation to property, such as exists in the UK with the National Land Information System (into which various public and statutory authorities feed data relating to land, such as planning status, easements, Compulsory Purchase Orders and the like). The Group has noted the significant progress that has been made in computerisation of the Land Registry, and further has noted the recent publication of the Law Reform Commission's Report into the Reform and Modernisation of Land Law and Conveyancing Law.

### 11.1 Speed of the Process

The Group considered the issue of the timescale of the conveyancing process. While delays obviously do occur, the Group is of the view that the pace of the transaction is usually dictated by the requirements of the parties to the transaction. However, delays in the issue of contracts after a sale is agreed are often blamed for exacerbating the problem of gazumping. It has been suggested that this very real (but not, the Group believes, widespread) problem can be addressed by making it mandatory that a draft contract is prepared before a property can be put on the market.

The Group does not support this suggestion for the following reasons:

- the requirement to have auctioneers request the seller to instruct a solicitor immediately or to permit the auctioneer to contact the solicitor directly will largely alleviate this problem;

- gazumping can often happen after the contract has issued, though not always, and may even occur after the contract has been signed by the buyer;
- the delays encountered are often on the buyer's side, for example while organising finance or surveys or selling another house;
- there is a danger that buyers could be pressurised into signing the draft contract to secure the property, effectively waiving their entitlement to a 'cooling off' period;
- every transaction is different as every buyer, seller and property is different. Having a draft contract that has to be amended may sow more confusion and reduce the ability of buyers and sellers to negotiate over the conditions of sale.

While there is no evidence that there is a widespread problem with delays in issuing contracts the Group recognises that the uncertainty caused by these delays or any subsequent delays in completing the sale can be a source of great concern - and sometimes financial loss - to individual buyers and, indeed, sellers.

While many delays will arise for legitimate reasons the Group believes that, by better understanding the different stages involved in the conveyancing process and the typical timescales for each stage, both buyers and sellers will be in a better position to judge whether or not the other party is deliberately delaying and so can make a better informed choice to stay with the transaction or withdraw from it. Similarly, they will be better able to judge if either their solicitor or the other party's is contributing to the delay and take appropriate action to drive the transaction forward.



The Law Society of Ireland publishes very clear guidelines and instructions for conveyancing, including timescales to be met at each stage. The Group believes that solicitors should be strongly encouraged to explain to their clients at the start of the transaction the stages that will be involved in the conveyance and the timescales associated with each stage. They should also keep the client and, as appropriate, the auctioneer, fully informed throughout the transaction.

The Group also believes that the Regulatory Authority should make it a priority, in its consumer awareness role, to ensure that buyers and sellers are better informed about the conveyancing process so that they can, if they wish, become more proactively involved in their own transaction.

- *the issues arising from the ownership and management of multi-unit developments.*

*Recommendation No.40*

*The Regulatory Authority should, in co-operation with the Law Society of Ireland and the auctioneering profession as well as consumer interests, actively promote better consumer awareness of:*

- *the duties of auctioneers to sellers and buyers;*
- *the roles and responsibilities of sellers and buyers and their solicitors;*
- *the duties and entitlements conferred on sellers and buyers by payment of a deposit;*
- *the duties and entitlements conferred on sellers and buyers by the issue of a draft contract;*
- *the process and timescales involved in property conveyances; and*



## *Property Letting*

Property letting is a growth area. The private rented sector has seen very positive trends in terms of supply and rent moderation since early 2002 as indicated by CSO rent data (showing that average rent levels have consistently reduced since April 2002 with an overall reduction of 9% in that period). The 2002 Census also showed a substantial increase in the supply of the private rented sector to just over 141,000 housing units, representing 11% of the total housing stock in the State – which highlights the current and future importance of this sector.

Recent legislative reform through the Residential Tenancies Act 2004 will also help promote investment and professionalism in the sector and enhance its attractiveness as a housing option.

Property lettings are conducted by both general auctioneering practices and by specialist letting and accommodation agencies. As with the process of selling or buying property, property letting frequently involves large sums of clients' money. The Group believes, therefore, that it is appropriate and proper to require persons wishing to operate as property letting agents to demonstrate that they have the necessary financial safeguards in place to protect their clients. Thus the Group recommends that property letting agents be required to hold a licence under the Regulatory Authority and contribute to a Fidelity fund to be operated by or with the approval of the Regulatory Authority. Letting or accommodation agencies will thereby be made subject to oversight by the Regulatory Authority and to its complaints procedures. Chapter 4 Licensing Auctioneers includes this recommendation and provides for a specific class of licence: Class C - Licence to act as a property letting agent.

The Group notes that the practice whereby a letting agent might charge a buyer/lessee/tenant a fee

or expenses (including a registration fee or charge) in respect of a sale/lease/letting is currently prohibited under Section 2 of the Auctioneers and House Agents Act 1973, and believes that this prohibition should continue under any new legislation in this area.

### *Recommendation No.41*

*The practice whereby an auctioneer charges the purchaser/lessee/tenant a fee or expenses or a registration fee in respect of a sale/lease/letting should continue to be unlawful, except in a situation where an auctioneer is specifically retained to act as agent for a buyer/lessee/tenant in such a transaction.*

Chapter 13

*Property Management*

## *Property Management*

Apartment complexes and other forms of multi-unit developments now account for almost a third of all newly constructed housing accommodation nationally and for close to half of all development in the Dublin area.

The enormous growth in this part of the residential property market has greatly increased the importance of considering what, if any, regulation should apply to multi-unit property management services and responsibilities that the Group believes are to a large extent unregulated at the moment.

The Group believes that the situation is greatly exacerbated by the widespread lack of awareness on the part of many apartment/unit owners of the issues and property management structures involved. For example, the Group believes that many apartment/unit owners do not fully appreciate the distinction between the management company, which owns and controls the common areas in the development, the directors thereof, or a committee of the owners, and any professional property management agencies employed. Typically:

- A Management Company is an ownership vehicle for the apartment complex or multi-unit development. It owns the common areas and roofs and has legal responsibility for the upkeep and insurance of the buildings, and the right to set and collect the service charge. The members of this company (usually the owners of the individual units) appoint the:
- Management Committee/Board of the apartment complex or multi-unit development. It typically meets 2-3 times a year to deal with any issues arising, and to set the level of the service charge. In smaller developments, the committee/board may attend to management functions itself, but in larger

developments, it is usual to engage a:

- Professional Property Management Agency which is a commercial entity offering management services, including, crucially, collection and disbursement of the service charges.

Numerous problems are emerging in the sector, including difficulties with the Limited Liability Company (limited either by shares or guarantee) which is the usual corporate entity chosen, adequacy of services charges, absence of proper provision for sinking funds etc. Some of these issues are being considered by the Law Reform Commission, which has already made submissions in relation to the appropriate corporate vehicle to the Company Law Reform Group, and proposes to issue a Consultation Paper on the wider issues in the near future. These wider issues are beyond the Terms of Reference of the Auctioneering/Estate Agency Review Group, but the Group considers that the current unregulated status of Property Management Agencies is a matter which properly comes within the scope of this report.

### **13.1 Property Management Agencies**

As with the process of selling or buying property, property management frequently involves large sums of clients' money. The Group believes, therefore, that it is appropriate and proper to require persons wishing to operate as property management agents to demonstrate that they have the necessary financial safeguards in place to protect their clients. Thus the Group recommends that property management agents be required to hold a licence under the Regulatory Authority and contribute to a Fidelity fund to be operated by or with the approval of the Regulatory Authority. Property management agencies will thereby be made subject to oversight by the Regulatory

Authority and to its vetting and complaints procedures. Chapter 4 Licensing Auctioneers includes this recommendation and provides for a specific class of licence: Class D - Licence to act as a property management agent.

*Recommendation No.42*

*The Regulatory Authority should licence and regulate property management agents undertaking multi-unit management functions.*

The Group does not believe that there are currently any significant concerns about property management agencies behaving dishonestly or incompetently but considers both recommendations in this area to be wise precautionary measures.

### **13.2 Management Committees/Boards**

Management Committees/Boards are in fact company boards of directors constituted under, and subject to, company law. As such they are required to organise and hold properly notified annual general meetings and maintain properly audited annual accounts. The Group does not believe that this is happening in all cases, or perhaps even in most cases, which is a cause of significant concern.

The Group is concerned at the amount of anecdotal evidence supporting the belief that developers are frequently reluctant to vest control of the property management company in the apartment/unit owners. The Group will not speculate about why this may be the case but believes that the sooner control of the property management company is vested in the apartment/unit owners the better, and also that the sooner the management committee comprises their representatives the better.

The Group is aware that the Law Reform Commission is examining this issue, and other related

issues, and welcomes this since it believes that recommending an appropriate solution is beyond its level of legal competence and most likely outside its Terms of Reference.

## Chapter 14

# *Other Roles in the Property Market*

## *Other Roles in the Property Market*

The Group concentrated its efforts primarily on the residential property sector, both in deference to its terms of reference and the fact that it is in this area that most problems are perceived to exist. However it is recognised that many auctioneers are active in non-residential sectors of the market. For example:

- Auctioneers of general chattels, including antiques
  
- Auctioneers of fine art
  
- Auctioneers of livestock
  
- Auctioneers of fish or farm produce or stock
  
- Auctioneers of plant, machinery and general equipment
  
- Auctioneers of motor vehicles
  
- Auctioneers of ships
  
- Auctioneers of books and manuscripts

As with the process of selling or buying property, the auctioning of personal property can involve large sums of clients' money. The Group believes, therefore, that it is appropriate and proper to require persons wishing to operate as auctioneers of personal property to demonstrate that they have the necessary financial safeguards in place to protect their clients. Thus the Group recommends that personal property auctioneers be required to hold a licence under the Regulatory Authority and contribute to a Fidelity fund to be operated by or with the approval of the Regulatory Authority. Chapter 4 Licensing Auctioneers includes this recommendation and provides for a specific class of licence: Class A - Licence to auction personal property.





## *Cost of Recommendations*

The Group considers that start-up costs should not exceed €1m. Once fully operational, the Group believes that an annual budget in the region of €3m to €3.5m should enable the Authority carry out its key roles of licensing, regulation and information. Such a budget would mean that the overall cost of regulation for the profession would not be more than the current annual cost of the licensing process. The Group considers that the current flat license fee (irrespective of size of enterprise) should be replaced by a three-tier system with fees for each band related to size and turnover.



## *Appendix A Review Group Membership*

*Chairman:* Alan McCarthy

Carol	Boate	Advocacy Division Manager	<i>The Competition Authority</i>
Paul	Caron		<i>Office of the Director of Consumer Affairs</i>
Alan	Cooke	CEO	<i>Irish Auctioneers &amp; Valuers Institute</i>
Patrick	Davitt	Auctioneer	
Jim	Devlin	CEO	<i>Irish Farmers' Association</i>
Gary	Dixon	Assistant Principal Competition & Consumer Policy Division	<i>Department of Enterprise, Trade &amp; Employment</i>
Patrick	Dorgan	Chairman, Conveyancing Committee	<i>Law Society of Ireland</i>
T.J.	Flanagan	Secretary, National Co-op Marts Committee	<i>Irish Co-operative Organisation Society Ltd</i>
Dermott	Jewell	CEO	<i>The Consumers' Association of Ireland</i>
Nuala	McLoughlin	Assistant Principal	<i>Department of Environment, Heritage and Local Government</i>
Liam	O'Donnell	CEO	<i>Institute of Professional Auctioneers and Valuers</i>
Randall	Plunkett	Principal Officer	<i>Department of Agriculture and Food</i>
Noel	Synnott	Principal Officer	<i>Department of Justice, Equality and Law Reform</i>

*Secretary to group:* Máirin Ni Dhuinn, Assistant Principal, Department of Justice, Equality and Law Reform

## *Appendix B Public advertisement for submissions*

### **Public Advertisement for submissions**

The Minister for Justice, Equality and Law Reform has established a Review Group to examine the regulatory framework for the auctioneering/estate agent profession.

The Review Group's work will include all matters relating to auctioneering/estate agency and property letting services to the public in terms of house purchase, house sale, property purchase, property sale, property letting and property valuation.

The Group will also examine

- the qualification requirements (if any) necessary or desirable for acting as an auctioneer or estate agent or property letting agent
- a code of ethics and professional standards for the auctioneering/estate agent profession
- an appropriate body to regulate the professional conduct of auctioneers/estate agents/property letting agents
- a system to facilitate the investigation of complaints in relation to auctioneering/estate agency/property letting transactions.

The Review Group now invites written submissions from interested parties in relation to their work. Submissions should be confined to the matters set out above and should arrive not later than 5pm on Friday 17th September 2004

*Submissions in writing should be sent to*

Máirín Ní Dhuinn,  
Project Development Division,  
Room 210J,  
Department Justice, Equality and Law Reform,  
Old Faculty Building,  
Shelbourne Road,  
Dublin 4.

*Submissions can also be made by e-mail to  
submissions2004@justice.ie*

## *Appendix C List of Submissions Received*

### *Submissions from the Auctioneering Profession*

	<i>Subject</i>
Institute of Professional Auctioneers & Valuers	A detailed submission covering all aspects of the auctioneering profession
Irish Auctioneers' & Valuers' Institute	A detailed submission covering all aspects of the auctioneering profession and containing 36 recommendations
Irish Property & Facility Management Association	A submission covering the licensing of the profession in regard of the management of real property
Sherry Fitzgerald Group	A submission welcoming the review and offering support to the Group

### *Submissions from other Professional Bodies*

	<i>Subject</i>
Chartered Institute of Building	A submission concerning single vendor property survey reports
Society of Chartered Surveyors	A submission concerning single vendor property survey reports

### *Submissions from other Interested Groups*

	<i>Subject</i>
The Consumers' Association of Ireland	A detailed submission covering consumer issues with regard to all aspects of house selling
Threshold	A submission raising concerns with the way that some property letting companies operate and recommending that they be regulated

### *Submissions from Public Representatives*

	<i>Subject</i>
Senator Shane Ross	A submission covering many aspects of house selling

### *Submissions from Individuals*

	<i>Subject</i>
Private individual	A detailed submission covering many aspects of house selling and containing 19 recommendations
Private individual	A submission alleging dishonest practices by an auctioneer
Private individual	A submission alleging dishonest practices by an auctioneer
Private individual	A submission alleging dishonest practices by an auctioneer
Private individual	A submission alleging unethical practices by an auctioneer

*Submissions from Individuals cont.**Subject*

Private individual	A submission comprising the RE/Max Europe code of ethics
Private individual	A submission concerning conveyancing delays
Private individual	A submission concerning conveyancing delays
Private individual	A submission concerning single vendor property survey reports
Private individual	A submission concerning single vendor property survey reports
Private individual	A submission concerning single vendor property survey reports and potential conflicts of interest
Private individual	A submission concerning the need for complaints to be promptly investigated and dealt with
Private individual	A submission concerning the need for fixed bid deposit fees and deposit protection
Private individual	A submission concerning the need for tenants to have redress when arbitration has failed
Private individual	A submission concerning the unreliability of guide prices
Private individual	A submission concerning entry qualifications to the profession and the need for complaints to be properly investigated
Private individual	A submission raising concerns about the lack of transparency in many property transactions
Private individual	A submission raising concerns about the lack of transparency in many property transactions
Private individual	A submission raising concerns about the practice of developers returning deposits in order to put new homes back on the market at a higher price
Private individual	A submission raising concerns about the taking of deposits for homes which ultimately are not built causing buyers to be disadvantaged in a rising market
Private individual	A submission raising concerns about the way that some property management companies operate
Private individual	A submission raising concerns about the way that some property management companies operate
Private individual	A submission raising concerns about the way that some property management companies operate
Private individual	A submission recommending that auctioneers who do not sell property should be regarded differently to those who do

## *Appendix D Relevant Legislation*

Auctioneers and House Agents Act, 1947

Auctioneers and House Agents Act, 1967

Auctioneers and House Agents Act, 1973

## *Appendix E Representative Bodies*

Institute of Professional Auctioneers and Valuers (IPAV)

Irish Auctioneers & Valuers Institute (IAVI)

Law Society of Ireland

The Society of Chartered Surveyors

Irish Property and Management Association

Chartered Institute of Building

The Consumers Association of Ireland



## *Appendix F International Practice and Experience*

The Group reviewed international practice and experience in 27 countries, listed below, focusing in particular on other common law countries and countries that served as good example of different levels of regulation. The Group drew on many sources and also had the benefit of international comparative research undertaken as part of detailed reviews of the auctioneering and estate agency profession already conducted in the United Kingdom, Australia and New Zealand.

Argentina	Hong Kong	Portugal
Australia	India	Russia
Brazil	Italy	Singapore
Canada	Korea	South Africa
Czech Republic	Mexico	Spain
Denmark	Netherlands	Sweden
Finland	New Zealand	United Kingdom
France	Norway	United States
Greece	Poland	Venezuela

The Group found that in most of the countries reviewed entry to the auctioneering and estate agency profession is regulated to varying degrees. However standards of service are rarely regulated and little other consumer protection exists. Most countries reviewed do not, to any great extent, promote consumer awareness of their rights and entitlements or the minimum standards of service they should expect.

### **Regulating Entry**

Entry requirements vary considerably from country to country. While all but one of the countries reviewed require some form of licensing or registration many of them require minimal or sometimes no standards of qualification. At the other extreme a small number of countries require a 2-3 year third level qualification. Most countries require 40-120 hours of education.

Licenses are usually granted and renewed by a branch of local government using limited quantitative criteria; for example, evidence of qualifications (where applicable), evidence of financial guarantees and evidence that no criminal convictions exist. The quality of service provided does not appear to be a criterion in any of the countries reviewed.

In most countries licenses are renewable every 1-2 years but, in the absence of criminal activity, licence renewal appears to be largely a formality on payment of the requisite fee. A small number of countries operate a Lifetime Licensing system but this is usually tied to mandatory continuing education, which is a requirement in about a third of the countries reviewed. In many other countries mandatory continuing education is encouraged. Mandatory continuing education usually runs to about 10-20 hours a year.

Most countries require licensees to provide some sort of financial guarantee and a small number of countries require mandatory membership of a professional body.

<i>Country</i>	<i>License Required</i>	<i>Entry Qualifications</i>	<i>Ongoing Oversight</i>
Argentina	Yes	Degree level	None
Australia	Yes	Minimum 40 hour entrance level course	License renewed on annual or 3 year basis Mandatory continuing education in some states
Brazil	Yes	High school course	None
Canada	Yes	Pre-licensing course and exam Standards vary by Province  Separate licenses for salespeople and a broker or manager	License renewed on annual or 2 year basis Most provinces require continuing education
Czech Republic	Registration	None	
Denmark	Yes	Sufficient technical and practical knowledge to meet requirements of Ministry of Trade and Commerce	Licence remains in place as long as licensee fulfils requirements
Finland	Yes	Real estate law exam for Principals	State Provincial Office monitors profession and promotes consumer protection Principal responsible for continuing education of employees
France	Yes	Must demonstrate vocational aptitude by way of qualification or experience	No mandatory continuing education
Greece	Yes	High school qualification Local Chamber of Commerce membership	Annual license renewal No mandatory continuing education
Hong Kong	Yes	Qualifying examination  'Fit and proper' test	Licenses renewed on annual or 2 year basis No mandatory continuing education
India	Registration	None	None
Italy	Registration	Minimum 80 hour course or High School diploma and relevant experience	Continuing education encouraged

<i>Country</i>	<i>License Required</i>	<i>Entry Qualifications</i>	<i>Ongoing Oversight</i>
Korea	Yes	32 hour business practice course	None
Mexico	Registration in some states	Pilot programme to test basic proficiency	None
Netherlands	Yes	Diploma and membership of professional body	Mandatory continuing education
New Zealand	Yes	Principal must have qualification or 3 years experience Membership of Real Estate Institute	Annual license renewal Real Estate Agents Licensing Board can fine licensee or suspend/cancel license
Norway	Yes	3 year third level course	Lifetime license which can be revoked if continuing education requirements are not met
Poland	Yes	130 hour qualification course 6 month internship	Lifetime license which can be revoked if continuing education requirements are not met
Portugal	Yes	None	None
Russia	Yes	90 hour qualification course approved by State Ministry of Property	None
Singapore	Yes	Bachelors degree in real estate, relevant experience and membership of Professional Body	Annual license renewal
Spain	Yes	None	Continuing education encouraged
Sweden	Yes	2 year third level course	Annual license renewal Government appointed Board of National Estate Agents regulates the industry
United Kingdom	Yes	None Voluntary Codes of Practice encouraged	License may be revoked if provisions of Estate Agents Act are breached Act includes many consumer protection provisions

<i>Country</i>	<i>License Required</i>	<i>Entry Qualifications</i>	<i>Ongoing Oversight</i>
United States	Yes	Varies from state to state  Minimum High School diploma Most states require 30-90 hour course	Continuing education mandatory in most states
Venezuela	Voluntary certification	None	None

### **Protecting Consumers**

In the absence of criminal activity, where the consumer can have recourse to the courts, most of the countries reviewed appear to offer limited statutory protection to the consumer. Substantial fines and revocation of licence appear to be available in only a small number of the countries reviewed.

With the exception of Finland, none of the licensing authorities in the countries reviewed appear to have a pro-active consumer advocacy role although they will provide legal information to consumers who feel they have been wronged.

While not responsible for licensing, the UK Office of Fair Trading plays a significant consumer advocacy role and has been responsible for major changes currently underway in UK estate agency practices. The UK is also one of the few countries reviewed to include consumer protection provisions in its legislation.

In the time available to it, the Group was not able to ascertain if consumer organisations in other countries play a significant consumer advocacy role in this sector of the market but anecdotal evidence would suggest that they do not.

## *Appendix G Glossary of Terms*

### *Auctioneers/Estate Agents' Fees*

Fees are typically a percentage of the purchase price for existing homes.

For leases it is a percentage of the annual lease rate negotiated, and for lettings the fee is usually a percentage of the annual rent. Estate agents in Ireland charge commission between 0.5% and 3.0% of the purchase price. This commission is paid by the seller. Most agents operate on a “no sale no fee basis” – if a sale is not concluded during the term of agency the seller will not be required to pay commission. S/he will however, be liable for any expenses incurred by the agent.

### *Conveyancing*

The legal process around the transfer of ownership of real estate

### *Gazumping*

When a seller accepts a higher offer having previously entered into a “subject to contract agreement”. A “subject of contract agreement” is defined as a provisional agreement for the sale of property which is not legally binding and from which either party can withdraw without legal consequence.

### *Gazundering*

The practice of withdrawing a price already offered and making a lower offer. This is the other side of the coin to gazumping. When the property market is weak, a buyer may try to reduce his bid for a home prior to the exchange of contracts.

### *Ghost Bidders*

The practice described to artificially create higher realisations for a lot by “accepting” bids from non-existent bidders.

### *Guide Price*

A tendency has existed for auction guide prices to be substantially below final sale prices. To alleviate this auction valuation problem, professional bodies have issued recommendations that guide prices should be within 10% of the actual sale price on auction day. However, with the reserve being set by the client within minutes of the start of the auction, these rules are ignored and are unenforceable. Another factor creating a gap between guide and realised prices is the practice of some agents to use guide prices as a marketing tool and deliberately under-value on order to increase interest in the property.

### *Property Survey*

Advice to buyer as to general condition of property identifying significant defects and repairs essential at the time of inspection and referring readily apparent potential inspection hazards

### *Reserve Price*

The catalogue stated or non-stated minimum price acceptable by the Auctioneer or owner of the property.

## *Appendix H Organisations Consulted*

Office of the Accountant of the Courts of Justice, *Dublin*

Revenue Commissioners, *Dublin*

Law Reform Commission, *Dublin*

European Commission Internal Market Directorate, *Brussels*

CEPI – European Association of Real Estate Professionals, *Brussels*

BEUC – European Consumers' Organisation, *Brussels*

UK Consumers Association "Which?", *London*

UK Office of Fair Trading, *London*

International Consortium of Real Estate Associations (ICREA), *Chicago*

New Zealand Ministry of Justice, *Wellington*

## *Appendix I Items that should be properly the subject of an engagement letter*

1. The name and trade name of the auctioneer.
2. The address and contact details.
3. The address/description and title (freehold, leasehold etc) of the subject property.
4. The Advised Minimum Value.
5. The amount of fee or commission. If expressed in percentage terms, the cash equivalent, based on the Advised Minimum Value, with details of VAT and a statement of the circumstances under which a fee becomes payable.
6. The amount (VAT - inclusive figures, as appropriate) of any promotional budgets detailing all outlays (sign, travel, brochure etc.). Provision that any additional expenditure must be agreed in advance and confirmed in writing to the client by the auctioneer.
7. Whether sole agency, sole selling rights, joint agency, or multiple agency, and the consequences.
8. Duration of agency contract and length of notice to be given in the event of termination by seller or auctioneer, and the implications therein.
9. Consequence of termination – e.g. seller will liable for fee if property sold to buyer introduced by auctioneer - should be identified for each contract.
10. Identity of seller's solicitor, and advice to seller to instruct solicitor immediately.
11. Notification of obligation on auctioneer to seek money laundering verification.
12. Schedule of contents and fixtures and fittings to be included in the sale.
13. Statutory matters:
  - License number
  - Complaints and redress procedures
  - Where applicable, statement of intent to offer financial products to prospective purchasers.
14. Affirmation that no conflict of interest exists that should prevent the auctioneer accepting the agency contract.