

**Commercial Property Exemptions**

**A Review of the *Land Agents Act 1994***

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1. **Introduction**

The real estate market in South Australia specifically, and in the Commonwealth in general, is a very sophisticated and highly regulated profession. There are a number of different pieces of legislation which outline the responsibilities and obligations of the land agent profession. The project that I worked on at the Consumer and Business Services, which was announced as part of *Simplify Day[[1]](#footnote-1)*, proposed an exemption for high end and related entities in real estate. The proposal would reduce regulatory burden for the commercial sector, inspiring and encouraging investment.

Consumer and Business Services (CBS) “ensures that laws affecting consumers, traders and businesses in South Australia are fairly and effectively administered.”[[2]](#footnote-2) CBS is a division of the Attorney General’s Department of South Australia, comprised of the former Office of Consumer and Business Affairs and the Office of the Liquor and Gambling Commissioner. Deputy Premier John Rau is the Minister for Consumer and Business Services.

CBS provides services to support every day activities of South Australian citizens, whether consumers, traders or businesses. These services include, but are not limited to:

birth, death, and marriage certificates; occupational licensing; liquor licensing; consumer and product safety; renting and letting; associations and co-ops. CBS is actively interacting with members throughout the many South Australian communities, and as such is focused and flexible in the services and information provided.

CBS is located in the city center of Adelaide. The ground floor of 91 Grenfell Street serves as the customer service section of CBS, where individuals can meet with a representative to answer a question or resolve an issue. The floors of 93-95 Grenfell Street serve as the office space for other CBS employees.

The proposed exemption has been advocated by members of the Shopping Centre Council of Australia for more than a decade. The states of Australia have individualized legislation to regulate the real estate market. It was agreed not to move forward with the National Occupational Licensing System, but in the past few years, other state jurisdictions have moved forward with a similar exemption. The real estate market is highly regulated, and that can often place burdens upon businesses attempting to invest and engage the market. This exemption would eliminate some unnecessary and irrelevant regulation in the real estate market for high end and related entities, stimulating investment and promoting competition in South Australia.

My background of policy debate in high school has developed a keen ability to objectively evaluate positions and provided a unique economic education. My senior year, the debate topic was covered the economic engagement policies of the United States towards Cuba, Mexico, or Venezuela. I was exposed to many of the realities of the global economic process, and I was able to learn about how economic policy affects the ways in which business can function.

The project that I initially interviewed for turned out to have a much smaller workload than expected, so my supervisor, Damian Allison, suggested the real estate exemption project because of my background in economics. I would have to be able to learn to arguments from all of the stakeholders, and then weigh them against each other to see which were most plausible. By choosing this project, I was also afforded the opportunity to write the cabinet submission for the project, which gave me a lot of freedom in determining the final result.

Entering the internship, I was keep to learn about the Australian structure of government and the process of change, and the buzzwords of “freedom” and “submission” peaked my interest. My civics education started when I was young with *School House Rock*, and continued into my secondary education with schooling and debate. I have a good grasp of how federalism, democracy, and the constitutional republic of the United States functions, but I realized that I knew very little about how other democratic institutions functioned. Through this project, I have been exposed to the parliamentary system in it’s entirely, seeing a different system of government from the inside out.

Being an American on study abroad, this project has given me invaluable experience. The cultural immersion that I was able to get has really helped me define my time in Australia, and having the opportunity to work on evaluating real world processes has inspired me to continue a future in public service. I chose this project because it offered me the ability to take complete ownership of the project.

1. **Objectives**

The objective of this paper is to serve as a report that can be disseminated as analysis and justification in proposing the new exemptions to the *Land Agents Act 1994*. The cabinet submission is written in a dry, legal format, and will not be available to the public for years to come. This should effectively provide my rationalization through an open analysis of the project’s methodology, the actions taken by other jurisdictions, and the evidence available while undertaking the review. For persons who are curious as to how an exemption is proposed in general, and why these exemptions were proposed in particular, I hope this paper is able to sate such curiosities.

The objective of the Arts Internship program is to address an issue or topic of concern to the host organization. My host organization, CBS, was first approached by the Shopping Centre Council of Australia (SCCA) about exploring a possible exemption in 2014. After receiving an advocacy for the exemptions and then meeting with the SCCA, CBS was instructed to begin a preliminary undertaking by the Minister. Exploring these exemptions was viewed as a high priority for CBS.

The goal for my project in particular was to write the cabinet submission for the proposed exemptions. As the internship has come to a close, that goal has been realized. The cabinet submission serves as the official proposal for the exemptions and is used by members of government to inform their perspective and determine whether or not the exemptions will move forward. This is a very useful document for CBS, and I am happy to have been able to complete the goals of the project.

1. **Methodology**

There were three steps in my project at CBS: literature review, collaboration, and completing the submission. The research question that drove the project was: should the government of South Australia implement an exemption where high end and related entities do not need a registered land agent to complete a transaction. Within that, I needed to understand how one becomes a real estate agent, what is required of real estate transactions, what classifies high end investors, what classifies related entities, what a justifiable threshold would be, and what the exemption would look like in practice. Working on this project for CBS has been unlike any other project or research assignment that I have previously undertaken, and as a result I approached the project using John Locke’s concept of the *tabula rasa*. Especially since I entered the project with very little knowledge about the real estate industry in South Australia, maintaining the *tabula rasa* perspective was fairly easy. I felt that it was very important to disregard any pre-existing ideas, and let the information itself serve as a starting point. In this section, I have tried to explain the method that I used for the project while still keeping with the expectations of confidence from CBS.

* 1. **Literature Review**

The literature review was quite comprehensive, taking roughly eight weeks to complete. I reviewed industry specific news articles, various third party position papers, legislation, and other pertinent reports. Most of the information that was used in creating my report is saved and organized within a large 2-ring binder at CBS. As the project continued, and the amount of research that was used increased, I also had to increase the size of the binder. Having the literature in a central location was very helpful to me in being able to go through and review it, and also proved very useful when searching for a reference of specific piece of data. I attempted to keep said binder structured so as to facilitate a review of the evidence used for the submission in an easy and straightforward manner.

The use of news sources was critical in developing context for the project and giving a picture of what is important for real estate investors. Third party externalities can be blinded by the different agendas that they are trying to promote, but the industry specific new sources presented information in an objective way. These sources are an authority used by investors to stay informed on the various happenings within the real estate industry, and as a result I felt confident in using these sources to inform my basic perspective on the project’s goals.

The consultancy reports from the different stakeholders and jurisdictions proved to be the most valuable part of the literature review. There are two different types of reports that informed this project: position papers and objective reviews. While the positions of the different stakeholders had been explicated in dot points or other broad overviews, the position papers provided a deeper understanding of the stakeholder’s arguments. However, a criticism of the position papers is that, at times, there was very little interaction with position of the other side; this was predominantly evident in the reports on behalf of opponents to the exemptions. The latter reviews were unburdened by the agenda of stakeholders, allowing them to create a holistic picture of everything for and against the proposed exemptions. Because these were conducted by professional consulting firms and delivered to the state jurisdictions, I took these reports as a strong authority on the matter.

The literature reviews also stimulated my analysis of how South Australia would be impacted by the proposed exemptions. The data and evidence that was used in these reports were specific to their jurisdictions, helping me outline what was needed in order to justify or condemn the exemptions for South Australia.

* 1. **Collaboration**

The communication stage of the project involved liaising with high-level officers of interstate regulators and other offices within the South Australian government. For clarifying and exploratory questions, I was able to communicate with members of the regulatory offices in New South Wales and Victoria. The exemptions had been explored in both jurisdictions, but existed in very different forms. Having means of communication was extremely useful, but it was also a very slow process. As an intern who was only in the office on one or two days in a week, my schedule and ability to respond was heavily restricted. Sometimes correspondence was very easy, but other times it was a difficulty.

The other offices that I interacted with in the South Australian government was the Valuer-General and Crown Solicitors Office. The Valuer-General is responsible for providing fair and transparent land values, which are then used by the government when determining property taxes. Additionally, the Valuer-General serves as special counsel and gives advice to the government based on the valuation and property statistics. For this project, the Valuer-General assisted CBS by compiling a report which demonstrated the scope of the properties that would be affected in South Australia. From the Valuer-General’s report, it was evident that the proposed exemptions were indeed small in scope, which solidified the position of CBS to support and propose the exemptions.

The Crown Solicitor’s Office provides legal advice and services to government Ministers, agencies and departments. The Crown Solicitor was responsible for providing CBS with legal advice on how to move forward with the exemptions. This was the bit of collaboration that took the longest amount of time to resolve. The legal advice had been requested by CBS midway through 2016, and the legal advice was not given until October 2016. Much of the project was completed and I had begun writing the cabinet submission, but the legal advice from the Crown Solicitor was needed before the final stages could be completed. I will go into more depth on the legal advice and advocacy in the “Advocacy of the Cabinet Submission” section.

* 1. **Submission**

The final stage of the project was to write and submit the cabinet submission. CBS recently began using a new template in which the cabinet submissions are written, and it was a steep learning curve in order to produce a quality submission. Cabinet is the central decision making body for the South Australian government, and the submission is what is considered by Members of Cabinet. The submission is circulated through CBS and given time for commentary and corrections, before finally being submitted to Cabinet.

The cabinet submission proposed an exemption for high end and related entities from the *Land Agents Act 1994*. The threshold proposed to qualify high end entities with the threshold of $10 million or 10,000 square meters. In order to preserve confidentiality, I cannot go intro much depth on the inclusions of the cabinet submission, but the Australian *Freedom of Information Act 1991* allows for the public to access cabinet documents that are 10 years or older.

1. **The Advocacy of the Cabinet Submission**

The cabinet submission that I completed on behalf of CBS advocated for the exemption for related entities and both of the exemptions for high end investors. The related entities plank has been the least controversial and has enjoyed the most widespread support, as allowing an entity to make a transaction with the legal equivalent of itself without a real estate agent is very rational.

The majority of the cabinet submission was a justification for both portions of the proposed exemptions that deals with high end investors. There are two unique parts to this part of the proposed exemptions. The first exempts the entities based on the value of the transaction. If the estimated value of the commercial real estate property is at least $10 million, or if the gross floor area is at least 10,000 square meters, then the entities to the transaction would be exempt.

The second part of the proposed exemptions exempts the entities to a transaction based upon the value or size of the entities themselves. Using the same thresholds set out for individual transactions, an entity that has real estate holdings, other than the real estate involved in the transaction, that is worth at least $10 million or has at least 10,000 square meters of gross floor area, then the entity can be exempt from the requirements of the LA Act. However, in order for the exemption to be applicable, all parties to a transaction must be over the thresholds and qualify for the exemption. Including a way for the entities to be exempt more accurately represents the idea that these are sophisticated investors, and reduces red tape most efficaciously.

While the proposed exemption based upon the worth or size of the entity does expand the scope of the exemptions to some degree, this is still a minor piece of deregulation. The goal of the exemptions is to reduce government red tape around business, creating a better environment for business to operate. by including both parts, the exemptions are able to have a greater impact, while still keeping with the protectionary and regulatory goals of government.

1. **Scope of the Proposed Exemptions**

A major advocacy in favor of the proposed exceptions claimed that this was a very minor piece of deregulation. The real estate industry is very highly regulated, and any piece of deregulation is perceived with extreme skepticism. I am not well informed on the operations of the real estate industry in the United States, but it has been my understanding that it is a fairly easy industry to enter.

In Australia, I found that the real estate industry is highly professional and expects high quality from agents. As a result, persons wishing to enter the profession must follow specially crafted courses to acquire the certifications necessary. In addition, there is constant professional development to continue to guarantee the excellence of estate agents.

However, only 1.14% of all commercial properties in South Australia would exceed the threshold of $10 million. This is in accordance with the proposal being a very small piece of deregulation. Other jurisdictions have similar statistics. In NSW, it is estimated that less than 1% of all buildings in the state would be caught by the regulation, but would reduce the cost of doing business in NSW by about $4 million a year. In Victoria, around 0.7% of commercial properties would have been affected.

The statistical analysis was compiled by the South Australian Valuation Office and is based on current land holdings that are strictly commercial properties. The valuation specifically removed land holdings that were classified as residential, rural, vacant, administrative, or reserve. The valuation did not cover the gross floor area of these properties, but in other jurisdictions, almost all properties above the 10,000 m2 requirement also exceeded a worth of $10 million.

1. **Political Themes Informing the Project**

The project I have worked on at CBS demonstrates one of the many balancing acts that government is responsible for. For any state or community, there needs to be a functioning economy so that the needs of the people can be met, and so there can be an overall prospering within the locale. Specifically, in my project, I was weighing market economic principles against the government’s role as a regulatory and protectionary body.

* 1. **The State as a Regulatory Body**

Regulatory economics serve a plethora of purposes in guaranteeing the efficacy of the market within a jurisdiction. As an economic principle, there is often a conflict between commercial procedures, the interests of persons using services, and those whose interests are not directly involved with the transaction. As a public body, the state government is obligated to mediate those conflicts and create a structure that is most fair for all participants. The state desires that services provided to the consumer is safe and appropriate, while not crippling business interests.

The real estate market is a heavily regulated market throughout Australia. Housing and accommodation is viewed as a universal human right, and as such there is a strong impetus to make sure that individuals are properly protected. As regulatory legislation, the *Land Agents Act* specifically seeks to remedy defalcation, misappropriation, or misapplication within the real estate profession. There is a system of deterrence that is legislated by the *Land Agents Act* and punishments for those who do not act in accordance with the law.

The proposed exemptions do not compromise the consumer protections parts of the legislation. The exemption is being created for consumers who do not want the protections of the act, and view the protections as burdensome for these types of transactions. Opponents are concerned that other consumers outside the real estate industry, like tenancy, will be negatively affected as a result of the exemptions, but the legislated consumer protections for other consumers will not be affected by the exemptions. The scope of the exemptions is very small, and the protections that are going away are contained only to those who do not need protecting.

More importantly, the regulatory process is not being changed. The principle of regulation which the *Land Agents Act* exists with is not being compromised, and the real estate market will continue to be a highly and efficiently regulated industry.

* 1. **The State as a Protectionary Body**

The LA Act is a piece of consumer protection legislation, on a mission to balance consumer protection and the business needs of licensed professionals. Consumer protection laws are designed to ensure the rights of consumers, while keeping ethics, competition, and transparency in the market place. The LA Act is predominantly oriented towards protecting individuals, for example a mom and dad, who are purchasing a home or other type of real estate. For the most part, these consumers do not know the nature of the real estate market, and do not know all of the regulations that must be met to complete a real estate transaction. The LA Act provides individuals with the confidence and security to commence real estate transactions.

If someone loses money as a result of a registered land agent’s or conveyancer’s wrongful actions, then those individuals can seek redress through the Agents Indemnity Fund (AIF). Monies that are paid to a registered land agent acting as a third party, such as a bond payment, deposits, and/or rent, must be paid into a trust operated by the agent. Any interest that accrues on money in the trust is collected by the state government and goes into the trust. The trust is then used to compensate individuals that are harmed through an agent’s fiduciary default.

For most, real estate is often one of the largest investments that they will make. It is reasonable to assume that most people are naïve to the real estate market, so the protections offered serve a vital purpose. However, some investors do not need the protections of the LA Act. High end investors have huge real estate portfolios and are aware of the nuanced realities of the real estate market, but in order to be in compliance with the law, these high end investors must still employ a registered agent. These individuals and entities have accountants, lawyers, strategists, and other personnel who could be just as equally qualified to conduct and determine the best deal, without being registered and licensed as a land agent. More importantly, high end investors have the ability to protect themselves, so they do not need, nor do they want, the protections offered by the government.

Related entities do not need the protections of the LA Act because one does not need to be protected from themselves when completing a transaction. Since, for all intents and purposes, related entities can also be considered the same entity, it makes logical sense the businesses should be able to make transactions with subsidiaries without a registered agent.

The second part of the government’s responsibility as a protectionary body was to make sure that the legislative protections in place for tenants would not be compromised. Leases and their requirements are legislated through two acts: *Retail and Commercial Leases Act 1995* and *Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Act 2015*. Because the exemptions only operate within the buying, selling, and transferring of property, the protections offered by these tenancy legislations will not be affected. There is a continuity between the government’s role as a protectionary body and the effects of the exemptions.

1. **Legal themes Informing the Project**

Precedent is the dominant legal theme which informed this project. Precedent is a legal principle in which the general rule of law is established via a previous legal cases. Precedent is often binding, or at least persuasive, when deciding a subsequent case. The intention of common law legal systems is to decide cases with similar facts according to principled rules so that predictable and similar outcomes are reached; that intention is achieved through precedent.

For this project, precedent served a persuasive role. Because South Australia has a certain level of intrinsic difference between other jurisdictions, it would be unwise to use other examples in a binding application. Instead, using the other jurisdictions and advocacies as a base point allowed for many different permutations to the exemptions to be realized. As a result, a comparative analysis of different possibilities can be completed, and the best possible result can be advocated.

The exemption needed to be large enough to make an effect on the market, but the exemption needed to stay small enough so that it kept a small scope. After looking at the different advocacies, I was able to create an understanding as to what a reasonable amount of the market share could be captured by the exemptions.

1. **Corporations Act**

The *Corporations Act 2001* provides precedent for who qualifies as a sophisticated investor[[3]](#footnote-3). The *Corporations Act* stipulates that if an one is investing a portfolio of at least $10 million, then an offer of securities does not need to disclose an offer of securities to investors. Proponents of the proposed exemptions advocated that high end real estate investors are actually sophisticated consumers in the market place, and as a result should be treated in a similary way. Since there was a clear definition of what a sophisticated investor is, I thought it justified to use that number of $10 million as the monetary threshold for the proposed exemptions.

Like how sophisticated investors are exempt from disclosing security offers to investors, the LA Act should recognize that there are real estate entities that are sophisticated, and allow them to make a business decision that is best suited to them. Some entities will continue to keep licensed agents on staff because they will still be dealing with transactions that are not exempt. If there is already a licensed employee, then it is easy to continue to keep them on board. However, for those entities that only deal in high end real estate, being able to make a business decision can resolve a potential burden of the status quo.

The market functions with *caveat emptor*, the principle that the buyer alone is responsible for checking the quality and suitability of goods before making a purchase, and that should serve as a balance against any unsavory behavior. If a party to a transaction recognizes that the property is flawed or not represented accurately, then they are able to report those people to CBS. CBS takes any potential violations very seriously and has the authority to right potential wrongs.

According to the theory of precedent, sophisticated investors in real estate should be considered the same way as sophisticated investors in the *Corporations Act*. Sophisticated entities employ individuals that are just as qualified, if not more so, than real estate professionals that go through the training. A licensed real estate agent serves a vital purpose in protecting consumers when purchasing a house or other property, an investment which is likely to be the largest of their life. However, sophisticated entities employ lawyers, consultants, and other persons that can be equally qualified to advise and confirm a deal.

As some entities will choose to disclose an offer of securities to investors, some entities will choose to continue employing individuals that are licensed real estate agents. The parties involved are dealing with very large amounts of capital, and they take their own precautions to balance the legal requirements and also promote the interests of the entity.

These persons or entities likely have other regulations they have to follow, and this could help centralize the person or entities’ approach to compliance. These entities have to employ legal teams and other consultants, and the current legislative structure creates red tape. While some businesses may have to keep a licensed agent on staff, there are entities that will benefit from being able to make a business decision on the matter.

1. **National Occupational Licensing System**

In 2008, the Coalition of Australian Governments agreed to a National Occupational Licensing System (NOLS) to cover a number of occupations. The duplicated and varying regulation that can exist between states and territories would be eliminated, allowing for more consistent economic regulation throughout Australia. However, it was agreed that the proposed national reform would not move forward.

A number of jurisdictions recognized concerns with the model and costs of the proposed NOLS system, but the individual states agreed to work in conjunction with the Council for the Australian Federation (CAF) to develop alternative options for minimizing licensing impediments, increase labor mobility, and achieve net benefits for business and government. A Decision Regulation Impact Statement (RIS) was produced for each of the occupations which would have been affected under the proposed licensing model.

The proposed exemptions were originally proposed as part of the NOLS proposal. As a result of collaboration between state governments and CAF, a number of other jurisdictions have continued with the regulation independently. As of this writing, Queensland and New South Wales have proposed and implemented a similar regulation; Victoria proposed the regulation, but only implemented the related entity plank; Western Australia has begun a preliminary undertaking of the proposal.

1. **Victoria**

The thresholds of the proposed exemptions is most similar to that of Victoria, but the Victorian government decided not to move forward with the exemptions. The Victorian model used $10 million and 10,000square meters as the thresholds for the exemptions, and that would have captured roughly 2% of estate agents and agents’ representatives in Victoria[[4]](#footnote-4). There was no provision to exempt entities involved in a transaction based on their other real property holdings, meaning that transaction size alone determined whether or not the exemption was applicable.

The scope of the Victorian legislation was consistent with arguments claiming that this was a small piece of legislation, but opponents were concerned that due process was not following in moving forward with the exemptions. As a result, the incumbent Victorian cabinet decided that delaying the exemption and allowing the next government to pursue or denounce the exemptions was the best course of action.

1. **New South Wales**

The form of the exemption in New South Wales demonstrated how contentious a piece of deregulation the exemptions are in the market. The real estate market plays an imperative role in the New South Wales economy, with about $14 billion changing hands every year, and regulators in NSW wanted to make sure that the industry would continue to be regulated in the most efficacious way. The Real Estate Institute – NSW (REINSW) fought vehemently against the proposal, with the NSW Minister ultimately having to broker a deal between the REINSW and the SCCA. The REINSW were unwavering in their belief that the exemptions would erode consumer confidence and ultimately impair the industry, while the SCCA were adamant that implementing the exemptions were necessary for evolving the business environment.

As a result, the NSW regulation exempts the entities involved with the transaction rather than exempting the transaction. This way, the thresholds were able to be higher, further restricting the scope of the exemptions. If both parties to the transaction have real property holdings, other than the property included in the transaction, worth at least $40 million or with a gross floor area of at least 20,000 m2, then the entities are exempt from the requirement. This is a much more complex version of the exemptions, as it deals with the portfolio of the entities to the transaction, rather than the transaction itself.

While the portfolio is a much harder to quantify, looking at the portfolio of the entity goes farther in recognizing the sophistication of the entities. However, this would allow a loophole in the legislation. As long as the entities to the transaction are above the threshold amounts, the transaction is exempt, regardless of the size of the transaction. Because the amount of properties that would be captured by the scope of the South Australian proposed exemptions is so small, this loophole did not seem to expand the scope by a substantial amount.

1. **Queensland**

The exemptions were least contentious in Queensland and had the least amount of available data. Similar to Victoria, the exemptions were given to the transactions, with the thresholds of the exemptions being unique to the Queensland jurisdiction. The exemption is given for property being exchanged that is worth at least $15 million or has a gross floor area of at least 10,000 square meters. In addition, if both parties to the transaction have other real property, besides the property in the transaction, worth at least $15 million or with a total gross floor area of at least 10,000 m2, then the parties are exempt.

The Queensland regulations provide an exemption for both classes of high end real estate investors, influencing the usage of both in the proposed exemptions for South Australia. By providing the exemption for both classes, the exemptions recognize the nuance of sophisticated real estate investors.

1. **Stakeholders and Arguments in Support**

Stakeholders that were consulted and offered a position on the proposed exemptions have expressed support for the exemption for related entities, but have competing positions on the high end investors exemption. To provide clarity, I have made a list of the stakeholders and different arguments which have appeared throughout the researching of the proposal. This paper as a whole offers analysis and commentary on the most important arguments and stakeholders, and so this section focuses on providing a clear and objective presentation of the stakeholders and their arguments. Following the lists of the stakeholders and their arguments, I will offer analysis on arguments that are not discussed elsewhere in the report.

Stakeholders in support:

* Shopping Centre Council of Australia
* Australian Retailers Association
* The Law Institute of Victoria
* Property Council of Australia

Arguments in support:

* The proposed exemptions will free owners from costly/irrelevant regulation.
* The proposed exemptions have been recommended by independent inquiries.
* The proposed exemptions have been legislated by other jurisdictions.
* The proposed exemptions will have a net positive affect on small business in South Australia.
* The proposed exemptions will not compromise the protections of tenants
* The proposed exemptions are a minor piece of deregulation.
* There are available means of recourse through legal/commercial avenues.
* Both of the proposed exemptions are necessary to effectively reduce red tape.

Stakeholders against:

* Real Estate Institute (Victoria/NSW/SA)
* Australian Livestock and Property Agents Association
* Estate Agents Council
* Council of Small Business of Australia[[5]](#footnote-5)

Arguments against:

* Assumption of sophistication in the proposed exemptions is wrong.
* The proposed exemptions will erode investor confidence in the industry.
* The proposed exemptions create easier conditions for fraudulent activity.
* The proposed exemptions will have a heavy impact on consumers
* The proposed exemptions will compromise the protections of tenants.
* Other aspects of owner-tenant relationship beyond the lease could be harmed by the proposed exemptions.
* The proposed exemptions are a large piece of deregulation for a specially regulated industry.
* 2-tiered system of licensing created by the proposed exemptions will lead to confusion in the market and give an advantage to unlicensed agents.
* The proposed exemptions increase the likelihood of legal involvement.
* Due process was not followed in proposing the exemptions.

1. **Analysis**

Many of the arguments for and against are on similar topics, allowing for easy comparative analysis. Specific commentary on tenants can be found in the “State as a Protectionary Body” section. This report as a whole should offer commentary on the arguments surrounding due process, the size of the exemptions, and the broad economic effect.

On the topic of size, I came to the conclusions that this was a very small piece of deregulation. Less than 2% of all properties in South Australia will be affect, and only a handful of real estate entities will be affected. For those that will be affected, the benefits will be quickly realized. The real estate industry is so specifically regulated, and the proposed exemptions will have such a small impact so as to not actually alter the regulatory scheme of the industry.

Opponents see legal means of recourse in a negative light, whereas proponents would prefer litigation. Most of the contracts utilized by entities that would be captured by the proposed exemptions have very specific contracts, making legal recourse a more appealing avenue.

Research indicates that fraud, both by agents themselves and with trust accounts, is very unlikely. Real estate licensing promotes ethics in the work place, but there is nothing unique to the licensing program which makes agents more ethical. The industry will still be able to protect against and promote ethical behavior, even if some actors are unlicensed.

1. **Potential Impacts of the Proposed Exemptions**

Regardless of intent, regulatory policies result in an impact on industry. Regardless of whether that impact is positive or negative, there are inherent affects associated with regulating an industry. The industry will continue to be affected by any new regulations that are introduced, and that includes the implementation of any exemptions. Throughout this project, I have been aware that new exemptions would have an effect on the market, and to the best of my ability, I evaluated the different potential impacts recognized by professionals in the industry.

1. **Potential Positive Impacts**

Members of the SCCA want to decrease costs to members. Since there are others viewed as equally qualified, these businesses don’t want to continue to pay the fees required to keep licenses current, and don’t want to pay employees for the time it takes for them to get the license. The SCCA estimates that members spend $800,000 a year on licensing.

Companies actively engaging in high end real estate see this as irrelevant. They want to be able to make a business decision regarding who they employ. The government has an interest in protecting naïve consumers, but these are not consumers that require those protections. These sophisticated investors have other avenues of redress, not normally needing the statutory conflict resolution.

The question of the effect on small business is much more contested, but it is unlikely that this regulation will have any impact on small business. The tenancy laws are not changing, so even if a large shopping center is to change hands under this regulation, any small business will still have protections. If anything, this proposal will positively affect small business, as savings for those who own the real estate can translate into savings for small business that rent out the space.

Proponents have called this a minor piece of deregulation, and opponents have critiqued it for being a major piece of deregulation. If looking at the total number of real estate transactions in a given year, transactions that meet the threshold will make up a very small percentage. However, these transactions are quite large transactions. In terms of monetary value, these transactions might make up a larger percentage of transactions. Regardless, it is a minute percentage.

1. **Potential Negative Impacts**

The REI has expressed concern that any deregulation of the real estate market will erode consumer confidence in the profession. While possible, it is improbable. This is a different part of the real estate profession than individuals purchasing a home will interact with, and some companies may still choose to keep licensed individuals on staff. Businesses will keep with best practices, and should be allowed to make a business decision.

There is also concern that the real estate profession could be ethically compromised. Most real estate agents are honest and ethical, but there is no compelling evidence that the license makes people *more* ethical; people simply choose to be ethical in their dealings. There is also no convincing evidence that an unlicensed professional acting as a real estate agents will be more likely to act unethically because they lack a license. Human behavior is hard to predict, but this should be a business decision, allowing businesses to choose the best representative.

The protections afforded to tenants should not be affected by this proposal. Retail tenants will still be protected in their dealings with landlords and their agents by the *Retail Leases Act 1995*. When other jurisdictions passed this regulation, there was no equivalent statutory protections for non-retail tenants. Non-retail tenants will be protected in dealings through the unfair contract terms protections (UTC) law. The UTC laws are extending to businesses on 12 November 2016*.*

Rent also goes into the trust. When agents are unlicensed, they will no longer have to put rent money in the trust. While this make create some risk, sophisticated property owners under the exemption have the ability to do due diligence on their agents and have recourse to legal and commercial avenues if the agent does not pay the rent to the owner.

Exemptions should increase competition by removing a barrier to entry into the commercial real estate market. This should benefit clients, as increased competition should lead to lower fees and better service as there are more available options. However, this is rather suspect in practice. The barrier to entry is already relatively small, and the high end real estate market is dominated by a small number of firms. In the larger real estate market, there are [number] of different firms, already providing plenty of choice.

1. **Conclusions**

The clear conclusion advocated by this report is that the proposed exemptions are beneficial for South Australia and should be enacted in practice. The proposed exemptions are beneficial to the South Australian real estate market, from both a simple cost-benefit analysis and a complex comparative analysis of the different positions. By enacting the proposed exemptions, South Australians throughout the economy will be benefitted, and the likelihood of negative consequences is extremely unlikely. The conclusions that I came to throughout this internship and research process have been unbiased by outside influences and are a pure reflection of the evidence that I have reviewed. Now that the proposal has been made, it will be reviewed and discussed with stakeholders to implement the best form of the proposed exemptions for all parties.

**Abbreviations & Definitions**

**Commercial Real Estate** – any non-residential property used for commercial profit-making purposes

**High End Investors** – (1) investors able to buy/sell/trade real estate over threshold amount; (2) investors with real estate portfolios that exceed threshold amounts

**High End Transactions** – transactions that meet or exceed the threshold amounts

**LA Act** – Land Agents Act

**NOLS** – National Occupational Licensing System

**Related Entities** – in relation to a body corporate, means a body corporate that is related to the first-mentioned body by virtue of section 50 of the *Corporations Act 2001*

**REI** – Real Estate Institute

**REINSW** – Real Estate Institute New South Wales

**REISA** – Real Estate Institute South Australia

**SCCA** – Shopping Center Council of Australia

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1. "Removing Outdated Legislation - Simplify Day." [↑](#footnote-ref-1)
2. "About Us." [↑](#footnote-ref-2)
3. Section 708, *Corporations Act* [↑](#footnote-ref-3)
4. *Review of the Estate Agents (Exemption) Regulations 2014* [↑](#footnote-ref-4)
5. COSBOA was the only stakeholder to oppose both exemptions. [↑](#footnote-ref-5)