PO-CH/NL/0206

PART A

Part A.

CONFIDENTIAL

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Begins: 27/7/88.

Ends: 5/10/88.

PO -CH /NL/0206

PART A

Chancellor's (Lawson) Papers:

CONVEYANCING BY EMPLOYED SOLICITORS

Disposal Directions: 25 Years

12/9/95.

PO -CH /NL/0206 PART A

B/f to J 29/7

27/7.

HOUSE OF LORDS,
LONDON SW1A 0PW

27 July 1988

I should advise PM shortly re for Wednesday.

Dear Nigel,

CONVEYANCING BY EMPLOYED SOLICITORS

On a number of occasions over recent years Ministers have considered the provision under the Building Societies Act 1986 for the recognition of conveyancing services by institutions and practitioners, and in particular the restrictions which should be imposed to safeguard the interests of the consumer.

The subject was mentioned again at E(CP) in January. Following that, Ministers suggested that officials should review the Government policy which was announced in 1985. That review has now taken place, and officials from the relevant departments have agreed the attached paper, which sets out the arguments for and against the current policy.

LORD CHANCELLOR - CH/EX 27/7

Colleagues will wish to consider the paper, in the light of the wider issues regarding competition policy in the legal profession which are under consideration by E(CP), although that may further delay the introduction of the conveyancing recognition system under the 1986 Act. I shall be interested to receive the views of colleagues.

I am copying this letter and attachment to the other members of E (CP) and Patrick Mayhew and to Sir Robin Butler.

Yours ever,

James.

The Chancellor of the Exchequer

FINANCIAL INSTITUTIONS AND CONVEYANCING

1. The question of banks' and building societies' powers to offer conveyancing services was discussed at E(CP) at the end of January. In subsequent correspondence, the Secretary of State for the Environment, the Economic Secretary and the Parliamentary Under Secretary of State for Corporate Affairs suggested that the opportunity be taken to reassess the proposed policy. They noted that there had been very rapid change in the provision of services for home buyers since the original policy had been agreed in December 1985, and it was not clear that the restrictions then envisaged were still appropriate. This paper, which has been agreed between officials of the Lord Chancellor's Department, Department of the Environment, Department of Trade and the Treasury, sets out the arguments for and against further relaxations.

Present policy

2. The current proposed policy was set out by the Solicitor General in a written answer on 6 December 1985 (copy attached at Annex A). He was reiterating statements by the Attorney General on 27 June 1985 and by himself on 17 July 1985 (Annexes B and C). These statements followed public consultation. They were confirmed by the Lord Chancellor during the passage of the Building Societies Bill on 10 July 1986 (Annex D). The policy proposed was that building societies and other financial institutions should be enabled to provide conveyancing, but not to their own borrowers; and the government would consider further the possibility of institutions owning minority stakes in firms of conveyancers. No figure has been given publicly for the size of this stake, but the Lord Chancellor's Department have had in mind less than 25 per cent. Schedule 21 to the Building Societies Act 1986, which provides the Lord Chancellor with the power to make regulations recognising institutions suitable to undertake the provision of conveyancing in England and Wales,

was enacted on the basis of this stated policy. Indeed it provides that the recognition rules may prescribe such conditions as appear to the Lord Chancellor to be appropriate for the purpose of "protecting persons for whom conveyancing services are provided by recognised institutions from conflicts of interest that might otherwise arise in connection with the provision of such services". The restrictions are not built into the primary legislation but the House was informed when the provisions were taken that the restrictions would apply.

Purpose of the restrictions

3. The proposed restrictions were intended to avoid the conflicts of interest which could arise if a solicitor employed by a bank or building society acts both for a society and for the borrower, between his duty to his employer and his duty to his client. Such conflicts could arise where the borrower reveals something to the solicitor which would reduce his chance of getting a loan if the information was passed to the lender. The separation also ensures that the solicitor is able to give independent financial advice to the borrower, about the type of mortgage which would be suitable to his circumstances, about the appropriate endowment policy, and whether he could secure better terms by going to a different bank, building society or other source for a loan.

4. The resulting conveyancing service that could be offered by institutions would not be particularly attractive to consumers. It would not, for example, allow a bank or building society to offer the "one stop" house buying service which they wish to offer and which customers appear to want, both as a matter of convenience and because the fewer people involved in the transaction the cheaper the service is likely to be.

5. The restrictions also seem to sit uneasily with recent proposals to expand building societies powers. Societies are already empowered to own estate agencies, sell insurance and give insurance advice. Under a package of orders which will come into

force on 30 August they will also be able to own or take an equity stake in a life insurance company, take an equity stake in a general insurance company (limited to 15 per cent for purely prudential reasons), provide pensions and fund management services, offer unit trusts, own a stockbroking firm, own removal firms, provide bridging finance, write wills, provide trustee and probate services and offer a wide range of housing and personal banking services. It might appear anomalous that they cannot offer the remaining key house buying service - conveyancing. On the other hand it can be argued that this service can be distinguished from the other services, on the grounds that, unlike them, conveyancing services would be offered to a borrower at a time when he is under pressure. He needs the mortgage and will not necessarily have the time or clear-sightedness to examine its terms adequately. This is why he will need particularly in this case to depend on reliable advice.

Possible conflict of interest

6. Although independent solicitors often act for both the lender and the borrower (at a significant saving for the customer), the solicitors accept instructions from them at a time after the mortgage terms have been considered and when the interests of the borrower and the lender are the same. They both wish the borrower to obtain good title. Until the mortgage terms are agreed their interests are not necessarily the same. The conflicts of interest which can arise are described in paragraph 3. While the borrower's interest is in a purchase which meets his particular requirements, the lender's interest is mainly in securing a commercially worthwhile transaction. So the concerns about conflicts of interest are legitimate enough. The questions for consideration are:

(a) whether, if the solicitor were actually employed by the lending institution, the conflicts of interest which would arise between lender and borrower would be recognised as such and would be sufficiently serious

and frequent to offset the perceived benefits of a more relaxed regime; and

(b) whether it is possible to provide sufficient safeguards to allow the customer at least a realistic and informed choice.

Possible safeguards

7. It would have to be made very clear to the borrower that the advice given by the society's solicitor is not independent. In addition lending institutions should not be able to insist that the borrower uses their solicitor. It should be possible to cover that in a suitable code of conduct, like the one which already exists for building societies. It would also have to be made clear at the outset that the employed solicitor could not represent his client in disputes with the society and may pass on any relevant information about the borrower to the society.

8. As for offering financial advice, any solicitor or conveyancer who wishes to advise on a particular endowment policy is covered by the Financial Services Act and will need to comply with its terms. Solicitors will be able to do this through their membership of the Law Society who will certificate them to do investment business. Conveyancers would have to apply either for membership of an appropriate self-regulating organisation or for direct authorisation by the Securities and Investments Board. (See Annex E for further details.)

9. This does not deal with possible conflict in advising about the particular terms of a loan contract. However, that is less of a disadvantage if the borrower knows that a solicitor or conveyancer is employed by, or is directly associated with, the institution making the loan and if there is an agreed code of conduct for stating particular items such as penalties or earlier repayment. An obvious parallel can be drawn with the arrangements for insurance brokers who must, under the Financial

Services Act, be either tied or independent. The consumer who buys from a tied broker knows that he will not receive impartial advice about products, but knows also that there are obligations to ensure, for example, that he is not sold inappropriate or unaffordable policies.

10. If it is felt that the risks of dealing with a solicitor or conveyancer employed by the lender are too great to give the customer the option, a further safeguard could be to require building societies to provide conveyancing services to borrowers only through a subsidiary or associated firm of conveyancers. The government has already said that it is prepared to consider allowing societies to own minority stakes in associated firms of conveyancers and, when Ministers discussed this issue briefly in January, it was suggested that an interest of up to 50 per cent might be reasonable (subject to checking commitments given to the House during the passage of the legislation).

11. In the case of building societies the risk of conflict of interest in the provision of estate agency services is already covered by a specific restriction. In that case societies can own the estate agents. Although these arrangements are unpopular with independent estate agents, there has been no evidence of problems or complaints from the customers and it is not clear why there should be any greater risk in the case of conveyancing where there would be the additional safeguard of professional codes of conduct.

The views of the Law Society and of the Marre Committee

12. The Law Society continues to believe that adequate safeguards are not possible. Although the Society is now prepared to allow lending institutions to refer clients to solicitors, it would not allow them to pay the solicitor's bills. It considers that this would dangerously restrict the solicitor's independence.

13. Any proposal to ease the restrictions envisaged in the Attorney General's original policy statement is likely to be

controversial and resisted by the legal profession. But it is clearly important that any restriction on institutions' ability to offer conveyancing services should be the minimum necessary to protect customers from the genuine risks of conflict of interest, and they should not be - or give the impression of being - a means of protecting the legal profession from competitive pressures to which other professions are exposed.

14. The recent Report of the Marre Committee on the Future of the Legal Profession expressed concern about the possibility of lending institutions becoming involved in the conveyancing process by offering a financial package to include legal services. Because of the conflicts of interest which may arise, and the absence of independent advice, they were concerned at the disadvantages that such arrangements would have for consumers. They referred to solicitors' experience in giving proper and impartial advice in connection with conveyancing transactions, including their financial aspects, and concluded that it must be of benefit to most people to employ solicitors in conveyancing transactions.

Timetable

15. The Lord Chancellor's Department has prepared an initial draft of part of the rules and had hoped to issue full draft rules for consultation before the summer with a view to implementing them around the turn of the year. That timetable has been delayed already following the correspondence suggesting reconsideration of the policy options (paragraph 1 above). If the current policy was changed there would clearly be further delay for the drafting needed to regulate the conduct of societies. Nevertheless, most banks and building societies would be content to live with the further delay if it resulted in more useful powers.

Summary

16. To summarise, the arguments for allowing a less restrictive regime are:-

i. Conveyancing is the only house buying service which the banks and building societies cannot offer; that is the only remaining obstacle to such institutions being able to offer the "one stop" service which consumers seem to want and find convenient.

ii. The circumstances in which potential conflicts of interest could do real harm to the customer are clear, although it cannot be certain how often they would arise in practice. At present, building societies frequently use the same (independent) solicitor as the borrower, at a significant saving for the customer - although only at a time when their interests coincide. The distinction between that and using the society's solicitor seems to be one of degree rather than substance, providing the customer is properly informed of the status of the solicitor, and given a clear choice.

iii. So far as offering independent financial advice is concerned, solicitors and conveyancers come within the scope of, and must comply with, the Financial Services Act if they offer advice on particular endowment policies. It is not clear that further protection is required.

iv. Although a society's solicitor would not be in a position to offer independent financial advice on the loan contract, a similar situation on insurance is dealt with by requiring the tied broker to inform his client clearly of his status.

17. Against that:-

i. A mortgage is likely to be the largest financial transaction in most people's lives. Borrowers need to be certain that they receive clear and impartial advice. This is at a time when they may be least likely to reach a reasoned decision on their own.

ii. The potential for conflict is greater when the borrower's conveyancer is employed than when he is instructed by the lending institution.

iii. The Government's current policy was agreed after public consultation and after intensive Ministerial discussions.

iv. The legislation was passed on the basis of clear and repeated statements of Government policy. It would be open to obvious criticism to change that policy after Parliament's reliance upon those statements, and at this late stage and without any indication in the intervening years that such a possibility was under consideration.

v. Any proposal to depart from the 1985 policy would be controversial and likely to cause further delay.

20 July 1988

Annex A

EXTRACT FROM HANSARD 6 DECEMBER 1985 Col. 354

Building Societies

Mr. Michael Forsyth asked the Chancellor of the Exchequer if he will make a further statement about the proposed building society legislation referred to in the Gracious Speech.

The Solicitor-General [*further to the answer given by the Minister of State, Treasury*, on 7 November 1985, c. *3*]: I can provide the following information.

The Government issued a consultation paper last year seeking views on the way in which conflicts of interest and anti-competitive practices could be avoided if building societies and other financial institutions were to offer conveyancing services to the public. Following that consultation, the Government have concluded that there is no difficulty in principle in such institutions providing conveyancing to persons to whom they are not also offering a loan. However, the Government are not satisfied that lending institutions could safely be permitted to offer both conveyancing and a loan in the same transaction. It is therefore proposed to prohibit lending institutions from providing conveyancing, either directly or through a subsidiary company in which they hold a majority stake, to those who are also borrowing from them.

The Government are also examining the possibility of estate agents providing a combined service of sale and conveyancing to vendors, and of lending institutions providing conveyancing to borrowers from them through associated companies in which the lender holds only a minority shareholding. Consultation on those matters is not yet complete.

It is also proposed to set a number of other conditions to ensure proper consumer protection. In particular, institutions will be required to ensure that their conveyancing work is supervised by a qualified person; and adequate arrangements will have to be made to protect the consumer against negligence or fraud on the part of those providing the service. Details will be announced in due course, after further consultations with the interests concerned.

Annex B

EXTRACT FROM HANSARD
27 June 1985, Cols 136 & 137

The Attorney General:...Our commitment is to permit financial institutions such as banks and building societies to offer conveyancing services, and to do so in a way that does not prejudice the consumer through conflicts of interest or anti-competitive practices. Both limbs of that commitment are important and both will be honoured....
The problem is that the arrangements for a loan are an integral part of most conveyancing transactions. The lender's employee cannot properly advise the borrower about the loan....
We remain firm in our resolve to find the correct solutions so that we can honour both limbs of our commitment.

Our conclusion is that we should bring forward amendments to the legislation which currently prevents all bodies corporate - including building societies - from offering conveyancing services. The amendments will enable the Lord Chancellor to exempt from the relevant restrictions those bodies which can properly be permitted to offer the service. The Lord Chancellor would have the power to impose any general conditions on the way in which the services were provided, to ensure that the consumer's interests are not prejudiced....

We see no difficulty in lending institutions offering the service in transactions where they are not providing the loan as well....
We are not at present - I emphasise at present - satisfied that lending institutions could provide a combined package of loan and conveyancing without risking unacceptable conflicts of interest. It is unrealistic to separate the arrangements for the transfer of title, on which the interests of the lending institution and the purchaser will generally coincide, from those for the loan. The loan is an integral part of the transaction. Lending institutions are commercial organisations and their interests in the arrangements for a loan are not the same as the borrower's. We have not as yet - I emphasise "as yet" - found a way round that, but my noble and learned Friend the Lord Chancellor recently met the Chairman of the Building Societies Association to discuss the matter.

We are still considering other possibilities. Lending institutions could perhaps provide the service through companies in which they held a minority share interest. It is possible that that would only dilute, rather than overcome, the conflicts, but we are examining that matter with the greatest care.
(Administration of Justice Bill, Standing Committee D).

Annex C

EXTRACT FROM HANSARD
17 JULY 1985, Cols 379 and 380

The Solicitor General:... I wish to make clear the Government's position on conveyancing by employees of building societies and other financial institutions. We are committed to introducing legislation to permit banks and building societies to offer financial services and we are committed to doing so in a way that does not prejudice the consumer through conflicts of interest or anti-competitive practices. Both limbs of that commitment are important and both will be honoured.

The problem is that arrangements for a loan are an integral part of most conveyancing transactions and the lender's employee is inhibited in advising the borrower about the loan, because he owes his primary duty and his livelihood to his employer....

We have decided to amend the legislation that prevents all corporate bodies, including building societies, from offering conveyancing services. The Lord Chancellor will be empowered to exempt individual corporate bodies from the restrictions and to impose general conditions on the way in which the services are provided, to ensure that the consumers' interests are not prejudiced. The legislative mechanism will have to be flexible enough to enable new ideas to be implemented quickly and without the need for further primary legislation....

We welcome measures to reduce the number of agencies that a purchaser has to deal with when moving house, subject to the overriding need adequately to protect the public from conflicts of interest. We see no difficulties arising if lending institutions offer services in transactions where they are not also providing a loan.... Lending institutions are commercial organisations and their interest is in the arrangements for the loan, as distinct from ensuring good title, and is not the same as that of the borrower.... and one possibility under examination is that lending institutions might provide the services through subsidiary companies in which they hold only a minority stake.
(Administration of Justice Bill, Standing Committee D).

Annex D

EXTRACT FROM HANSARD
10 JULY 1986, Col. 559

Lord Chancellor:...The Government do not at present intend to allow lending institutions to offer conveyancing services to their borrowers. But if our worries over conflict of interest can be allayed, it will be possible for the then Lord Chancellor to bring forward the necessary amendment to the rules. The aim of those rules will be to ensure that the consumer is properly protected, but not to such an extent that unnecessary restrictions are imposed on those wishing to enter the conveyancing market.
(Building Societies Bill debate)

EFW

Annex E

BUILDING SOCIETIES AND CONVEYANCING WITH REFERENCE TO THE FINANCIAL SERVICES ACT 1986

The Financial Services Act 1986 is concerned with investments and investment business as defined in Schedule 1 of the Act. Mortgages are not included in these definitions although endowment insurance policies are. Building societies offering such policies and/or advice on such policies fall within the Act and are bound by rules made under it. In the case of a building society which was authorised by the Securities and Investments Board, it would, for instance, have to declare whether it was tied to one particular insurance company or whether it was offering independent advice. Even when tied the building society would still be obliged to consider the suitability of the investment for the particular customer.

Conveyancing, of itself, would not appear to include the provision of investment advice and therefore the provision of conveyancing services, whether in-house or through a subsidiary, would not be a matter for the Financial Services Act 1986. It should be noted however that a person who is approached to provide conveyancing services and then offers advice on investments may need to be authorised or exempted under the Act. A subsidiary company specialising in conveyancing which gave investment advice to customers leading them to the parent company could be in breach of the Financial Services Act unless properly authorised. This could also apply to independent solicitors who recommend potential house-buyers to take out a particular endowment policy or who arrange for them to do so.

mjd 2/71Jn

RESTRICTED

FROM: J M G TAYLOR
DATE: 4 August 1988

PS/FINANCIAL SECRETARY

CONVEYANCING BY EMPLOYED SOLICITORS

The Chancellor has seen the Lord Chancellor's letter of 27 July, and the enclosed paper. He has commented that he awaits advice - but there is a strong case for liberalisation.

JMGT → PS/FST 4/8

J M G TAYLOR

dti

the department for Enterprise

The Rt. Hon. Lord Young of Graffham
Secretary of State for Trade and Industry

The Rt Hon The Lord Mackay of Clashfern
Lord Chancellor
House of Lords
LONDON
SW1A 0PW

Department of Trade and Industry

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REC. 09 AUG 1988 9/8
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Direct line 215 5422
Our ref PS5BGC
Your ref
Date 8 August 1988

L. YOUNG
→ L. MACKAY
8/8

CONVEYANCING BY RECOGNISED INSTITUTIONS

Thank you for the copy of your letter of 27 July to Nigel Lawson about conveyancing by recognised institutions and for the attached report.

The report sets out quite clearly that lenders and others wish to offer, and customers appear to want, the choice of a "one stop" house buying service. Our policy on conveyancing makes it about the only service which cannot be offered by a one-stop shop. It must surely be right to reconsider our policy in a market which has changed so considerably since that policy was decided in 1985. The key question seems to me to be whether adequate safeguards can be devised to counter the possible conflicts of interests and pressures which may arise. If the safeguards can be found I do not see how we can fail to change our policy. I am aware of both the Law Society's and the Marre Report's reservations but I am also aware of the views of the Director General of Fair Trading and the National Consumer Council.

The report does not examine possible safeguards in any detail and without such examination we cannot take an informed policy decision. I propose therefore that before we consider the question in detail, officials should urgently prepare a paper on possible conflicts and safeguards. If you and colleagues

are content that we should proceed on that basis, I hope that further delay would be minimised. I hope in any case that such work would provide useful background to the rules for which ever system we agree.

I am copying this letter, like yours, to the other members of E(CP) and Patrick Mayhew and to Sir Robin Butler.

3773/23

cc PPS PS/FST
MRS LOMAX
MR BURR MR REVOLTA
MR ILETT MISS NOBLE
MR DICKSON MR FLANNAGAN
MR MATTHEWS BSC.

Treasury Chambers, Parliament Street, SW1P 3AG

The Rt Hon the Lord Mackay of Clashfern
Lord Chancellor
House of Lords
LONDON
SW1

11 August 1988

EST
→L. MACKAY
11/8

Dear James

CONVEYANCING BY EMPLOYED SOLICITORS

The Chancellor has passed me a copy of your letter of 27 July, as the Minister responsible for banks and building societies. I have also seen David Young's letter of 8 August.

The officials' paper sets out the arguments for and against the present policy very clearly, but I do not find the arguments about potential conflicts of interest particularly compelling. As the paper notes, building societies frequently use the same independent solicitor as their borrowers and the distinction between that and using the society's own solicitor seems to be one of degree rather than substance, providing the borrower is aware of the status of the solicitor as a tied-agent and has the choice of going to an independent solicitor. David Young has suggested that officials should prepare a paper setting out the possible additional safeguards which could be put in place if we were to decide to allow employed solicitors to act for an institution's own borrowers. I am sure it is sensible for that to be considered alongside the paper attached to your letter. The present policy is becoming increasingly difficult to justify, and we should be careful not to condone restrictions which go beyond the absolute minimum necessary to protect borrowers from genuine dangers of conflicts of interest.

I am copying this letter to the Chancellor and the Financial Secretary, members of E(CP), Patrick Mayhew and Sir Robin Butler.

Yours ever

Peter

PETER LILLEY

SECRETARY OF STATE FOR THE ENVIRONMENT

2 MARSHAM STREET
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My ref:

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CH/EXCHEQUER
REC. 18 AUG 1988
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The Rt Hon Nigel Lawson MP
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17 August 1988

Dear Nigel

FINANCIAL INSTITUTIONS AND CONVEYANCING

I have seen the paper on 'Financial Institutions and Conveyancing" circulated by James Mackay under cover of his letter of 27 July to you; and David Young's letter of 8 August. I welcome the chance to reconsider our line on this issue and I think that the paper draws out the issues admirably.

In the past, we have said that financial institutions should not provide mortgage loans and conveyancing services because of the danger of conflicts of interest. I am not persuaded that those conflicts of interest are insurmountable. We faced similar potential conflicts in the provision of financial services and we have developed a satisfactory way of dealing with them through the Financial Services Act. If we can develop similar safeguards in this instance (and the paper suggests safeguards) then there are strong reasons for allowing lenders to offer conveyancing services: it could simplify house-buying for some people, promote competition and give the consumer a greater choice.

I wonder whether we are, in any case, making too much of the dangers. Some of the same conflicts of interest arise where an independent conveyancer is acting for both the borrower and the lender; and they are tolerated in those circumstances. The important thing is to make sure that the lender cannot insist on a borrower using its conveyancer and the borrower is clear about the conveyancer's position as an employee of the lender.

The borrower then knows that, if he wants independent financial advice, he must go elsewhere. In practice, I doubt whether many borrowers would expect advice from their conveyancer about types of loan or the merits of different mortgage lenders.

Therefore, I agree with David Young that we should press ahead in developing the sort of safeguards which are suggested in paras 7 to 9 of the paper; and that we should agree in principle, subject to being able to develop the necessary safeguards, to allow mortgage lenders to offer conveyancing.

Yours ever

Nicholas

NICHOLAS RIDLEY

cc. E(CP)

BACKGROUND

COMPETITION INITIATIVE ACTION PROGRAMME MAUDE → CH/EX 21/9

dti
the department for Enterprise

bf 4/10 (for meeting on 5/10)

The Hon. Francis Maude MP
Parliamentary Under Secretary of State for
Corporate Affairs

The Rt Hon Nigel Lawson MP
Chancellor of the Exchequer
Treasury Chambers
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REC. 23 SEP 1988
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23/9

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21/9/88.

Direct line 215 4417
Our ref
Your ref
Date 21 September 1988

Dear Nigel,

The Competition Initiative Action Programme endorsed by E(CP) on 26 July included a new requirement that Departments supply interim progress reports on items with a "continuing" or long-running timescale. Several of these are due by October, specifically from the Department of Transport ("Broaden private sector participation in provision of ancillary railway services"); the Department of Employment ("Review coverage of Wages Councils") and the Department of Health ("Review arrangements for letting NHS pharmacy contracts to ensure competition is not inhibited"). Two more are the responsibility of my own Department ("Ensure any EFT/POS system allows free access (subject to security etc considerations) and anti-competitive effects examined" and "Monitor construction industry professions' rules on fee-scales").

I am taking this opportunity to inform colleagues of developments in respect of the last two items in advance of the next meeting of E(CP) scheduled for 5 October. No doubt Paul Channon, Norman Fowler and Kenneth Clarke will be reporting on the other items listed above.

EFT/POS (ELECTRONIC FUNDS TRANSFER AT POINT OF SALE)

Since the establishment of EFT/POS (UK) Ltd by the major banks in December 1986 to set up a national system whereby customers could use plastic cards to purchase goods whose cost would be directly debited from their bank accounts, officials from the Treasury, DTI and Office of Fair Trading (OFT) have discussed developments with the various parties involved. Although the scheme is a commercial venture by private companies, the Government is concerned to ensure that financial institutions

CVGAAP

the enterprise initiative

should have freedom of access to the system, that there should be no technical barriers restricting participation (subject to security considerations) and that the operation of the scheme does not fall foul of the competition legislation (in particular the Restrictive Trade Practices Act 1976).

EFT/POS (UK) Ltd have been in touch with OFT over the question of whether their proposed arrangements are registrable under the 1976 Act and have been advised that certain documents are registrable by virtue of forming part of an overall arrangement with various aspects of the operations of the Association of Payment Clearing Services (APACS) which supervises other systems run by the banks collectively. The APACS agreement and certain of EFT/POS (UK) Ltd's documents were entered on the register in July 1988 but EFT/POS (UK) Ltd have not yet submitted all their documentation to the OFT. Documents furnished so far are regarded as giving rise to a relevant restriction for the purposes of the RTP Act by limiting membership of the scheme to members of APACS. EFT/POS (UK) Ltd are therefore aware of the requirements of the RTP Act in relation to their proposed arrangements.

It remains for them to seek to persuade the OFT that any restrictions in their agreements (including procedures for membership) are not of such significance to call for investigation by the Restrictive Trade Practices Court. If the Director General of Fair Trading accepts that they are not, he may make representations to the Secretary of State asking him not to refer the agreement to the Court. At that point, it will be necessary to decide whether to grant the necessary direction. The timescale here is entirely dependent on the progress made by EFT/POS (UK) Ltd in setting up the system and registering agreements with OFT.

EFT/POS (UK) Ltd have also explored with my Department the possible exemption of their arrangements from the application of the 1976 Act by means of an Order made under Section 29, but the exemption powers available are not properly suited to arrangements such as theirs, which are expected to evolve. For this reason, EFT/POS (UK) Ltd now seem unlikely to proceed with an application.

Officials are satisfied that the participants in the system are seized of the competition issues at stake and there will be continuing liaison as the plans for a national system evolve. The next major developments will be the launch of EFT/POS (UK) Ltd's pilot scheme of 2000 outlets in Leeds, Southampton and Edinburgh early next year. However, since there is little prospect that a national system will be in place within twelve months, I propose that the next report back date to E(CP) should be September 1989.

dti

the department for Enterprise

CONSTRUCTION INDUSTRY PROFESSIONS' FEE SCALES

The OFT is continuing to monitor trends in construction industry output with a view to assessing the likelihood of fee-scales restricting competition in the light of developments in the industry since the publication in March 1986 of the Director-General's report on the Advertising and Charging Rules of the Professions serving the Construction Industry. The OFT considers that no further action is warranted at present, but the position will be reviewed in the light of any comments relating to fee-scales that might be made by the Monopolies and Mergers Commission in their report (due to be published in November) following the reference of the advertising rules of consulting engineers in February this year. Once the MMC report is published, the Director-General will advise whether any further action is necessary in respect of fee-scales in the light of the latest output figures.

I am copying this letter to E(CP) colleagues and to Sir Robin Butler.

FRANCIS MAUDE

the enterprise initiative

MULTI-DISCIPLINARY PRACTICES

dti
the department for Enterprise

DT 4/10 (for E(CP))

The Hon. Francis Maude MP
Parliamentary Under Secretary of State for
Corporate Affairs

The Rt Hon Nigel Lawson MP
Chancellor of the Exchequer
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CH/EXCHEQUER 27/9.

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Direct line 215 4417
Our ref
Your ref
Date 26 September 1988

Dear Nigel,

MULTI-DISCIPLINARY PRACTICES IN THE PROFESSIONS

In the revised Competition Initiative Action Programme which I presented to the last meeting of E(CP), I indicated that I would be putting a paper to the next meeting on multi-disciplinary practices (MDPs). My officials have researched this issue and found few statutory or professional restrictions save in the areas of law and dentistry. I am therefore attaching the note by officials as a background to our discussions - and in particular to those on the legal profession - which will be taken at the next E(CP), which unfortunately I shall be unable to attend.

I think that we should accept that there are strong competition, deregulation and consumer choice arguments in favour of lifting the restrictions on MDPs, as long as there are adequate safeguards for consumer protection and the maintenance of professional standards. I know that the competition authorities believe that such safeguards can be drawn up. I am certainly not persuaded when professional bodies say that they would have less control of their members under MDPs. The professional, no matter the type of organisation within which he practices, is bound as an individual by the rules of his organisation.

The note by officials comments on the restrictions that Section 716 of the Companies Act 1985 imposes by limiting partnerships to 20 people. I accept that this is restrictive; but, on the one hand, we have said that we are willing to consider applications for further exemptions and, on the other, the forthcoming changes to permit incorporation by solicitors and by auditors will allow larger practices in that form. The

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professions are moving steadily towards greater freedom to practice in corporate form.

I agree with the paper's conclusions that:-

a) there are surprisingly few professional or statutory restrictions on the formation of MDPs apart from the legal and dental professions (paragraphs 7 to 10);

b) where MDPs do exist, there are rules to govern their operation, and conflict of interest does not seem to have been a major problem (paragraphs 7 to 8);

c) the whole area of restrictions in the professions will have to be examined again in the light of the forthcoming revision of the Restrictive Trade Practices legislation. Legislation is planned for 1989/90 (paragraph 3);

d) the Government has already consulted widely on restrictions on MDPs; the views of all those concerned are well known. There is no benefit to be gained from further open ended consultation (paragraphs 4-6 and 11-13);

e) there are competition, deregulation and consumer choice arguments for lifting the restrictions as long as there are adequate safeguards for protection of the consumer and the maintenance of professional standards. Drawing up such safeguards would be a complex task but the OFT believe the problems can be resolved (paragraphs 13 to 16).

I have no doubt that we should aim to remove the restrictions which exist in respect of both lawyers and dentists. I therefore recommend that:-

a) the Green Paper on the legal profession should state that the Government is in favour of removing the statutory restrictions on solicitors forming MDPs. Any consultations should concentrate on the necessary safeguards;

b) the legal review should also look critically at the restrictions on barristers but this will need to be done in a wider context of the organisation of the profession;

c) the Department of Health should re-examine the statutory restrictions on dentists when the next major legislation is introduced on the health service.

dti

the department for Enterprise

I am copying this letter to members of E(CP), James Mackay, Peter Walker, Tom King, Malcolm Rifkind and Sir Robin Butler.

FRANCIS MAUDE

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BARRIERS TO MULTI-DISCIPLINARY PRACTICES IN THE PROFESSIONS

Paper by Officials of the Department of Trade and Industry

Introduction

1 The primary purpose of this paper is to look at the statutory and professional restrictions on multi-disciplinary practices (MDPs) in the professions. The findings are set out in Appendix 1. A relatively broad view of what constitutes a profession has been taken bearing in mind the difficulties of definition. Contrary to expectations, Appendix 1 shows that there are surprisingly few restrictions on MDPs. The two exceptions are the legal and dental professions.

2 The paper also looks at the consultations which have taken place on MDPs and examines briefly the case for and against them. Paragraph 17 draws some conclusions from the paper. Action would have to be considered in the light of the forthcoming reviews of the legal professions and of the health service.

General Points

3 This paper only applies to multi-disciplinary partnerships in the professions. It does not deal with the question of whether particular professions can practice in corporate form or not. Some (eg consulting engineers) can already. Solicitors and accountants will shortly be able to do so. It is unclear at this stage how incorporation will affect any restrictions limiting whom a professional can practice with.

4 This paper also needs to be read against the background of the proposed revision of the restriction trade practices legislation. The professions are currently excluded from the Restrictive Trade Practices Act 1976. The Green Paper on restrictive trade practices, published in March 1988, heralded the legislation's overhaul. It indicated that no exclusions for the professions would be carried across into new legislation without the merits of each being established afresh. It is envisaged that such a judgement will be made by the competition authority responsible for enforcing the new arrangements. Legislation could be ready for the 1989/90 session. Restrictions on MDPs therefore need to be looked at in the context of the proposed legislation as well as on their own merits.

Background

5 Professional restrictions are a much reviewed area. Reports by the MMC on particular professional restrictions appeared from 1976 onwards, following the Monopolies Commission's general report on this area in 1970. These reports have resulted in, for example, the lifting of advertising restrictions in certain professions. A 1985 report of the OECD Committee of Experts on Restrictive Business Practices also found that in the few countries where MDPs were permitted, it could lead to more flexible professional structures.

6 In 1985, the Government specifically asked the Director General of Fair Trading (DGFT) to look at restrictions on the kind of organisation through which members of professions may offer their services. A wide range of professional and consumer bodies were consulted. The report concluded that it was in principle desirable to remove the restrictions on forms of practice with suitable safeguards for the maintenance of professional standards and adequate consumer protection. The report was deliberately silent on barristers because the Marre Committee was still sitting. Two recommendations were however directed at Government:-

a) the removal of the statutory restrictions on solicitors entering mixed partnerships;

b) a review of Section 716 of the Companies Act 1985 which restricts partnerships to twenty persons.

7 Following the DGFT's report, the Scottish Office issued a consultation paper on 'the practice of the solicitor's profession in Scotland', covering inter alia MDPs. The Law Society also published a consultation paper and, following discussions with other professional bodies, the Council of the Law Society has agreed some small amendments to its rules (including incorporation and business introductions). These will not however permit MDPs. The Marre report recommended that any action on MDPs should await an assessment of the Law Society's rule changes.

The Current Position

8 Appendix 1 shows that there are surprisingly few restrictions on MDPs. Where they are permitted, the professional body usually has rules to govern the position (eg MDPs including chartered accountants have to be cleared by the appropriate institute, consulting engineers have to be in a majority in any joint partnership and the Standard of Conduct for architects covers behaviour in mixed practices). The bodies permitting MDPs have reported no significant problems in regulating their mixed partnerships.

9 It should be noted that both in the UK (where MDPs are permitted) and elsewhere, liberalisation has not led to a major upsurge of MDPs. The Institute of Chartered Accountants for England and Wales has only received requests to approve about ten. There are also some 'construct and build' partnerships involving architects, surveyors and engineers. Current pressures in favour of MDPs are primarily from city firms (accountants and solicitors), some of which would like to provide a more comprehensive service for corporate clients. If MDPs were permitted, other potential areas of take-up could be property transfer (where a client can require the services of an estate agent, surveyor and solicitor) and the merger of individual accountancy and solicitors firms outside the big cities.

10 There are two potential restrictions on MDPs which need mentioning:-

a) Section 716 of the Companies Act 1985. The DGFT's report recommended the DTI should review this (paragraph 5a above). Section 716 (described in more detail in Appendix 2) has the effect of prohibiting partnerships with more than twenty partners unless it is composed wholly of solicitors, accountants or stockbrokers. Separate regulations also provide exemptions for partnerships wholly or mainly made up of other single professions. This is a potential barrier to large MDPs but in such cases the DTI is willing in principle to consider applications for further exemptions where a need can be established and where the disciplines of the professions concerned would provide adequate protection for clients of such partnerships.

b) Following the implementation of the Eighth Company Law Directive, qualified auditors will have to be in a majority and hold most of the voting rights in any partnership which carries out statutory audits in the name of the partnership. Similar restrictions will apply to incorporated auditors. The purpose of these requirements (which are contained in the Directive itself) is to ensure the effectiveness of safeguards on the independence of the auditor's judgement from the influence of the company he audits, despite the fact he is appointed and paid by the company. Qualified auditors will however remain free (subject to the rules of their profession) to participate in MDPs in which they are in a majority.

The two significant restrictions on the freedom to form MDPs therefore remain:-

a) dentists: although there are no restrictions on other medical groups, dentists are statutorily restricted from forming a partnership with other professionals (apart from doctors). This issue has been looked at before but the Department of Health decided to take no action because of concern in the profession and lack of demand from consumer groups;

b) the legal profession: barristers are only permitted to act as individuals; solicitors are prohibited both by statutory and professional restrictions from entering into MDPs (details in Appendix 1).

Case Against Multi-Disciplinary Partnerships

12 The Scottish Law Society is opposed to MDPs. The Law Society is still considering. Given the restrictions on lawyers, the case against MDPs has largely centred on them. The main arguments are:-

a) there would be conflicts of interest, in particular between a practitioner's duty to his client and his desire to put business in the way of his partners. Impartial advice, client confidentiality and the standards of the profession could be at risk. This would not be in the long term interests of the consumer;

b) there would be significant problems in reconciling the standards and requirements of the different professional bodies. The risk is that standards would be reduced to the lowest common denominator;

c) there would be difficulties in policing any professional rules; a particular concern is how consumer complaints would be treated;

d) there is no obvious demand for MDPs;

e) MDPs could lead to widespread mergers, which could reduce consumer choice;

f) lawyers have a special position as officer of the court - MDPs could put this at risk.

Case in Favour of Multi-Disciplinary Partnerships

13 As well as the OFT, most consumer bodies, some professional bodies and some of the practitioners concerned are in favour of MDPs. Their case rests on the following arguments:-

a) as long as there are adequate safeguards to protect the consumer and maintain professional standards, the professions should be free to organise themselves as they see fit, to meet the changing needs of their business. The restrictions are unnecessary regulation which cannot be justified;

b) removal of the restrictions would allow practices to meet the needs and demands of their clients better, thus offering greater consumer choice; the onus should be on those in favour of restrictions to justify them not vice versa;

c) the removal of restrictions would promote competition. A possible reduction in the number of practices is not a reason for restricting competition. The removal of restrictions should lead to more competition on pricing and quality of service, a more efficient use of resources (through shared overheads, greater economies of scale) and more flexibility in the structure of the professions;

d) the independence and integrity of the professional and any special role he may have could be safeguarded through a code of conduct backed by professional disciplinary procedures.

Assessment

14 The case against MDPs rests primarily on the problems of conflict of interest, policing professional rules and safeguarding any special role the professional may have. Even the Law Society has accepted that solicitors deal with some of these difficulties in their existing single discipline practices. For example, a solicitor will sometimes have to consider whether to refer a subject to another member of his own firm or to a different firm. Equally there are already pressures within partnerships to act in the most profitable areas. Solicitors currently cope with both these pressures.

15 In addition, it will be noted that professions which currently allow MDPs have not faced problems in this area (paragraph 8). No one in favour of MDPs challenges the need for safeguards to protect the consumer and maintain professional standards. The task of drawing up rules applicable to different professionals and deciding how these should be policed would be a complex one. the OFT believe the problems can be solved and have given some initial thought to what the rules might involve (eg a clear definition of each partner's role, compatible professional rules covering indemnity insurance etc). Major issues remain for discussion however such as the enforcement mechanism for these rules and how widely they would apply (eg only to recognised professional groups or more widely).

16 As long as the safeguards can be sorted out, the competition, deregulation and consumer choice arguments all point to the removal of the restrictions at least for dentists and solicitors. (The restrictions on barristers will need more discussion given at the moment they cannot even operate jointly). Apparent lack of demand and possible reduction in the number of practices are not arguments justifying the retention of restrictions. Provided safeguards are in place, the market should find its own level.

Conclusions

17 The conclusions to be drawn from this paper are:-

a) there are surprisingly few restrictions on the formation of MDPs apart from the legal and dental professions (paragraphs 7 to 10);

b) where MDPs do exist, there are rules to govern their operation and conflict of interest does not seem to have been a major problem (paragraphs 7 and 8);

c) the whole area of restrictions in the professions will have to be examined again in the light of the forthcoming revision of the Restrictive Trade Practices legislation. Legislation is planned for 1989/90 (paragraph 3);

d) the Government has already consulted widely on restrictions on MDPs; the views of all those concerned are well known. There is no benefit to be gained from further open ended consultation (paras 4 to 6 and 11 to 13);

e) there are competition, deregulation and consumer choice arguments for lifting the restrictions as long as there are adequate safeguards for protection of the consumer and the maintenance of professional standards. Drawing up such safeguards would be a complex task but the OFT believe the problems can be resolved (paragraphs 13 and 14).

COMPETITION POLICY DIVISION
DEPARTMENT OF TRADE AND INDUSTRY
September 1988

APPENDIX ONE

BARRIERS TO MULTI-DISCIPLINARY PRACTICE IN THE PROFESSIONS

Profession	Statutory Restrictions	Professional Restrictions
Solicitors England and Wales	Prohibited with regard to contentious business by S.39 of Solicitors Act 1974 (solicitor may not act as agent for non-solicitor in any court action) coupled with S.5 of Partnership Act 1890 (partners are agents of the firm and each other). [Possibly prohibited for conveyancing services under S.22 of Solicitors Act 1974.]	Practice Rule 7 limits fee-sharing with non-solicitors to employees and, in certain circumstances, estate agents. Practice Rules 1 and 3 (obtaining business and introductions) also inconsistent with mixed practice - but a recent amendment to Rule 3 has slightly relaxed the absolute ban.

Profession	Statutory Restrictions	Professional Restrictions
Solicitors Scotland	Prohibited for all solicitors' services under S.27 of Solicitors (Scotland) Act 1980. Prohibited for contentious business by S.26, as for English Solicitors above. Secretary of State for Scotland has proposed in his consultation document to amend these sections to permit MDPs.	Rules 2 and 3 of the 1964 rules prohibit fee-sharing and partnerships with non-solicitors.
Solicitors Northern Ireland	Solicitors (Northern Ireland) Order 1976 prohibits fee-sharing with non-solicitors (S.28).	None.
Barristers England and Wales	No statutory provisions. Conduct of barristers is the responsibility ofthe Bar Council.	Under the Code of Conduct (revised January 1985) paragraph 26 prohibits practising except from Chambers and in sole

Profession	Statutory Restrictions	Professional Restrictions practice. Paragraph 28 prohibits fee sharing.
Advocates Scotland	None. The Faculty of Advocates has responsibility for the conduct of advocates called to the Court of Session.	No formal rules, only a guide produced in June 1988; in practice, however, advocates risk disciplinary action if they depart from the guide. Partnerships with solicitors are specifically prohibited; it is stated that acts of an advocate are acts done on his own responsibility in performance of an office.
Barristers Northern Ireland	Responsibility lies with the Executive Council of the Inn of Court.	No formal rules; by tradition, all barristers practice from the Bar Library.

Profession	Statutory Restrictions	Professional Restrictions
Licensed Conveyancers England and Wales	None.	Licensed Conveyancers' Practice Rules state that a licensed conveyancer shall not combine his practice (or go into partnership or association with) any profession, trade or business unless such profession, trade or business is regulated or conducted in a manner acceptable to the Council. Licensed conveyancers must be solely responsible for provision of conveyancing services in such circumstances.

Profession	Statutory Restrictions	Professional Restrictions
Patent Agents	MDPs are currently prohibited. The Copyright Designs and Patents Bill has the effect of removing the restrictions and contains provision for the Secretary of State to make rules to allow the title to be used by mixed practices. The Bill should receive royal assent end 1988.	
Chartered Accountants	None at present. Legislation to implement EC 8th company law directive will mean that only where a majority of partners are auditors will the partnership be able to perform statutory audits.	Subject to consent of appropriate institute and subject to such conditions as the institute may impose and provided there is no breach of legal ethical or other requirements governing members of the bodies. (Statement 9 of ICAS and Statement 11 of the ICAEW.)

Profession	Statutory Restrictions	Professional Restrictions
Loss Assessors	None.	None.
Loss Adjustors	None.	None.
Shipbrokers	None.	None.
Doctors	None.	None.
Dentists	Only registered dentists and doctors may be in a partnership which practices dentistry. No lay persons or corporate bodies (except specific exemptions) may set up a dentists business (Dentists Act 1984)	None.
Physiotherapists	None.	None.

Profession	Statutory Restrictions	Professional Restrictions
Osteopaths	None.	None, but the General Council has in the past disciplined Registered Osteopaths who went into business with what they considered disreputable associates.
Chiropodists	None.	None.
Veterinary Surgeons	None.	The carrying on of a private veterinary practice by a lay person or a company is "unacceptable".
Architects	No prohibition, provided that all architectural work is supervised by a registered architect.	The Architects Registration Council of the United Kingdom (ARCUK) controls the register under the Architects (Registration) Acts 1931 and 1938, and publishes the Standard of Conduct for Architects. This gives advice on behaviour in mixed

Profession	Statutory Restrictions	Professional Restrictions
		practices, eg it should be indicated how the architect's responsibilities differ from a wholly independent service.
Chartered Surveyors	None.	None.
Consulting Engineers	None.	Rules of the International Federation of Consulting Engineers (FIDIC) require that consulting engineers must be a majority of the controlling partners and in a private company must have a numerical majority of directors and a majority of the voting rights.
Civil Engineers	None.	None.

Profession	Statutory Restrictions	Professional Restrictions
Building Services Engineers	None.	None.
Valuers and Auctioneers	None.	None.
Estate Agents	None.	None.

APPENDIX TWO

Section 716 and 717 of the Companies Act 1985

The prohibition: All partnerships of more than 20 persons formed for business purposes and including other associations except registered companies.

Exceptions : i. Solicitors (provided that each partner is a solicitor)

ii. Accountants (provided that each partner is a qualified auditor)

iii. Stock Exchange (provided that each partner is a member of the Exchange)

Exceptions by regulation S716 (3) S717 (2) : The Secretary of State may make exceptions by regulations in a statutory instrument. The following exceptions exist in the Partnerships (Unrestricted Size) Regulations:

a) firms of registered patent agents carrying on practice as patent agents;

b) firms carrying on any of the following activities:

1) surveying;

2) auctioneering;

3) valuing;

4) estate agency;

5) land agency;

6) estate management;

if at least three-quarters of the partners of the firm in question are members of one or more of the following bodies:

i) the Royal Institution of Chartered Surveyors;

ii) the Chartered Land Agents' Society;

iii) the Chartered Auctioneers' and Estate Agents' Institute;

iv) the Incorporated Society of Valuers and Auctioneers;

c) firms of actuaries each of whom is a fellow of either the Institute of Actuaries or the Faculty of Actuaries;

d) firms of chartered engineers the majority of whom are recognised as such by the Council of Engineering Institutions;

e) firms of building designers of whom not less than three-quarters are registered under the Architects (Registration) Act 1931 or are recognised by the Council of Engineering Institutions as chartered engineers or by the Royal Institution of Chartered Surveyors as chartered surveyors;

f) firms of loss adjusters, if not less than three-quarters of their total number are members of the Chartered Institute of Loss Adjusters.

TREASURY BRIEF

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Annex D

CONVEYANCING BY RECOGNISED INSTITUTIONS

Lord Young's letter to the Chancellor of 27 September.

Proposal

Paper sets out a case that adequate safeguards exist to protect consumers against any conflicts of interest which may arise if lending institutions offered conveyancing services to their borrowers.

Line to take

- welcome paper which sets out sensible and adequate safeguards. Could form good basis for a Code of Conduct for lenders.

- arguments about conflict of interest never been particularly compelling. Doubtful that many borrowers seek financial advice from solicitor who does conveyancing.

- need to ensure restrictions do not go beyond minimum necessary to protect borrowers from genuine dangers.

Background

The Lord Chancellor circulated a paper to colleagues in E(CP) on 27 July which dealt exclusively with conveyancing by financial institutions. This issue and his revised proposal is being discussed as part of E(CP)(88)15 (competition in the legal profession). In the E(CP) paper the Lord Chancellor states that a Code of Conduct will be necessary to overcome his reservations about allowing financial institutions to undertake conveyancing for their borrowers. Provided satisfactory safeguards were worked out, he would be willing to allow solicitors or licensed conveyancers employed by the institutions to undertake conveyancing for their employers or their clients.

Lord Young replied on 8 August to the original (27 September) paper suggesting that he ask his officials to prepare a paper on possible safeguards. The Economic Secretary wrote on 11 August (as duty Minister) stating that the arguments about potential conflicts of interest were not compelling and supporting Lord Young's proposal. Lord Young circulated his paper attached to a letter to the Chancellor of 27 September.

His paper sets out both safeguards to deter and to provide remedy in the event of loss. The two major concerns were that an employed conveyancer would not give independent financial advice and that there was a conflict of interest over confidentiality of information. The suggested remedy is to require institutions to make it clear: (i) that independent financial advice is not available from the conveyancer and (ii) that information disclosed to the conveyancer could be passed to the lender.

In addition the terms and conditions of the loan offered would have to be clearly explained. Any conflict of interest would have to be brought to the client's attention and the conveyancer would have to advise on all details of title and related matters A further safeguard is that institutions would be prohibited from tying provision of the service to offer of a loan (building societies already have a similar code of conduct). There would also be a requirement to list of price of each service offered by a lender separately. All of these requirements would have to be included in a contract.

On top of the Code of Conduct safeguards, the lenders could have their recognition revoked if they failed to comply with rules. The borrower would also have a right of redress against the conveyancer (who would be required to have indemnity insurance). The paper thus makes a good case for sufficient safeguards being possible without undue regulation of the institutions.

The only safeguard on which there is some doubt is the suggestion that the institutions are put under a duty not to offer a loan on a basis which was unsuitable or unduly onerous. This could lead

to pressure for all consumer lending to be covered by such a condition. A restriction on conveyancing is not the appropriate place to consider this point. Although it appears in this version, DTI officials have agreed to delete it from future drafts. The point, like others in the paper, was taken from a draft when this subject was first considered, by them, some six years ago).

ANNEX E

MULTI-DISCIPLINARY PRACTICES IN THE PROFESSIONS

Mr Maude's letter to the Chancellor of 26 September.

Proposal

The letter recommends that:

(a) the Green Paper on the legal profession should state that the Government is in favour of removing the statutory restrictions on solicitors forming MDPs. Any consultations should concentrate on the necessary safeguards;

(b) the legal review should also look critically at the restrictions on barristers but this will need to be done in a wider context of the organisation of the profession;

(c) the Department of Health should re-examine the statutory restrictions on dentists when the next major legislation is introduced on the health service.

Line to Take

Strongly support (a) and (b) (these are covered in detail in the papers by the Lord Chancellor and the Secretary of State for Scotland.

If raised support (c).

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Background

In the revised Competition Initiative Action Programme agreed at the last meeting of E(CP) in July Mr Maude agreed to put forward a paper on multi-disciplinary practices (MDPs) in the professions. We understand from the Cabinet Office, however, that as this letter is to be taken under the agenda item "Competition in the Legal Profession" the Chancellor, as Chairman, will be briefed to concentrate on the legal profession and MDPs leaving the issues of dentists (as well as a separate issue concerning the Companies Act 1985 restriction limiting partnerships to 20 people) to be settled in Ministerial correspondence after the meeting. Since the Lord Chancellor's paper fully covers the issue of the legal profession and MDPs we expect there to be little discussion of Mr Maude's paper which can be viewed essentially as background material.

As Mr Maude says there are strong competition, deregulation and consumer choice arguments in favour of lifting the restrictions on MDPs as long as there are adequate safeguards for consumer protection and the maintenance of professional standards. As indicated in the Lord Chancellor's paper, and in Lord Young's letter on the more specific issue of conveyancing, such safeguards can be drawn up.

On dentists, while we do not imagine that many dentists will be rushing to set up in partnerships with accountants and vets there seems no good reason why there should be statutory restrictions preventing them doing so or operating as limited companies rather than partnerships. (At present dentists are restricted from forming partnerships with other professionals, apart from doctors).

CONVEYANCING

dti

the department for Enterprise

bf for 3/10 (E(CP)).

The Rt. Hon. Lord Young of Graffham
Secretary of State for Trade and Industry

The Rt Hon Nigel Lawson MP
Chancellor of the Exchequer
HM Treasury
Parliament Street
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Date 27 September 1988

Dear Nigel,

CONVEYANCING BY RECOGNISED INSTITUTIONS : SAFEGUARDS

In my letter of 8 August to the Lord Chancellor about conveyancing by recognised institutions, I argued that the radical changes in the property transfer market made it increasingly difficult to justify our current restrictive policy. I suggested a paper on safeguards on the possible conflicts of interest between institutions and their clients. Whether these safeguards could be drawn up appeared to be the last obstacle to re-examining our policy. My views were endorsed by both Nicholas Ridley and Peter Lilley.

... Officials in my Department have now prepared the attached paper which I am circulating in anticipation of our discussion at the next meeting of E(CP). The paper demonstrates, I believe, that safeguards can be found which are both adequate and acceptable. I hope that colleagues will now be able to agree to a less restrictive regime, permitting conveyancing by recognised institutions (including lenders providing the service to their borrowers) as long as those institutions abide by an agreed code of conduct. Once the change in policy has been agreed in principle, officials can then be asked to discuss the Code of Conduct in more detail and the system for implementing it.

I am copying this letter and attachment to the other members of E(CP), James Mackay, Peter Walker, Tom King, Malcolm Rifkind, Patrick Mayhew and Sir Robin Butler.

Yours ever,
Norman

the enterprise initiative

CONVEYANCING BY RECOGNISED INSTITUTIONS

Purpose of paper

1 The Secretary of State for Trade and Industry wrote to the Lord Chancellor on 8th August. He argued that, in order to increase competition in the conveyancing market, lending institutions should be recognised as suitable to offer conveyancing services including to their borrowers, provided that adequate safeguards could be found to protect the consumer against any conflict of interest. Treasury and DOE Ministers have supported this view. This paper sets out a package of safeguards for discussion between departments.

Background

2 Conveyancing is limited by statute to "qualified persons", notably solicitors and licensed conveyancers. Provision was made in the Building Societies Act 1986 for the Lord Chancellor to recognise building societies, other institutions and individuals as suitable to provide conveyancing services. The Lord Chancellor may make rules as a condition of recognition.

3 Government policy, as stated in 1985, was to prohibit lending institutions from providing conveyancing, either directly or through a subsidiary in which they hold a majority stake, to those who are also borrowing from them. The Lord Chancellor indicated that the prohibition was the result of unresolved concerns over conflict of interest.

4 Since that time there has been rapid change in the property transfer market. Banks and others have had a major impact in lending where previously building societies had been responsible for over 90% of mortgage availability. Building societies have been permitted to expand their activities but in house purchase the consumer is still obliged to seek independent conveyancing or do it himself. Conveyancing is the last key element to permit "one stop shops" for property exchange. Lenders wish to offer this facility and consumers seem to want it. A "Which" survey, the results of which were published in April 1988, has demonstrated that competition in conveyancing undoubtedly reduces costs. The survey found that since 1983 [when advertising by solicitors was permitted following an OFT report], solicitors conveyancing fees have dropped by about a quarter. Licensed conveyancers are also about 30% cheaper than solicitors.

5 As a result of the changes since the original policy had been agreed, Ministers asked officials to review the policy and that has resulted in the paper circulated by the Lord Chancellor in July. The paper is a compromise between various views and officials were not able to agree a recommendation.

6 The paper accepts that there may be differences of interest between a borrower who is purchasing a home and a lender (eg confidentiality of information about the borrower, financial advice including terms and conditions of the loan, and details of title etc.) The DTI's view is that these potential conflicts can

be met by the provisions of safeguards incorporated in the rules permitting institutions to carry out conveyancing. This approach - which is endorsed by the major consumer bodies - would give consumers a wider choice in the provision of conveyancing services. The following paragraphs explore possible safeguards in detail. They do not deal with the question of their enforcement [see paragraph 18 below].

Safeguards

General points

7 Safeguards for consumers must take account of the type of risk and the degree of exposure but should impose the minimum burden on business. Safeguards should aim both to deter and to provide for remedy in the event of loss. The DTI's proposals seek to take both these points into account.

Basis and scope of advice from conveyancer should be clear

8 2 major concerns have been expressed about the legal advice provided by a conveyancer employed by a lending institution; firstly that he would not give independent conveyancing advice and secondly that there could be a conflict of interest over confidentiality of information [eg a borrower might disclose information about his financial position which could put his loan in doubt]. An employee of the lender would have a duty to disclose this information to his employer whereas an independent conveyancer would have a duty of confidence to the borrower, whether or not it was in the borrower's best financial interests.

9 We believe that both these concerns can be met by rules requiring the institution to make it clear on what basis conveyancing advice was being given. An employed conveyancer would not be able to give independent conveyancing advice but in this, he would be no different from tied agents in other financial markets. [The Financial Services Act requires those providing certain financial services to declare whether their advice is independent or as an agent]. The institution should have a duty to make the employed conveyancer's position clear on this point and to explain the terms and conditions of the loan offered by the instituion and their effect. The institution could also be put under a duty similar to some other financial services not to offer a loan on a basis which is unsuitable or unduly onerous.

10 As long as he understands the position, the borrower would still have the option of seeking independent legal advice, if he so wished, to cover alternative financial packages. It is worth pointing out, however, that under the current system

a) although a solicitor has a duty on to act in his client's best interests, he is not necessarily a specialist financial adviser

b) although there is conflicting evidence, a significant proportion of home buyers do not approach a solicitor

until they have arranged their mortgage and do not therefore look to their solicitors for financial advice.

11 On the second issue, confidentiality of information, the borrower should again be left in no doubt that any information disclosed during conveyancing may be used by the lender in assessing the borrower's suitability for a loan. The rules could also require the conveyancer to alert the borrower if a conflict of interest arises and advise him to seek independent advice.

Prohibition on tying in

12 There is an obvious risk that lenders will tie in other services to the loan thus forcing the consumer to take the whole package. Since the loan is the necessary element in most property purchases this would effectively take away the consumer's ability to choose where to procure the ancillary services. The long term effect could be the end of those service providers and a lack of competition in those areas. There should therefore be a prohibition on the offer of a loan being conditional in any way on any other service being taken. It is noteworthy that the Building Societies Association's Code of Conduct already prohibits any tying in of services.

Duty of care on details of title and other matters

13 It has been suggested, and also disputed, in the past that lenders are not sufficiently concerned about certain matters provided that title is adequate to represent security on the loan, which may represent much less than the price of the property. The borrower is interested not only in good title but also in matters which affect both the price of the property and his enjoyment of it such as private rights of way, restraints on planning, fixtures and fittings, arrangements for repair and maintenance, the rights and obligations within a lease, apportionment of joint interests etc.

14 It is not clear that there is any conflict here but rather a question of the degree of interest. One option to ensure that an adequate service is provided would be to require institutions to include these matters. There is also another safeguard. The borrower would have a contract with the lender for the conveyancing service. As such the latter (through his employed conveyancer) has a duty to convey properly with due care and skill. This duty [enforceable in the Courts in the last resort] must encompass the kind of issues raised in paragraph 12 above.

Prohibition on anti-competitive pricing

15 The dividing line between competitive marketing and anti-competitive practice can sometimes be very fine but there could be a risk of predatory pricing. Whilst consumers should be able to benefit from packages which are competitively priced because the services are all provided in house, independent service providers should not be driven out of business because of artificially low package prices. The consumer needs to be able to make an informed choice between in house and independent provision of any services.

There should be therefore a requirement that the costs of each element of the service are priced separately and the prices quoted.

Safeguards on acting for buyer and seller

16 The draft rules of the Council of Licensed Conveyancers (endorsed by the LCD but yet to be submitted to the Lord Chancellor) envisage conveyancers acting for both parties to a transaction as long as there is no apparent conflict of interest and both parties have consented in writing and have agreed that the same conveyancer will cease to act for either party should a conflict of interest arise. A similar safeguard could be written in the institution's rules.

17 Over and above, the safeguards outlined above, there would also be two others which could be applied

a) recognition could be revoked for failure to comply with the rules made by the Lord Chancellor
This would undoubtedly have a wider implication than simply ending the conveyancing service. The major institutions spend heavily on creating an image which would be tarnished by revocation.

b) there would always remain the right of redress to the individual, backed up by professional indemnity insurance The rules should require all institutions to take out such insurance. The borrower would have a contract with the lender for the conveyancing service.

As such the latter has a duty to convey properly with due care and skill. The borrower would thus have a legal remedy against loss arising from negligence or failure to perform the contract.

18 This paper has been written on the presumption that recognition of institions would take place under Schedule 21 of the Building Societies Act 1986. Schedule 21 gives responsibility for drafting the rules, recognising institutions and monitoring or policing the system to the Lord Chancellor. If there was a significant number of applications, this would have considerable resource implications - particularly if there were many from smaller organizations (eg estate agents) as opposed to the major banks and building societies. We understand the LCD may have other preposals to put forward on the enforcement of the systems. This paper has not explored this issue.

Summary and conclusions

19 Lending institutions should be allowed to provided conveyancing to their borrowers subject to safeguards to protect borrowers against possible conflicts of interest. The conveyancing package on offer from an employed conveyancer would be different from an independent one. Consumers should however be given the option of chosing between the services.

20 Consumers as a group would be protected by the Lord Chancellor's power to revoke recognition for non compliance with the rules. As individuals, their protection is in the form of remedy for breach of contract supported by compulsory indemnity insurance (paragrpah 17).

21 The safeguards should include the following points.

22 The conveyancing service should be supervised by a qualified person. The institution should be required to,

(i) make it clear that independent financial advice is not available from the conveyancer (paragraph 9)

(ii) explain the terms and conditions of the loan on offer from the lender and their effect in a clear and straightforward manner; (paragraph 9)

(iii) make clear that information given to the conveyancer may be used in assessing the client's suitability for a loan (paragraph 11)

(iv) bring any conflict of interest to the client's attention and advise him to seek independent advice (paragraph 10)

(v) advise on details of title and other matters (eg restraints on planning, rights of way). This would be backed up by the duty of care in any contract for conveyancing services (paragraph 14)

(vi) cost each element of the service provided to a borrower independently and quoted the cases of each (paragraph 15)

(vii) include these requirements in a contract for conveyancing services.

23 The institution should be prohibited from,

(i) making a mortgage offer conditional in any way upon the use of conveyancing [or other] services (paragraph 12)

(ii) acting for vendor and purchaser except as permitted in the Council for Licensed Conveyancer practice rules. (paragraph 6)

(iii) offering a loan on a basis which is unsuitable or unduly onerous (paragraph 9).

24 These rules should apply to institutions, their subsidiaries within the meaning of the Companies Act and any other companies in

which they have a dominant influence. [This can probably be encompassed within the definition of subsidiaries prepared for the New Companies Act Bill].

COMPETITION POLICY DIVISION
DTI
September 1988

FUTURE OF BRITISH WOOL MARKETING BOARD.

E(CP) Walker

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WALKER → CH/EX 30/9

Rt Hon Peter Walker MBE MP

CT/4617/88

30 September 1988

E (CP): FUTURE OF THE BRITISH WOOL MARKETING BOARD

Your meeting on 5 October is due to discuss the memorandum submitted by John MacGregor on the British Wool Marketing Board (BWMB).

I write in order to confirm my fullest support for the conclusion in the memorandum that the BWMB should be allowed to continue to exist within existing Agricultural Marketing legislation. We should not underestimate for one moment the powerful support that exists amongst producers for the Board. The Board has been a notable success story in recent years through its efforts in promoting and marketing British wool in overseas markets in what remains an extremely competitive area. And all of this has been built upon the Board's work in improving the quality of British wool through the whole of the production process.

The Board's current arrangements, through the averaging of costs across all producers, also provide clear advantages for producers operating in the more remote and less favoured areas and it is difficult to see how any alternative mechanisms could provide the same facilities. In addition, as the memorandum makes clear, there are no obvious benefits that would result from the dissolution of the Board and it would be very difficult to defend such a highly controversial course of action.

For these reasons I totally agree with John MacGregor's conclusion that the BWMB be allowed to continue to function with existing legislation.

/ Copies of this letter go to members of E (CP), Malcolm Rifkind and Tom King.

The Rt Hon Nigel Lawson MP
Chancellor of the Exchequer

CH/EXCHEQUER
REC. - 3 OCT 1988
ACTION FST
COPIES TO

✓ 3/10

E(CP)(88)14
CHAIRMAN'S
BRIEF.

4/10/88 -

E0604

CHANCELLOR OF THE EXCHEQUER

FUTURE OF THE BRITISH WOOL MARKETING BOARD

Paper by the Minister of Agriculture, E(CP)(88)14

DECISION

The Committee need to decide on the future of the buying monopoly now held by the British Wool Marketing Board (BWMB). Mr MacGregor argues strongly that the Board's operations should not be changed in any way. He will have the strong support of the regional Secretaries of State as shown in Mr Walker's letter of 30 September. He is likely to press his case hard.

2. On the other hand, the Prime Minister has, as you know, described the MAFF paper as "very timid", although Mr MacGregor does not know that. And the non-agricultural members of the Committee are likely to support abolition of the monopoly.

3. Policy on wool marketing needs to be seen in the context of that for potatoes and milk, on both of which final decisions have yet to be taken. Arguably, it is more important to abolish the marketing boards for potatoes and milk, since they affect the price to the consumers. But it is not clear that the Prime Minister would be willing to support such action in the case of milk.

4. There are two possible compromises. One is replacement of the BWMB by a voluntary co-operative, although Mr MacGregor may not see that as much of a compromise. The other is to accept Mr MacGregor's view on the buying monopoly, but to take action on the BWMB's subsidiaries.

BACKGROUND

5. The British Wool Marketing Board (BWMB) is the statutory monopoly buyer of all wool produced in the UK. It sells the wool through auctions. It also has subsidiary companies 'upstream' (collecting and handling the wool before the auctions) and 'down-stream' (buying some of the wool at the auctions, and processing and marketing it).

6. There is also at present a wool guarantee operated by the Government, which provides a national guaranteed price for wool each year. The guarantee is operated by means of the price paid to producers by the Board, but the Board could continue as a monopoly buyer even if the guarantee were withdrawn.

7. These arrangements are to be reviewed in 1990. Last year E(CP) asked Mr MacGregor to "consider whether the BWMB was necessary at all and the case for privatising it and its subsidiaries as a whole or in part". Mr MacGregor put a paper accordingly to the July meeting of E(CP), under Mr Fowler's Chairmanship. This recommended abolishing the wool guarantee, but leaving the BWMB's operations otherwise unchanged. The Committee agreed to abolition of the guarantee, but did not take a final decision about the future of the BWMB. It asked Mr MacGregor to prepare a further paper on the consistency of the BWMB's monopoly with EC law; the possibility of replacing it by a voluntary cooperative; and the possibility of requiring it to divest itself of its subsidiaries. E(CP)(88)14 is the result.

ISSUES

Should the BWMB continue at all?

8. It seems hard to deny that retaining a statutory buying monopoly in this industry would be inconsistent with the Government's general policy. It may well be right for the Committee to start from the presumption that it should be abolished. Abolition is likely to be supported by non-agricultural Ministers such as Mr Ridley and Lord Young.

9. The agricultural Ministers will argue that the BWMB should continue as the monopoly purchaser of British Wool because:

a. It does no harm to consumers. BWMB wool is sold at auctions, in competition with imported wool, at the world price.

b. The producers want it. Abolition would almost certainly need primary legislation and would be very controversial.

c. The Board's size enables it to get full advantage of economies of scale in collecting wool from producers and preparing it for sale.

d. It charges the average collection costs to all producers. This favours those who offer small amounts or are in remote locations. The Government would not want to see such producers disadvantaged. The regional Ministers are likely to make this point strongly.

10. The dilemma is that although a buying monopoly is inconsistent with the Government's general policy, it is hard to point to specific disadvantages for consumers which follow from it. Mr MacGregor will make much of this. Some questions you might like to raise on it are:

a. Mr MacGregor refers (paragraph 13 of Annex 2) to the possibility of "price stabilisation" by the BWMB even after the guarantee is ended. What does he have in mind here? Price stabilisation by producers is not often in the consumer's interest.

b. He also says (paragraph 4 of Annex 2) that British Wool sells at a premium of 8 to 15 p/kg over continental wool. You might explore this. Maybe it is the result of the higher quality of British Wool, but price premiums are always a cause for suspicion, especially when they are enjoyed by a monopoly.

c. You might also ask how much competition there really is between British and imported wool. Paragraph 5, Annex 2 says that domestic production accounts for "rather less than half" of the wool sold in the UK. This might be enough to give the BWMB some of the advantages of a selling monopoly, especially if the competition is fragmented. Does the proportion vary with quality or region? How do selling prices in the UK compare with those abroad? Do importers try to undercut the BWMB or do they accept it as price leader?

d. The standard price for collection means a subsidy from low cost to high cost producers. This cannot be in consumers' interests. But there are regional arguments for the subsidy.

A Voluntary Co-operative

11. A possible compromise might be to turn the Board into a single voluntary co-operative, so that producers also had the option of selling on the open market. Many of the arguments Mr MacGregor gives against this option (in section A of Annex 2) apply to a complete disintegration of the present buying machinery. In practice it may be more likely that most producers would continue at first in the voluntary co-operative; after all, Mr MacGregor himself says that producers generally, even the bigger ones, are quite content with the buying monopoly. Eventually some might break away, but such a process would really be the market at work. Indeed, setting up a voluntary co-operative could be a good way of managing the change from a buying monopoly to a free market gradually and without upheaval.

The Board's subsidiaries

12. A further compromise would be to accept Mr MacGregor's view on the BWMB's monopoly of purchase and in return press for more action on the divestment of their subsidiaries.

13. The Board's subsidiaries handle about half the total national production before it is delivered to the Board and buy about a third of the wool at the Board's auctions. The Board has actually extended the range of its subsidiaries in the last few years. Even if the Board's buying monopoly continued, these interests could be privatised.

14. Mr MacGregor opposes this because:

i. The Board would not agree voluntarily and primary legislation would be needed.

ii. The industry would strongly oppose the legislation.

iii. The work of the subsidiaries has been valuable, especially in promoting British Wool as a distinctive product.

15. Nevertheless, privatisation would so obviously be consistent with the Government's general policy that you might want to press Mr MacGregor on the case for it, covering such questions as:

- Has he discussed the possibility of divestment with the Board? If not, can he do so, with a view to achieving it? (In 1985 E(CP) asked his predecessor to press the Board, but it is not clear that this ever happened).

- Could he in negotiation with the Board indicate to them that willingness on their part to give up their subsidiaries might keep to fend off pressure for abolition of their buying monopoly?

- Do the objections seen by the Board and the industry apply to all subsidiaries? Surely privatisation would be more acceptable for some than for others?

- Would it be possible to introduce a partial private sector shareholding, at least to start with? This could conveniently be in Wool Growers Limited, the subsidiary through which all other interests are held.

G W MONGER

4 October 1988

TREASURY BRIEF

4

E(CP) (88) 14

FUTURE OF THE WOOL MARKETIMG BOARD

Memorandum by the Minster of Agriculture, Fisheries and Food

Proposals

(i) Confirm earlier E(CP) decision to legislate to end national wool guarantee scheme; but

(ii) proposes to retain Wool Board in current form (ie with statutory monopsony powers); and

(iii) unwilling to force board to divest itself of subsidiaries.

Line to take

- Have already agreed to end wool guarantee scheme. Should start from presumption that Wool Board's statutory monopoly should also be wound up, unless there are compelling arguments for retention.

- Find arguments in MAFF paper unconvincing. If producers really want Board to continue, nothing to stop them setting up one or more voluntary co-operatives.

- Whitehall lawyers would need fo check MAFF view that Wool Board not in breach of EC competition legislation.

- Accept that winding up the Board may not be top Government priority but notc thal primary powers to end statutory monopoly seem already to exist.

Defensive

Q: **Why risk damaging Wool Board's successful record?**
Accept sucess of Wool Board's marketing and promotion campaigns. But if they are popular with producers they will choose to retain a voluntary co-operative.

Q: Controversial primary legislation essential?
Primary legislation essential to end wool guarantee scheme [which MAFF themselves propose]. Powers already seem to exis to end statutory monopoly if Minister takes the view that it is not in the public interest.

Q: **Ending Board would reduce farm income especially in the Less Favoured Areas (ie Hills)?**
Wool is by-product of sheep farming and accounts for only 5 t 10% of producers' incomes. No reason why voluntary cooperative should not maintain incentives to produce in the hills.

Background

1. Wool is one of only two main agricultural products not covered by the Common Agricultural Policy (the other being potatoes). The BWMB was established in 1950 to operate the price support arrangements under the 1947 Agriculture Act (ie the wool guarantee scheme which has involved considerable public expenditure over the period). Its principal objective has been to maximise returns to farmers from the sale of British wool by minimising administration and marketing costs.

2. In July 1987, E(CP) concluded that there should be a full review of the British Wool Marketing Board (BWMB) and its activities in 1988, before the existing financial agreement with the Government came up for renewal in 1990. The E(CP) meeting in July 1988 examined a preliminary paper from Mr MacGregor. E(CP) agreed with the MAFF proposal that the national wool guarantee scheme should be ended as soon as the necessary legislation could be passed but it failed to agree on what should happen to the statutory monopoly powers of the Wool Board. Mr MacGregor agreed to produce a paper on the legal implications of abolishing the monopoly position of the BWMB and the scope for replacing it with a voluntary co-operative. These issues are covered in the latest MAFF paper but we gather that No. 10 think that the argumentation is rather limp.

Statutory Monopoly

3. At the E(CP) meeting held in July you took the line that it is not right to retain statutory monopolies unless there are compelling reasons for doing so. This was supported by DTI and DE Ministers. Mr MacGregor will argue that in the case of the BWMB there are compelling reasons:

(i) the board is popular with producers and it provides valuble buying, selling and marketing services which would otherwise be inaccessible to remote producers.

(ii) if the abolition of the board means that these services are not taken up by a voluntary body then some hill farmers might be forced out of production.

(iii) at present MAFF are aware of no opposition to the continuation of the activities of the board. They anticipate considerable opposition to any attempts to disband it.

(v) (according to MAFF lawyers) continuing the existing arrangement does not conflict with EC legislation.

4. On theoretical grounds this is clearly against the Government's policy on competition. If this statutory monopoly were continued it would become increasingly anomalous. To counter Mr MacGregor's arguments you might say:

(i) the activities of the BWMB are cross-subsidising small producers at the expense of efficient producers. This is not the way to stimulate a healthy and competitive industry.

(ii) if all producers are in favour of the existing powers of the BWMB then it is likely that they will ensure that its replacement has smilar functions. As long as it has the full support of producers, a voluntary body will be as effective as a statutory one.

(iii) if ending the statutory monopoly results in fragmentation of the Board's activities it will be clear that there was previously latent oppositon to its current cross-

subsidisation of remote and less efficient producers.

Fallback

5. DTI and DE ministers at any rate are likely to continue to support the case for abolition. However, there is no doubt something in the MAFF argument that winding up the Wool Board may not be among the Government's most pressing legislative priorities. Provided that the previous decision that the wool guarantee scheme should be ended by legislation as soon as possible, you may feel that enlarging the necessary bill to wind up the Board as well is not strictly essential, especially as the existing powers would allow the Minister to end the present scheme if in his view it is no longer in the public interest. You would however, wish to get Mr MacGregor to confirm that he would be prepared to use this power if there was any evidence of dissatisfaction with the activities of the Board after the end of the guarantee scheme.

Other Issues

6. The Board's subsidiaries were considered in detail by E(CP) in July 1987 [paper E(CP)(87)4]. Mr MacGregor's paper suggests that there is no strong case for forcing the Board to divest itself of them. We see little point in pressing this issue.

7. The MAFF paper suggests that there is no conflict between the Board's monopoly powers and EC competition legislation. At first glance Treasury Solicitors Department are not fully convinced of this and we suggest that the arguments should be fully reviewed by a meeting of Whitehall lawyers.

IAE(1)
3 October 1988

E(CP)(88)16, CHAIRMANS BRIEF.

E0607

4/10/88.

CHANCELLOR OF THE EXCHEQUER

Competition in the Legal Profession in Scotland
Paper by the Secretary of State for Scotland, E(CP)(88)16

DECISIONS

Mr Rifkind's paper about the Scottish legal profession also contains several proposals for change but is less wide-ranging than the Lord Chancellor's and contains no commitment to legislation in 1989-90. You may want to ensure that reform of the Scottish legal profession proceeds in parallel with that in England and Wales, with a firm commitment to legislation in 1989-90 on the same range of issues.

BACKGROUND

2. When the legal profession in England and Wales was last discussed in January, Mr Lang (who will also represent Mr Rifkind this time) offered a paper on restrictions in the Scottish profession. After some indications that the Scottish Office planned a limited paper, E(CP) at its July meeting asked for it to be as comprehensive as the Lord Chancellor's paper on England.

ISSUES

3. You will probably not want to spend so much time on the Scottish paper. The main objective might be:

a. To ensure that the timing and procedure for reform in Scotland are consistent with those proposed for England. The Scottish Office paper is not clear about this. You might ask Mr Lang if they have in mind, like the Lord Chancellor, an early Green Paper, and legislation in 1989-90.

b. To ensure that reforms are as comprehensive in Scotland as in England. Some differences may be inevitable because of differences between the two legal systems, but Scotland should

not emerge with a more restrictive system than England. There are some issues discussed in the Lord Chancellor's paper which are not mentioned in Mr Rifkind's, most obviously:

- Attendance on Counsel.

- Direct access to the bar.

- Liberalisation of conveyancing work.

Rather than go through these items one by one, you might prefer to place a general remit on the Scottish Office to ensure that as far as possible reforms proceed in parallel in the two countries. They could be asked to consult other Departments in the preparation of their proposals and to report regularly to the interdepartmental group to be established by the Lord Chancellor's Department. If a Green Paper for Scotland is agreed, that too might be cleared in E(CP).

4. There is one important subject, however, on which more than this may be required. The Scottish Office paper does not mention conveyancing at all. We understand however that there has been no change to date in the Scottish solicitors' monopoly on conveyancing equivalent to the recent reforms in England and Wales and that Scottish Office Ministers are divided about the desirability of reform. If Mr Lang accepts that there is this important difference between England and Scotland, you might ask the Scottish Office to present proposals on the liberalisation of conveyancing in Scotland to an early meeting of E(CP), preferably the next one already arranged for 24 November.

G W MONGER
Cabinet Office
4 October 1988

TREASURY BRIEF

hel.rb/revolta/E(CP)16

Annex C

E(CP)(88)16: COMPETITION AND THE LEGAL PROFESSION IN SCOTLAND

Paper by the Secretary of State for Scotland.

Proposals

E(CP) is invited to agree that the Secretary of State should issue a parallel consultation paper on certain legal restrictive practices (rights of audience and setting of solicitors' court fees), and that he should delay decisions on three other restrictive practice issues (including multi-disciplinary partnerships and executory arrangements) so as to move in parallel with Lord Mackay's exercise.

Line to take

Support proposals for consultation paper, and proposals on handling.

Background

Mr Rifkind put out a consultation paper earlier this year on 3 of the 5 items in his list; and the overall tone of his E(CP) paper is much more bullish than we had expected. It is obviously sensible for reform in Scotland to move in parallel to England, since Lord Mackay is in any case proposing a remarkably quick timetable.

The detail of the restrictive practices which he discusses is different from that in England, but the broad framework of the profession is the same. Scottish practice is already slightly more liberal than in England (eg there is not the same restriction on court appearances by all employed barristers) but far reaching reform will still meet stiff opposition. We understand that Lord Mackay takes the view that the Scottish Bar should remain separate from solicitors in order not to dilute its expertise.

E(CP)(88)15
CHAIRMAN'S
BRIEF.

4/10/88

E0606

CHANCELLOR OF THE EXCHEQUER

Competition in the Legal Profession
E(CP)(88)15

(Also relevant are the letter from Mr Maude to you of 26 September on multi-disciplinary practices, and the letter from Lord Young to you of 27 September on conveyancing)

DECISIONS

The Lord Chancellor recommends the removal of a wide range of restrictive practices in the legal profession in England and Wales. We understand that the Prime Minister has described his paper as "excellent". The tactic for the meeting might be to welcome the Lord Chancellor's general approach but press him to go further in one or two cases - for example on rights of audience - in stating the Government's commitment to reform.

2. Another objective for the meeting might be to get collective endorsement to a firm timetable of action leading to legislation in the 1989-90 session. You might ask the Lord Chancellor to circulate his draft Green Paper to E(CP) for comment. It may be possible to clear it in correspondence.

BACKGROUND

3. At E(CP) in January the Lord Chancellor agreed to prepare a further paper on removing restrictive practices in the legal profession, in the light of the recommendations of the Marre Committee. The Marre report, which was commissioned jointly by the Bar Council and the Law Society, was published on 13 July. The Lord Chancellor's paper covers in paragraph 9 the seven issues on which he was specifically asked to report. It also mentions in paragraphs 10 and 11 several further issues which should be the subject of public consultation. The following brief discusses these issues in order.

Rights of Audience

4. The important point here is that the Lord Chancellor does not propose, as he does on most of the other issues, that the Green Paper should state a Government view in favour of change. You might suggest that it should. The majority of the Marre Committee said that solicitors' rights of audience should be extended to all Crown Court cases. The Law Society want solicitors to have access to the higher courts as well. We understand that the Lord Chancellor himself would be prepared for some extension of their rights of audience.

5. As a fallback, you could concentrate on getting a commitment now that a clear statement should be made in the Green Paper, leaving its exact content to be decided later.

Probate

6. Though the Law Society is opposed, the Lord Chancellor wishes to commit the Government to legislate at the first opportunity to allow non-solicitors to apply for grants of probate (paragraph 9(b)). No problem arises.

Multi-disciplinary Practices

7. The Lord Chancellor agrees that a clear statement should be made that the Government favours allowing solicitors to operate in MDPs. The Lord Chancellor's paper should satisfy most of the points in Mr Maude's letter of 26 September. You may suggest that any further points on this letter should be handled in correspondence.

Attendance on Counsel

8. There seems a clear case for abolishing the rule that barristers have to be accompanied in court by a solicitor's representative. The Lord Chancellor says in paragraph 9(d) that the Government's view should be that a range of criminal cases can be dealt with by a single advocate, of which guilty pleas are a prime example. You may wish to see if he would go further than this. The objective might be abolition of any general rule, so that solicitors only accompany barristers if the case justifies it and not as a matter of course. Achieving this ought to realise public expenditure savings on legal aid.

Direct access to the Bar

9. Agreement now appears close on letting the professions have direct access to the Bar, without having to go through a solicitor (paragraph 9(e)). You may wish to ask the Lord Chancellor whether he believes any remaining restrictions on direct access for members of the public should remain and whether the Green Paper could promise movement on these also.

Conveyancing

10. The Lord Chancellor now proposes that members of professional bodies, such as the Building Societies Association and the Royal Institute of Chartered Surveyors, could be recognised for conveyancing work (paragraph 9(f)). He is also content for solicitors or other licensed conveyancers to undertake conveyancing work for their employers and their employers' clients, provided satisfactory safeguards can be worked out. This meets the main points in Lord Young's letter of 27 September. Points of detail could be remitted to officials. The Lord Chancellor wishes to issue a separate consultation paper on conveyancing, at the same time as the Green Paper, because the detailed coverage of this subject would be disproportionate to that of other issues. You may be content to agree to this, so long as the same timetable is maintained.

Competition in Legal Aid Work

11. The action described in paragraph 9(g) seems satisfactory, but you might ask the Lord Chancellor to circulate the Legal Aid Board's report when it is ready.

Other Issues

12. Paragraphs 10 and 11 list several other issues not in E(CP)'s remit. It is especially welcome that the Lord Chancellor volunteers a consultative document on contingency fees. You might ask him if he proposes that the Government should express a view on any of these issues.

Next Steps for England and Wales

13. Legislation in 1989-90 would have a number of advantages. First, relatively rapid action could be taken on restrictive practices in the legal profession, after years of inactivity. Second, 1989-90 is probably the last chance in this Parliament of getting through a measure which in Parliamentary terms will be fairly controversial. If E(CP) is content, you may wish to obtain specific endorsement for the following elements of the Lord Chancellor's timetable:

- an interdepartmental group of officials to be established immediately, under the chairmanship of the Lord Chancellor's Department, to draft the Green Paper. Membership as proposed in paragraph 8;

- publication of the Green Paper in January, with three months for public consultation. January is better than the Lord Chancellor's suggestion of "early next year". This Green Paper is to contain clear statements of the Government's firm policy on each restrictive practice described;

- a statement of the Government's conclusions by the summer recess (The Lord Chancellor's comment in paragraph 8 that a White Paper will not be needed at this stage may be optimistic, but no decision on this has to be taken now);

- introduction of legislation at the beginning of the 1989-90 session.

14. You may wish to consider briefly whether the Government's initial proposals should be in the form of a Green or White Paper. Arguably a document containing clear statements of Government policy, as the Lord Chancellor recommends (paragraph 8), should appear as a White Paper. However, we understand the Lord Chancellor prefers a Green Paper format so that the document can be described as consultative in nature. He feels this will help him to win over a reluctant judiciary. The Lord Chancellor is reportedly less concerned about the Bar Council and the Law Society, on the grounds

that their views are firmly entrenched and because the public will regard their responses solely as those of self-interested parties. On this basis, you may be content with the Lord Chancellor's proposal for a Green Paper format.

VIEWS OF OTHER MINISTERS

15. The Attorney General, with the Solicitor General would be responsible for piloting any legal reform bill through the Commons. We understand that when the Marre Report was published the Attorney said he was unpersuaded of the case for making major changes. The Lord Chancellor has seen him recently and reported that he was "coming round", at least to some extent. It will clearly be important to include the Attorney General in collective endorsement of the Lord Chancellor's proposals.

16. Lord Young will strongly support the Lord Chancellor's main proposals. He may raise briefly the interaction between this work and the creation of the Competition Authority, which it is also hoped to include in the 1989-90 legislative programme and which will consider restrictive practices elsewhere in the economy. If rapid progress really is made in legislation on legal restrictive practices it might be right to exclude them from the Competition Authority's remit. Lord Young will probably not wish to reach a conclusion on this now, in view of the implications for other professions. The Lord Chancellor may suggest that some smaller issues, such as baristers' partnerships and the arrangments for barristers' chambers and clerks may best be left to the Competition Authority.

17. Mr John Patten has been invited to attend in view of the Home Office's responsibilities for criminal law and the administration of justice.

REPORT TO PRIME MINISTER

18. No. 10 have suggested that, in view of the Prime Minister's interest in this subject, you might send her a brief report after the meeting.

G W MONGER
Cabinet Office
4 October 1988

TREASURY BRIEF

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CONFIDENTIAL

Annex B

E(CP)(88)15: COMPETITION IN THE LEGAL PROFESSION

Paper by the Lord Chancellor

Proposals

E(CP) is invited to agree the drafting of:

(i) a Green Paper for publication early in 1989 on reform of the legal profession, focusing particularly on restrictive practices of both barristers and solicitors, and with a view to legislation in the 1989-90 session;

(ii) consultation papers on corporate conveyancing and contingency fees.

Line to take

Strongly support Lord Chancellor's general approach.

But **ambitious timetable, so:**

- important that Green Paper should be ready in January.

- important also that Government should be in a position to move on to legislation in 1989-90 without accusations by the profession of too little time for consultation.

- **tone of document must be more a White Paper with green edges:** firm indication of Government plan, with only limited areas for detailed consultation.

- (if other colleagues content) support Lord Chancellor's judgement that a Green Paper plus statement before Summer Recess is sufficient.

- particularly welcome **new, more positive and liberal approach** suggested on conveyancing by building societies and other financial institutions. Especially welcome agreement that **employed solicitors** could do work for societies' borrowers, subject to **code of conduct.** Lord Young's paper on safeguards forms a good basis for a code of conduct.

- concerned that this would need further legislation and more delay. Further consultation paper on this not needed, simply state we are going to do it. Also suggests officials see if something more limited can be put in place in meantime.

Background

Lord Mackay inherited Lord Hailsham's commitment to put a paper to E(CP) on restrictive practices. At an E(CP) discussion in January shortly after he took office he set out 7 restrictive practices (see para 1 of current paper) on which he took a somewhat defensive line. He undertook to provide a further paper in the light of the Marre Committee's report, and although several months later than had been hoped, E(CP)(88)15 is the result.

Since January, there has been heavy pressure from Treasury (and latterly from DTI) on the issue of legal restrictive practices, but the remarkable radicalism of the paper reflects principally the Lord Chancellor's own reforming stance. He dismisses the Marre Report (para 2), which we have always argued was commissioned by the profession as a delaying tactic, and having proposed a Green Paper (para 6 and Annex A of paper) goes on to suggest legislation on almost every one of the specific topics remitted in January.

Economic and financial benefits

At Treasury insistence, the paper makes it clear that the need for reform of restrictive practices springs from the Government's policies on competition and the supply side, and not just from a perception of outdated practices in the legal profession. We have supplied LCD with a list of 28 restrictive or inefficient practices, virtually all of which have been picked up in the LCD proposals.

There will be an important symbolic benefit in reforming a particularly recalcitrant profession, but we can also expect some marginal but worthwhile economic and financial benefits: we estimate that lawyers' gross earnings, which are widely regarded as a highly priced product, are the equivalent of 0.75 - 0.8% of GDP, and so any resulting improvement in the price structure will

have significant supply side benefits. These will of course extend to industry and commerce including small firms as well as to the individual consumer. Public expenditure suffers directly through the impact of high legal costs on legal aid and through the ban on employed lawyers (notably in Crown Prosecutions Service and Customs and Excise) appearing in Crown courts, and some marginal benefit from reform may be expected here too. But the paper rightly points out (para 7) that the overall expenditure effects would be complex, and have yet to be explored in detail.

Background on conveyancing

Conveyancing by solicitors employed by institutions is an issue with a long and vexed history going back Mr Austin Mitchell MP's House Buyers Bill in 1984. Schedule 21 to the Building Societies Act allows the Lord Chancellor to make rules to recognise institutions for conveyancing purposes in England and Wales. The lack of progress with the Regulations was raised in E(CP) in January and the Lord Chancellor's Department reluctantly agreed to produce a paper which was circulated on 27 July. The Economic Secretary replied on 11 August that he did not find the arguments about conflict of interest particularly compelling. Lord Young circulated a paper on 27 September which sets out possible safeguards and which could form the basis of a Code of Conduct: this paper is a separate item on the E(CP) agenda. The relevant section of E(CP)(88)15 (pps 7 & 8) sets out a more liberal approach which would be self regulating, through a Code of Conduct, and which allows conveyancing by a wide variety of institutions. This is a fundamental change from Lord Hailsham's earlier position.

Outstanding issues

(i) timing

The Lord Chancellor is particularly concerned that the judiciary should have a genuine opportunity to comment on what is proposed, and so wants to use the Green Paper format to signal this. But we are worried that this will inhibit him from giving a sufficiently strong steer about what he intends on restrictive practices, and will invite the legal profession to try to unpick his proposals. Any substantial consultation will inevitably go over the ground on

which the Marre Committee made no progress, and many would expect a Green Paper to be followed by a White Paper. But there is hardly time for this if a Bill is to be ready for introduction late in 1989. Lord Mackay has resisted our pressure to present this overtly as a White Paper with green edges, and argues (para 8) with the support of LCD lawyers that a Green Paper followed by a Parliamentary Statement will be sufficient. This is a key judgement which E(CP) will need to address.

(ii) realism/deliverability

We hesitate to look this gift horse in the mouth, but it is evident that this is a most ambitious proposal in substance as well as timing. Any resulting Bill will meet with very strong resistance from the legal profession, and from legal interests in both the Commons and the Lords. If this Bill involves dismantling restrictive practices at the Bar, it may be difficult for the Attorney to act as the Lord Chancellor's counterpart in steering the Bill through the Commons. The proposal involves legislation on the conduct of a profession, although the professions in general have hitherto been treated as exempt from restrictive practices legislation, and so this will in principle also be controversial. The issues on the organisation of the legal profession have previously been Royal Commission territory (Benson 1979), and the proposal to proceed by a Green Paper and Bill will attract criticism for this reason too.

Our advice is that the Lord Chancellor's proposal is well worth a try, and may succeed. If it fails, the fallback would be to amend statute (possibly through DTI's restrictive practices legislation planned for 1989-90 session) to allow the OFT to pursue the issues (they apparently cannot tackle restrictive practices which are in effect protected by statute) although this would be slower and likely to achieve less.

(iii) Conveyancing by authorised institutions

The policing of a Code of Conduct by bodies such as the Building Societies Association could be ineffective; they have no real sanction over their members and there may be no legal fallback. Nevertheless the full implementation of the procedures in Schedule 21 would involve considerable bureaucracy. On balance it

is best to proceed with a more liberal approach but some further thought should be given to regulation. The Lord Chancellor should meanwhile investigate whether a more liberal approach for certain types of institutions could come under Schedule 21. This would allow a much earlier introduction. An interim and simple scheme to allow building societies and banks (and possibly others) to offer conveyancing services should certainly be possible. Primary legislation could then tackle unsupervised bodies such as estate agents. It could also extend the coverage to Scotland.

Other points

The Lord Chancellor wants to handle conveyancing and contingency fees separately because the volume of the considerations involved would distort the balance of the Green Paper. We have no objection to this so long as the determination to make quick progress is made clear.

We have no indication of the Lord Chancellor's thinking on contingency fees, and the proposal for a consultation document was a late addition to his E(CP) paper. We have no Treasury view on the merits at this stage.

RESTRICTED

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FROM: THE CHAIRMAN
DATE: 5 OCTOBER 1988

CHANCELLOR OF THE EXCHEQUER cc Financial Secretary

E(CP)(88)15: COMPETITION IN THE LEGAL PROFESSION (RIGHTS OF AUDIENCE FOR CUSTOMS AND EXCISE LAWYERS)

I fear that I have only just woken up to the fact that you are to discuss at E(CP) today a paper by the Lord Chancellor (which I have not seen, but which seems to be encouragingly progressive) on competition in the legal profession.

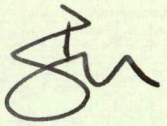
2. May I very briefly give you some material on the issue I have mentioned to you informally a couple of times and on which I have been battling with the Lord Chancellor's Department?

3. In brief, I have about 90 qualified lawyers in my Solicitor's Department, most of whom happen to be barristers. They are, however, under an absurd and indefensible restrictive practice, debarred from appearing for the Department in the Crown Courts. As a result, we have to employ and pay Counsel, even in simple uncontested cases.

4. If our lawyers were given the right of audience in the Crown Courts, we have calculated that it would achieve net annual savings of around £80,000 on our running costs - not a massive amount, but not to be sneezed at in these hard times. Further - and perhaps more important at the moment - it would undoubtedly improve morale in my Solicitor's Department and, I think, help our recruitment on which we are having severe problems.

5. I have convinced Sir Robert Andrew of our case, and he is likely to support it in his report on the government legal services at the end of the month. I have so far, however, drawn a complete blank with the Lord Chancellors Department. Their first ploy was to ask me to wait for the Marre Report. Their next tactic will no doubt be to ask me to wait for the Green Paper.

6. It looks as if the general thrust of the Lord Chancellor's paper will be sympathetic to our case. But I would not want it to get lost again, and if an opportunity arose it would be extremely helpful if you or the Financial Secretary were able to ensure that some reference to our aspirations is included in the conclusions of the E(CP) discussion. After all, it is not even as if I am asking for new rights of audience for **solicitors**; as noted above, most of my lawyers are already barristers.



J B UNWIN