REINSW
REAL ESTATE INSTITUTE
OF NEW SOUTH WALES

The Real Estate Institute of New South Wales Limited

Submission dated 14 June 2016

Property, Stock and Business Agents Amendment (Property Reports and Exemption) Regulation 2016 (NSW)

To:

PS&BA Amendment (Property Reports & Exemption) Regulation
Policy & Legislation
NSW Fair Trading
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1. INTRODUCTION

This Submission has been prepared by The Real Estate Institute of New South Wales Limited (**REINSW**) and is in response to the public consultation draft *Property, Stock and Business Agents Amendment (Property Reports and Exemption) Regulation* 2016 (NSW) (**Draft Amendment Regulation**), issued by NSW Fair Trading on 19 May 2016.

REINSW is the largest professional association of real estate agents and other property professionals in New South Wales. It seeks to promote the interests of its members and the property sector on property-related issues. In doing so, REINSW plays a substantial role in the formation of regulatory policy in New South Wales.

REINSW agrees in principle with the intention of the proposed clause 33A (**Clause 33A**), namely to make it easier and cheaper for prospective purchasers to obtain building and pest inspection reports (**Pre-Purchase Property Reports**) and owners corporation records, particularly if prospective purchasers incur the associated expense and miss out on buying the property. However, REINSW does not believe Clause 33A will resolve the existing problem or achieve its objectives. REINSW insists that the solution is to make Pre-Purchase Property Reports included as prescribed documents in Schedule 1 to the *Conveyancing (Sale of Land) Regulation* 2010 (NSW). If that mandatory approach is not adopted then REINSW recommends certain amendments be made to Clause 33A to help give effect to the true intention of the changes. This Submission sets out the relevant provisions that require redrafting or clarification.

REINSW takes this opportunity to reiterate its position that it does not support proposals to deregulate any type of real estate agent providing real estate services to third parties. REINSW is concerned about the significant and potentially detrimental impact of deregulation, including (without limitation) abolishing the need for agents to hold a licence, maintain professional indemnity insurance, manage trust accounts and compliance with other requirements under the *Property, Stock and Business Agents Act* 2003 (NSW) (**PSBA Act**). REINSW stands by its submission dated 13 June 2014 made in response to the draft *Property, Stock and Business Agents Regulation* 2014 (NSW) issued by NSW Fair Trading on 16 May 2014 and its further submission made on 25 July 2014 in response to the proposed deregulation of certain commercial property agency work and draft exemptions issued by NSW Fair Trading on 27 June 2014. This Submission must be read in conjunction with REINSW's initial and subsequent submissions, both of which are **enclosed**.

2. COMMENTS ON THE DRAFT AMENDMENT REGULATION

a) Records of property reports to be kept by real estate agents (Clause 33A)

REINSW is strongly of the view that the appropriate avenue to address the problem of duplication and additional expense incurred by prospective purchasers in obtaining Pre-Purchase Property Reports is to make them mandatory annexures to the contract for sale of land. The way to do this is by making them prescribed documents in accordance with section 52A(2)(a) of the *Conveyancing Act* 1919 (NSW) and clause 4 of the *Conveyancing (Sale of*

Land) Regulation 2010 (NSW). This approach would be similar to the legislative measures taken by the Australian Capital Territory (**ACT**) in the *Civil Law (Sale of Residential Property) Act 2003* (ACT), which also provides that the purchaser reimburses the vendor for the costs of the reports upon completion of the contract. REINSW believes that this approach would effectively resolve the issue of potential purchasers having to commission their own Pre-Purchase Property Reports.

REINSW is of the view that making Pre-Purchase Property Reports prescribed documents annexed to the contract for sale is essentially legislating what happens in practice on a daily basis. The Government should be aware that, for many years now, a significant number of agents are following what is considered to be best practice. Currently, best practice is for licensees-in-charge to advise vendors to commission and pay for independent Pre-Purchase Property Reports before listing the property for sale and to disclose those reports to any person requesting a copy of the contract for sale. Licensees-in-charge find that disclosure of Pre-Purchase Property Reports as a matter of course makes the selling process easier, and assists with the appropriate pricing of properties and negotiation between the parties. REINSW proposes that this form of best practice should be reflected in legislation and made mandatory. REINSW also recommends that the legislation extend to a requirement for vendors to resolve problems revealed in a Pre-Purchase Property Report, after which a new Pre-Purchase Property Report should be commissioned before putting the property on the market. This process would ensure convenience and reliability for purchasers, vendors and licensees and minimal, if any, issues with the property.

Consistent with the **enclosed** REINSW Submission in response to the draft Discussion Paper on the review of the *Conveyancing (Sale of Land) Regulation* 2010 (NSW), Pre-Purchase Property Reports should be standardised with a prescribed list of matters to be addressed, including:

- asbestos;
- glass safety;
- window safety locks;
- smoke alarm compliance;
- safety and structural integrity of decks and balconies;
- the presence of lead paint;
- electrical installations;
- swimming pool compliance;
- blind cord safety; and
- other hazards located on the property.

This approach is also consistent with ACT Regulation which standardises the minimum content of these reports. In addition, prescribing the areas which a Pre-Purchase Property Report must cover ensures that the building inspector considers the relevant issues and that the parties have a better understanding of the contents of the report.

If REINSW's preferred mandatory approach is not adopted, whilst REINSW appreciates the intention behind Clause 33A, it does not support the clause in its current form. REINSW is of

the view that the clause needs clarification as set out below, in order to remove confusion in the marketplace and meet the goal of enabling home buyers easier, faster and cheaper access to Pre-Purchase Property Reports that have already been commissioned.

(i) ***Clause 33A(1)***

The current drafting of Clause 33A(1) causes confusion as to which licensee has the relevant disclosure obligations. Presumably, it is the licensee-in-charge but the clause could also capture licensed corporations and licensed real estate agents. REINSW recommends that the clause clarify that the reference to "licensee" is a reference to "licensee-in-charge".

The preamble requires the licensee to make a "written record of any report". REINSW proposes that the preamble clarify whether the written record can be in hard copy or electronic forms. REINSW also suggests that the report be a paid commissioned report, hence reducing the likelihood that a prospective purchaser, vendor or other third party arrange for a friend to inspect the property. Further, there should be a requirement that the Pre-Purchase Property Reports be prepared by qualified and licensed building and pest inspectors.

Further, REINSW recommends that the term "physical inspection" be removed from Clause 33A(1)(a) on the basis that it is too broad; it could refer to any number of reports (such as engineer reports, geotechnical reports, bushfire attack level reports, asbestos reports, strata search reports, etc.). REINSW suggests that the clause should instead be limited to maintaining a written record of building and pest inspection reports carried out with which they are aware.

(ii) ***Clause 33A(4)(a)***

Paragraph (4)(a) of Clause 33A should be redrafted, as the licensee is often unaware of when the owners corporation records are inspected. For example, the licensee will not always be in close communication with strata managers who hold the relevant strata records.

(iii) ***Clause 33A(4)(c)***

REINSW is of the view that this clause should be redrafted. By complying with the clause in its current form, licensees could potentially be in breach of the *Privacy Act* 1988 (Cth), if governed by it, because of the requirement for them to disclose the name and telephone number of the person who prepared the Pre-Purchase Property Report, which may constitute personal information. For that reason, REINSW recommends that Clause 33A(4)(c) should only require the business name and contact details of the business that prepared the report and not the personal details of the individual who prepared it.

(iv) ***Clause 33A(4)(d)***

REINSW insists that Clause 33A(4)(d) be removed in its entirety on the basis that it goes beyond the scope of the licensee's responsibilities. Whether or not a report is or is not

available for repurchase is a matter for the potential purchaser to investigate and should form part of their own due diligence. It is worth noting that if Clause 33A(4)(c) were to be redrafted in line with REINSW's recommendation above (that is, limited to the author's business name and business contact details) then that would assist the potential purchaser in obtaining a copy of a Pre-Purchase Property Report.

(v) ***Privity of Contract***

Clause 33A does not deal with the legal doctrine of privity of contract where a purchaser wishes to directly rely on representations in a Pre-Purchase Property Report commissioned by the vendor or another party. ACT legislation gives the purchaser a direct right to sue the author of the report where loss is suffered because of reliance on a materially false or misleading statement or content in a report. REINSW recommends a similar legislative mechanism be introduced into NSW whereby the purchaser can have a right of recourse against the building or pest inspector in respect of the contents of the report, even though the vendor or other third party commissioned it.

b) Exemption for persons acting as real estate agents for certain properties (Clause 46A)

REINSW maintains its position that it strongly opposes exemptions and deregulation within any area of the real estate profession. REINSW's main concern is that in a delicensed and deregulated environment there would be no probity checks of service providers and, alarmingly, no training, trust account protection, experience, minimum age requirements, regulatory environment, rules of conduct and requirement for professional indemnity insurance, to name a few. Without the requisite competencies, knowledge and skills required to deliver services in this complex area of our society, REINSW is of the view that consumers will be placed at risk, the industry and profession will be damaged and potentially corrupted and professional standards and reputation would diminish. Further, REINSW is concerned that the exemptions could set a precedent for other types of real estate agents.

However, whilst REINSW has made it very clear that it does not support the exemptions in Clause 46A, it acknowledges that there is a desire for large businesses involved in certain transactions to be exempt from having a licence and from compliance with other requirements of the PSBA Act.

With that in mind, REINSW is comfortable with the thresholds proposed in Clause 46A(b) but considers it imperative that those thresholds are reviewed every 3-5 years on the basis of escalating property prices. That review will ensure large residential, rural and industrial properties and transactions are taken into account with respect to the exemptions.

To avoid disputes and to ensure the thresholds are appropriately determined, REINSW recommends that they are reviewed by the Valuer-General possibly through the Industry Advisory Committee, which comprises peak industry bodies including the Office of State Revenue, Land and Property Information, the Valuer-General, Australian Property Institute, REINSW, the Shopping Centre Council and University of Western Sydney.

3. CONCLUSION

Whilst REINSW believes a mandatory regime (as opposed to Clause 33A) will give effect to the objective of creating a more efficient and economical regulatory scheme for the buying and selling of residential properties, REINSW is of the view that Clause 33A requires significant improvements before it can try to achieve its objectives.

In addition, whilst REINSW defends the requirement for real estate agents in New South Wales to be licensed and regulated by the PSBA Act, it acknowledges that there is a desire for large business to business transactions to be exempt from the PSBA Act. In accepting the proposed thresholds set out in Clause 46A(b), REINSW recommends a regular review of those thresholds every 3-5 years by the Valuer-General through the Industry Advisory Committee.

REINSW appreciates the opportunity to provide this Submission. Should NSW Fair Trading wish to discuss it further prior to finalisation of the Draft Amendment Regulation, REINSW is more than happy to do so.

Yours faithfully

Tim McKibbin
Chief Executive Officer
The Real Estate Institute of New South Wales Limited

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Real Estate Institute of New South Wales Limited

Submission

Review of the *Property, Stock and Business Agents Regulation* 2014 (NSW)

To:
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Policy
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1. INTRODUCTION

This Submission has been prepared by Real Estate Institute of New South Wales Limited (**REINSW**) and is in response to the draft *Property, Stock and Business Agents* Regulation 2014 (NSW), issued by NSW Fair Trading on 16 May 2014 (**Draft Regulation**).

REINSW is proud to be the largest professional association of real estate agents and other property professionals in New South Wales, with members specialised in one or more practice areas, including property management, strata management, residential sales, commercial/industrial, project marketing/management, project investment, stock and station, holiday and short-term rentals, business agents, buyers' agents, auctioneers and valuers.

REINSW's business objectives include:

(a) promoting the interests of its members and the property sector on property-related issues;

(b) promoting and facilitating professional standards in real estate practice;

(c) assisting members in the conduct of real estate practice;

(d) promoting the benefits of REINSW's membership, home ownership, property and business investment.

In order to achieve the above objectives, it is imperative for REINSW to have a substantial role in the formation of regulatory policy in New South Wales. By representing its members in that way, members have a voice in shaping the legislative and regulatory framework of their industry.

REINSW has reviewed the Draft Regulation together with its accompanying Regulatory Impact Statement (**RIS**), and this Submission sets out REINSW's comments on the Draft Regulation.

REINSW agrees in principle with the intention of the Draft Regulation and to the majority of proposed changes set out in Table 2.7.1 of the RIS. REINSW appreciates that those amendments are required to:

(a) bring the *Property, Stock and Business Agents Regulation* 2003 (NSW) (**Existing Regulation**) up-to-date with the times, particularly with respect to modern technology;

(b) rectify unworkable, convoluted, obsolete and repetitious provisions;

(c) give effect to, and achieve, the objectives of the *Property, Stock and Business Agents Act* 2002 (NSW) (**Act**);

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(d) maintain an industry where agents are continually required to act in a professional and ethical manner; and

(e) increase consumer confidence when dealing with agents.

Whilst REINSW agrees in principle with the intention of the proposed changes, the drafting of some amendments require further attention to give effect to the true intention of the changes. This Submission sets out the relevant provisions that require redrafting or clarification.

REINSW has taken the opportunity to also include in this Submission other proposed changes and improvements to the Draft Regulation as well as its comments on, and reasons as to why it does not support, the deregulation of commercial property agency work, abolishing the need for certain agents to hold a licence.

2. COMMENTS ON THE DRAFT REGULATION

Itemised Account - clause 5(2) of the Draft Regulation (clauses 9(2) and 9(3) of the Existing Regulation)

Clauses 9(2) and 9(3) of the Existing Regulation have been combined into one clause in the Draft Regulation (namely, clause 5(2)). That way, repetition is avoided and the clause is simpler and easier to read. Those clauses have also been amended to allow a request for an itemised account to be electronically served on a licensee and to be electronically provided to the person who made the request. However, the drafting of the combined clause requires further attention because, unlike a licensee, a *person* might not have a place of business for the purpose of serving an itemised account. REINSW believes that the reference to "place of business" should specifically relate to the licensee as it does in clauses 9(2) and 9(3) of the Existing Regulation. Accordingly, REINSW proposes that clause 5(2) of the Draft Regulation read as follows:

"*A request for an itemised account under section 36(3) or 101 of the Act may be served on the licensee concerned, and an itemised account may be provided to the person who made the request, by:*

(a) delivering it personally to the licensee or person, or

(b) leaving it:

(i) for the licensee at a place of business of the licensee; or

(ii) for the person at an address specified as the person's address in the request or, if not specified, in an agency agreement, or

(c) sending it by post to the licensee at the address of a place of business of the licensee or to the person at an address specified as the person's address in the request or, if not specified, in an agency agreement, or

(d) sending it by facsimile transmission to a number specified by the licensee or person (in correspondence or otherwise) as a number to which facsimile transmissions to the licensee or person may be sent, or

(e) transmitting it electronically to the email address specified by the licensee or person (in correspondence or otherwise) as an email address to which electronic transmissions to the licensee or person may be sent."

Provision of financial and investment advice – clause 6 of the Draft Regulation (clause 10 of the Existing Regulation)

The RIS states that a penalty will be included on the basis that clause 10 of the Existing Regulation lacks any penalty for enforcement. However, there is no reference in clause 6 of the Draft Regulation to a maximum penalty of 40 penalty units for a corporation and 20 penalty units in any other case, as the RIS suggests. There is, however, a "Note" that has been included in clause 6 that refers to section 46 of the Act and states that "*a real estate agent who fails to comply with a requirement to provide information or warning specified in the regulations is guilty of an offence*".

Section 46(2) of the Act provides that a real estate agent who fails to comply with a requirement of the regulations under section 46 is guilty of an offence, with a maximum penalty of 200 penalty units.

REINSW seeks clarification on why the proposed changes to clause 10 of the Existing Regulation (as set out in the RIS) have not been included in clause 6 of the Draft Regulation, and why a "Note" has been included that cross-refers to section 46 of the Act. REINSW presumes it is intentional and because the inclusion of penalty units in clause 6 of the Draft Regulation would be inconsistent with the penalty set out in section 46(2) of the Act. However, clarity is required in that regard.

In any event, if the drafting of clause 6 of the Draft Regulation remained, REINSW recommends that the words "a person with" be included after the reference to "provide" and that "warning" should be replaced with "warnings".

Contents of agency agreements – clause 8 of the Draft Regulation (clauses 13(4)(a) and (b) of the Existing Regulations)

For clarity, REINSW suggests a minor drafting change to clause 8(4)(a)(iv) of the Draft Regulation. That amendment would be to include "electronic" after the reference to "person's".

Proof of identity for Bidders Records – clause 14 of the Draft Regulation (clause 17(1) of the Existing Regulation)

Clauses 17(1)(a)-(e) of the Existing Regulation have been redrafted in clause 14 of the Draft Regulation for the purpose of combining the subclauses. Again, that would avoid repetition and it makes the provisions easier to read. To completely achieve that objective, REINSW recommends combining clauses 14(1)(a) and 14(1)(c) of the Draft Regulation. By doing so, clause 14(1)(c) is deleted and clause 14(1)(a) would read as follows:

"(a) a card or document that is issued by the government or a statutory authority of New South Wales, the Commonwealth, another State or Territory, or by an authorised deposit-taking institution, and:

(i) shows the name and address of the person; or

(ii) shows the name of the person, together with a statutory declaration by the person as to the person's address,".

Provision of unique identifying number when opening or maintaining a trust account – new clause 19 of the Draft Regulation

REINSW is not opposed to the introduction of a unique identifying number for general trust accounts to ensure that deposit-taking institutions are accountable for interest paid into the Statutory Interest Account.

However, REINSW is concerned that there is no process in the Draft Regulation (or accompanying it) that explains how to obtain the unique identifying number, other than an agent must obtain it from the Department of Finance and Services. REINSW recommends further consideration take place on what the process involves, the timeframe and practicality for agents to apply to the Department and be given a unique identifying number.

REINSW also recommends clarification be given, perhaps by way of a definition in the Draft Regulation, as to what is a "unique identifying number". REINSW assumes the intention is for the Department to issue each agency with a specific number to separately identify them from other agencies; however, that is only an assumption.

Section 31 exemptions – person in charge at place of business – clause 39(2) of the Draft Regulation (clauses 6(1) and (2) of the Existing Regulation)

Since the matters specified in clause 39(2) of the Draft Regulation are to be taken into account by the Director-General, from a drafting perspective, REINSW recommends the words "*For the purposes of subclause (1)*" be inserted at the very beginning of the preamble of subclause (2).

Conditions of sale by auction – clause 15(3)(d) of the Draft Regulation (clause 18(2A)(d) of the Existing Regulation)

REINSW suggests that clause 15(3)(d) of the Draft Regulation be deleted because attendees at an auction (including other bidders) do not need to know the identity of any co-owner, executor or administrator or any person registered to bid on behalf of those people.

REINSW is of the view that disclosing the identity of potential bidders might impact on whether or not other prospective purchasers might bid on a property. Further, REINSW does not consider clause 15(3)(d) to offer buyers or sellers any consumer protection which they are entitled to receive.

Definitions – clause 11 of the Draft Regulation (clause 14 of the Existing Regulation)

REINSW is of the view that the definition of "property" in clause 11 of the Draft Regulation should exclude rural land with an area of greater than 20 hectares. The reason for that position is because land that is greater than 20 hectares in size is essentially considered to be commercial real estate, having regard to the commercial use of that property. Therefore, rural property that is predominantly commercial should be treated differently to residential rural property. There needs to be a clear distinction between the two.

Bidding at auctions of residential property or rural land is covered in Division 2 of Part 5 of the Act. Those provisions place restrictions on vendor bids and require bidders to register and be identified at auctions with respect to the sale of residential property or rural land. As a result, potential buyers of rural land might be reluctant to register as bidders and participate in auctions.

Those provisions do not apply to vendors and purchasers of non-rural commercial land. Therefore, they should equally not apply to vendors and purchasers of rural land with a commercial purpose.

3. DEREGULATION OF COMMERCIAL PROPERTY AGENCY WORK

REINSW has been invited to comment on the possible deregulation of commercial property agency work, which would make certain work exempt from the requirement to hold a licence.

REINSW opposes de-licensing and deregulation within any area of the real estate profession, including commercial practice. In a de-licensed and deregulated environment there are no probity checks of service providers and, alarmingly, no training. Without the requisite competencies, knowledge and skills required to deliver services in this complex area of our society, consumers will be placed at risk and the industry and profession will be damaged.

REINSW's position is that the licensing requirements in New South Wales is currently grossly inadequate and should be modelled against the training requirements offered in other jurisdictions, where a broader skill-set is required to that in New South Wales. For

instance, the licensing requirements in the Northern Territory, South Australia and Tasmania recognise the importance of a broader skill-set through agents needing to hold a higher level qualification to gain their licence.

In the instance of entry level training into the profession, the number of units of competency required across jurisdictions varies dramatically. For example, in the Northern Territory, South Australia, and Tasmania the units of competency vary from 17-21, as opposed to just 4 units in New South Wales. Whilst the number and selection of units of competency required for entry into the profession is reflective of each jurisdiction, in New South Wales the required 4 units have no relevancy to commercial property agency practice. REINSW would welcome a review of the number of entry level unit requirements in New South Wales which would create a more consistent and relevant approach for the State, as well as reflect training regimes in other jurisdictions.

The deregulation of commercial property agency work would be going further in the wrong direction and would be counterproductive for consumer protection in the commercial space. REINSW considers it imperative for all types of agents to be properly trained and licensed, including commercial agents, whether that is underpinned by a full qualification or a skill-set from a nationally accredited training package or non-accredited short courses relevant to the area of commercial practice. This learning requirement should be determined by the State regulator (being, NSW Fair Trading) in consultation with the industry, the needs of the market in New South Wales and legislative requirements.

Accordingly, REINSW suggests that the selection of units of competency for the entry and licensing requirements be reviewed to allow for additional and more relevant units specific to the area of commercial practice.

REINSW is of the view that there can never be a substitute for a properly trained and regulated service provider. The proposal to deregulate commercial property agency work will adversely affect the consumer, the industry and the profession. REINSW does not support the proposal and strongly recommends that it be rejected.

REINSW is concerned that the result of deregulating commercial property agency work would be that anyone could carry out that type of work without having completed a qualification or skill-set that underpins a regulatory requirement, and without any experience, training, probity checks, minimum age requirements, regulatory environment, rules of conduct and requirement for professional indemnity insurance (to name a few).

The industry, its professional standards and reputation would diminish. In addition, there would be a potential lack of trust from consumers who would face no security, trust account protection and other consumer protections that accompany a regulated profession.

REINSW is concerned that the industry may become corrupt with commercial property agents, who might have had their licenses suspended or cancelled, being able to practice again if there was no licence requirement for that type of work.

Ironically, the ability to practice without a licence goes against everything that the Government's campaign to amend the Existing Regulation stands for. As set out in the RIS, the Draft Regulation benefits consumers by:

(a) prescribing rules of conduct which require agents to treat their clients and customers professionally and ethically;

(b) requiring agency agreements to include fair terms and warnings for clients about cooling off rights and circumstances in which more than one commission might be payable;

(c) requiring agents to give clients warnings and information when giving investment advice;

(d) ensuring itemised accounts are delivered to clients correctly;

(e) ensuring that all prospective bidders are able to register to bid at auctions of residential or rural property by providing for flexible registration and proof of identity requirements;

(f) requiring warnings about bidders' rights and obligations to be given at auctions;

(g) protecting consumers' funds held in trust by agents by prescribing trust accounting and record keeping requirements;

(h) ensuring that agents whose licences have been suspended remain accountable to former clients;

(i) providing access to information on the public Register about licences and certificates issued under the Act and the compliance history of agents; and

(j) providing for payment of contributions to the Compensation Fund, which is available to compensate consumers in the event of trust account.

The removal of the requirement for certain agents to hold licenses would be in contrast to the intention of the Act and Existing Regulation and would strip consumers of any benefit they receive by the profession's regulatory framework.

In addition, REINSW does not support the proposition to exempt providers of real estate services to be licensed for large property holders for the following non-exhaustive reasons:

1. tenants and consumers need to be protected from business operators behaving in a manner that has no control mechanisms, such as the Act and Existing Regulation;

2. the industry must be protected from allowing non-licensed people opening up real estate consultancies/agencies using the exemption as a precedent to trade unlicensed; and

3. operators must be continually updated with the industry, relevant laws and other significant issues affecting their business through the benefit of compulsory continuing professional development required as a condition of licensing.

REINSW is concerned that the exemption would open up a precedent that could affect the entire real estate industry. It would damage the integrity of existing licensed operators and would pave the way for unscrupulous operators to act as they choose without any governing act or regulations. To support the exemption would be to ridicule the importance of compliance and potentially place tenants and consumers at risk.

3. CONCLUSION

REINSW commends NSW Fair Trading and the Hon Matthew Mason-Cox, MLC, Member of the Legislative Council, Minister for Fair Trading, and Member of the Liberal Party, for the opportunity to amend the Existing Regulation.

Whilst REINSW welcomes the changes to the Existing Regulation, it requests NSW Fair Trading consider this Submission and amend the Draft Regulation so that it reflects the comments and suggestions set out herein.

For the record, REINSW does not support the possible deregulation of commercial property agency work, which would exempt providers of real estate services to be licensed with respect to large commercial property.

REINSW thanks you for the opportunity to provide this Submission. Should NSW Fair Trading wish to discuss it further prior to finalisation of the Draft Regulation, REINSW is more than happy to do so.

Yours faithfully

Tim McKibbin
Chief Executive Officer
The Real Estate Institute of New South Wales

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Real Estate Institute of New South Wales Limited

Submission

Possible Exemption of Commercial Property Agency Work

25 July 2014

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Policy
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1. Introduction

In addition to the submission made by The Real Estate Institute of New South Wales (**REINSW**) on 13 June 2014 (**Initial Submission**), REINSW makes this further submission in response to the proposed deregulation of certain commercial property agency work and on the draft exemptions issued by NSW Fair Trading on 27 June 2014 (**Draft Exemption**). This submission must be read in conjunction with the Initial Submission as if Section 3 of the Initial Submission ("Deregulation of Commercial Property Agency Work") were set out in Section 2 below.

REINSW takes this opportunity to object to the deregulation and, therefore, the de-licensing of any class or type of agent in the real estate profession, including commercial agents. The reasons for that objection are set out in this submission and in the Initial Submission.

This submission does not include comments on the specific drafting of the Draft Exemption because REINSW is opposed to the exemptions, both individually and collectively.

REINSW also opposes the speed at which the exemptions have progressed and is of the view that due process has not been followed. It also believes that to acquiesce to the arguments put forward by proponents of the exemptions puts the majority at risk of unlawful, unethical and unfair behaviour for the benefit of a minority group. It would allow an unregulated agent to act with those behaviours and damage the entire profession, industry and market. Further, the removal of the requirement for that minority group to comply with the *Property, Stock and Business Agents Act* 2002 (NSW) (**PSBA Act**) would erode consumer security and confidence that exists in the current regulatory environment. REINSW considers the exemptions to be an inappropriate response by the NSW Government. A better solution is to review the content of the licensing course to make it more relevant to commercial property practice.

Please note that references to the PSBA Act throughout this submission include references to the *Property, Stock and Business Agents Regulation* 2003 (NSW) (**Regulation**), except where otherwise stated.

2. Possible Deregulation of Large Commercial Property Agency Work

(a) Due Process

REINSW is concerned that the Draft Exemption is likely to be included in the remake of the Regulation (expected to commence on 1 September 2014) without due process being followed by the NSW Government.

REINSW considers that the Draft Exemption should have been included in the Regulatory Impact Statement (**RIS**) and draft Regulation issued by NSW Fair Trading on 19 May 2014, as required by section 5 of the *Subordinate Legislation Act* 1989 (NSW) (**SLA**). That section relevantly requires the Hon Matthew Mason-Cox, MLC, Member of the Legislative Council and Minister for Fair Trading to ensure that, as far as is

reasonably practicable, a RIS complying with Schedule 2 of the SLA is prepared. Schedule 2 sets out the following matters to be considered in a RIS:

(i) a statement of the objectives sought to be achieved and the reasons for them;
(ii) alternative options by which those objectives can be achieved;
(iii) an assessment of the costs and benefits of the proposed statutory rule and of each alternative option;
(iv) an assessment as to which alternative options involve the greatest net benefit or the least net cost to the community; and
(v) a statement of the consultation program to be undertaken.

REINSW believes that the Draft Exemption cannot be incorporated into the remake of the Regulation, particularly since the certificates required by section 7 of the SLA cannot be provided to the Governor without due and proper process being followed.

If the Draft Exemption is included in the remake of the Regulation, it would be made *ultra vires* and a party would have the right to bring proceedings in a Court of competent jurisdiction to obtain a judgment that the Regulation is invalid. REINSW is concerned that the prescribed process in place for making regulations has not been followed.

(b) *Retail Leases Act* and *Competition and Consumer Act* not substitutes for the PSBA Act

REINSW rejects the argument that the *Retail Leases Act* 1994 (NSW) (**RLA**) and the *Competition and Consumer Act* 2010 (Cth) (**CCA**) provide the protections required by parties dealing with exempted agents. Those Acts are not, and were never intended to be, substitutes for the PSBA Act. The RLA lacks significant consumer protections that exist under the PSBA Act. For instance, the RLA does not deal with trust money or the requirement for agents to have professional indemnity insurance, disclose material facts or comply with rules of conduct (refer to section 11 and Schedule 1 to the Regulation).

With respect to the CCA, it is not a licensing statute and the protections are not as industry-specific as those under the PSBA Act (including, amongst others, the Property Services Statutory Interest Account and the Property Services Compensation Fund). The Fund allows for a much quicker and cost-effective resolution of disputes compared to litigation under the RLA and CCA.

(c) Stakeholders - the RLA does not cover all shopping centre leases

The RLA was introduced because of a perceived inequity of bargaining power between parties and is specific to retail premises, retailers and retail tenants. However, they are not the only parties who will be affected by the exemptions. In fact, the RLA is not applicable to many retail tenants, retail shops, retail businesses and retail leases. Further, not all non-residential leases are governed by it (for instance, its protections do not extend to industrial and commercial parties). Accordingly, REINSW rejects the argument that tenants will be unaffected by the removal of regulation due to the protections provided under the RLA.

The proposed lack of regulation would open the door for inexperienced, untrained and incompetent agents to act with inappropriate behaviour on complex transactions. There would be many stakeholders affected, not just agents, principals and retail tenants (as has been suggested).

Without being exhaustive, those protected by the PSBA Act include property owners, vendors, landlords, tenants, buyers, prospective buyers, foreign investors, those affected by what would be unregulated foreign entities, third parties who receive financial or investment advice from agents, the public by virtue of agent advertisements or representations made by agents, all parties to transactions, customers of agents (whether potential or prospective clients or otherwise), other licensees or registered persons employed at a licensee's business, third parties with respect to inducements, the real estate market, industry, profession and the economy. Also refer to Divisions 4 and 5 of Part 3, Part 6, Part 7 and Part 10 of the PSBA Act and clauses 10, 11, 13B, Part 3, Part 4 and Schedule 1 of the Regulation.

Even the NSW Government is a stakeholder affected by the exemptions. The exemptions come at a cost because revenues will decrease. The interest earned on agents' trust funds that flow to the NSW Government will cease and costs will increase due to increased complaints made to NSW Fair Trading. The NSW Government will need to invest in resources and training to deal with those complaints and associated impacts.

(d) Investor confidence in a regulated environment

REINSW is of the view that all agents must be regulated to protect businesses, consumers and other stakeholders against aggressive high profit-driven corporations or foreign entities that sell, purchase and/or manage large commercial holdings in New South Wales.

Overseas regulation is not based on agency laws that have been tried, tested and proven to work in New South Wales. Allowing large foreign entities with cultural differences to act at their discretion will significantly erode consumer confidence and security that exists in the current regulatory environment. The property market in New South Wales relies heavily on foreign investment, which freely flows into the market because foreign investors have confidence in our regulated environment and the way in which business is conducted within that framework. Their confidence is boosted by the lack of registered complaints and problems, a result of players in the market having to comply with the PSBA Act.

If the exemptions were to proceed, large foreign entities would be permitted to (and will) sell or manage their properties however they see fit. They may be unfamiliar with and lack the standard and expertise that is best practice in New South Wales (again, reducing consumer confidence in the market and profession). They might even apply in New South Wales the systems and practices in place in their own country, which might be contrary to what is standard, prescribed and acceptable domestically or they might support conduct that is restrictive and unlawful, including conduct prohibited by the PSBA Act. The REINSW International Chapter's biggest concern is foreign investment in

New South Wales by high net worth individuals who lack the experience and skill. The exemptions go against the International Chapter's efforts to lift the standard of education for agents to assist foreign investors through compliance with the PSBA Act. Such action boosts confidence and protects the market and those investors against bad advice, bad practices and bad policies.

Another issue to consider is that if foreign entities employ personnel who operate from overseas, unemployment rates in New South Wales would increase as those jobs would be unavailable to qualified people, adversely impacting on the economy.

(e) Training and compliance costs

Proponents of the exemptions argue that the costs and licensing requirements associated with compliance is a burden and unnecessary for a sophisticated commercial entity which will have already adopted best practice. REINSW does not agree on the following grounds:

(i) not all entities falling within the exemptions will be sophisticated in the market;

(ii) not all entities will have already adopted best practice and already abide by the rules of conduct;

(iii) how is best practice determined and by whom?;

(iv) compliance costs are not unnecessary where they protect less sophisticated or inexperienced small businesses or individuals;

(v) just because a large and "self-regulated" organisation has the capacity to employ its own agents does not mean they should have an unfair advantage in the market; and

(vi) there can never be a substitute for a properly trained and regulated service provider.

If training is irrelevant, as suggested by proponents of the exemptions, then it should be reviewed and modified to become relevant rather than be abolished. The answer is not to eradicate the need to hold a licence or to comply with the PSBA Act in its entirety. To do so would result in untrained, inexperienced and unlicensed people required to deliver competent services and meet the expectations of a sophisticated market. People who have had their licenses suspended or cancelled would have no impediment to re-joining the profession as agents and that is a primary concern of REINSW.

(f) Proportion of market affected

In its submission dated 13 June 2014, the Shopping Centre Council of Australia (**SCCA**) estimated that the exemptions will only affect less than 1% of all commercial buildings in the New South Wales. Those figures are not supported by REINSW's research obtained from RP Data, a respected database, which concludes that in excess of 10% of

commercial buildings will be affected. If the exemptions went through, they would affect a significant proportion of commercial properties and are, therefore, not "*a very minor piece of deregulation*" as put forward by SCCA. REINSW is happy to provide the NSW Government with further details relating to its research if required.

(g) Previous Enquiries

The concept of exempting large commercial agents from compliance with the PSBA Act has been previously discussed on 3 separate occasions in New South Wales. That concept has been rejected by the NSW Government on each occasion based on a cost/benefit analysis of the arguments put forward by REINSW and other stakeholders in previous submissions. Those arguments have not changed and, since then, the Victorian Government has reconsidered the issue and rejected it. With respect, the NSW Government should keep the bar high and follow in the footsteps of the Victorian Government.

3. Conclusion

REINSW defends the requirement for non-residential real estate agents in New South Wales to be licensed.

REINSW opposes a proposal where due process has not been followed and which allows inexperienced, unqualified and unlicensed operators to practice real estate. That would expose stakeholders to high financial risk and the potential for unlawful behaviour. REINSW is committed to protecting the professionalism of, and confidence in and within, the market and industry, which would be tarnished if the exemptions were to proceed.

REINSW is extremely proud of the current regulatory system in place. Agents have high standards of business acumen, practice and regulation. The system and its legislation works and all players in the field understand and comply with it. If the system is not broken, REINSW encourages the NSW Government not to fix it. To do so is dangerous and costly (if not initially then in the long term), and opens up an unwarranted can of worms.

REINSW appreciates the opportunity to provide this submission and is more than happy to discuss if further if required.

Yours faithfully

Tim McKibbin
Chief Executive Officer
The Real Estate Institute of New South Wales

REINSW
REAL ESTATE INSTITUTE
OF NEW SOUTH WALES

Mr Robert Goncalves
Senior Solicitor
Legal Services Division
Land and Property Information
Department of Finance, Services and Innovation

10 September 2015 By email: robert.goncalves@lpi.nsw.gov.au

Dear Mr Goncalves,

REINSW Submission
Draft Discussion Paper – Review of the Conveyancing (Sale of Land) Regulation

The Real Estate Institute of New South Wales (**REINSW** or the **Institute**) appreciates the opportunity to contribute to the review of the *Conveyancing (Sale of Land) Regulation* 2010 (**Regulation**) and to provide comments in relation to the contents of the draft Discussion Paper (**Discussion Paper**).

The Institute is the largest professional association of real estate agents and other property professionals in New South Wales. The REINSW seeks to promote the interest of members and the property sector on property related issues. In doing so the REINSW believes it has a substantial role in the formation of regulatory policy in New South Wales.

The REINSW welcomes discussion of the issues raised in this submission with the legal and policy officers at the department of Land and Property Information (**LPI**).

General

In the interests of consumer protection there are certain things that a prudent purchaser should do as part of their enquiries. If these matters are prescribed for inclusion in the contract, then this ensures that they have been brought to the purchaser's attention.

Stigmatised properties (material fact)

Traditionally there have been two lines of enquiry for purchasers of real property:

- the quality of the title, which can be ascertained by a search of the register at LPI; and
- the quality of the structures, which to an extent can be ascertained through a building report and other similar reports.

In recent years, the question of whether a property is "stigmatised" has become increasingly relevant. Section 52(1) of the *Property, Stock and Business Agents Act* 2002 (**PSBA**) states:

> *A person who, while exercising or performing any function as a licensee or registered person, by any statement, representation or promise that is false, misleading or deceptive (whether to the knowledge of the person or not) or by any concealment of a* ***material fact*** *(whether intended or not), induces any other person to enter into any contract or arrangement is guilty of an offence against this Act.* (bold emphasis added)

An agent has a duty to act in the best interests of the vendor. The agent also has an obligation to disclose to a purchaser any stigma or "material fact" pertaining to the property. There is no corresponding obligation on the vendor.

Imposing these disclosure obligations only on the agent results in several concerning, but probably unintended, consequences:

- the intent of ensuring consumer protection is not met, as there is no obligation on the vendor to inform the agent or the purchaser of any stigma associated with the property;
- it is not in the interest of the vendor to make these disclosures as the price purchasers are willing to pay may be adversely affected;
- it creates a tension in the relationship between the vendor and the agent;
- there is conflict between the consumer protection obligation in the PSBA and the disclosure obligations of the vendor, which are not consistent with the agent's;
- the agent may become liable for non-disclosure in instances where the vendor has not made the agent aware of those matters in the first place.

For example, an agent acting in the best interest of a vendor in the sale of a stigmatised property may in all the circumstances advise the vendor to conduct the sale themselves. It is submitted this is repugnant to the interests of consumer protection.

Matters that could possibly be considered to stigmatise a property range from a murder or violent crime having taken place on the property to the presence of asbestos or other latent or safety defects, through to matters relating to cultural or religious beliefs.

It is submitted that in the interest of consumer protection the following should be addressed in the new Regulation:

1. To ensure consistency for purchasers there needs to be a disclosure obligation on the vendor corresponding to the obligations on the agent under the PSBA.
2. To ensure clarity for agents and vendors, the concept of what comprises a "stigmatised property" needs to be clearly defined in the legislation.
3. To ensure certainty of disclosure, the vendor's disclosure obligations need to be contained in the contract.

Asbestos

We note your comments that the section on asbestos has been removed from the Discussion Paper as the outcome of the Loose Fill Asbestos Taskforce is still pending.

It is submitted that loose-fill asbestos, although known as the most dangerous, is only one type of hazard associated with asbestos. As mentioned above, the presence of asbestos could be considered to be a stigma in relation to a property. In addition, some asbestos issues may be latent defects in a property.

It is submitted that there needs to be a mechanism to put prospective purchasers on notice of the presence of asbestos in a property. To achieve this, a mandatory asbestos report prepared by a licenced asbestos inspector setting out the location of asbestos and a management plan, should be attached to the contract for sale.

Strata certificate

The Institute is of the view that, in addition to a strata inspection certificate, a certificate pursuant to section 109 of the *Strata Schemes Management Act* 1996 should be attached to the contract. This way purchasers will be put on notice upfront about the costs associated with the strata lot they are considering purchasing, including any existing special levies.

Planning certificate

It is submitted that the certificate pursuant to section 149(5) of the *Environmental Planning and Assessment Act* 1979 should also be a prescribed attachment to the contract. In practice purchaser's lawyers and conveyancers obtain this certificate after exchange.

Building and pest reports

The draft Discussion Paper recognises that frequently there is duplication and additional expenses incurred by prospective purchasers in obtaining building and pest reports for a property and then being unsuccessful, and that purchasers are understandably upset at having incurred the expense and missing out on the property.

It is submitted that, to ensure economy, convenience and reliability for purchasers and vendors the following matters should be legislated:

1. The building report should be one of the prescribed documents.

2. There should be a requirement for building inspectors to be licenced, with an obligation that inspectors act impartially and there should be a prescribed set of qualifications.

3. There should be a legislated mechanism whereby the purchaser can have a right of recourse against the building inspector in respect of the contents of the report, even though the vendor commissioned the report.

4. Building reports should be standardised with a prescribed list of matters to be addressed, including:

    - asbestos;
    - glass safety;

- window safety locks;
- smoke alarm compliance;
- safety and structural integrity of decks and balconies;
- the presence of lead paint;
- electrical installations;
- swimming pool compliance;
- blind cord safety;
- other hazards located on the property.

The above list comprises the matters which a property manager (with no building expertise) is required to address when managing and leasing a property. It is submitted that this falls more appropriately in the domain of the building inspector.

In addition, prescribing the areas which a building report must cover ensures that the building inspector turns their attention to the relevant issues and that the parties have a better understanding of the contents of the report.

Comments on Discussion Paper

1. On page 4, under the heading of "Objectives of the Regulation":

   In the third paragraph, after the first sentence, please add a sentence to the effect that a vendor is not required to disclose latent defects in the building or any stigma attached to the property.

   In the fifth paragraph, where it states that there has been relatively little litigation, it would be useful to add some information and statistics to illustrate how much litigation there has been and how it compares to other areas of law.

   Under the "Issues for Discussion" heading, please add the following questions:

   - *Should there be an obligation on the vendor to disclose latent defects in the building (as well as defects in title)?*
   - *Should there be an obligation on the vendor to disclose the existence of any stigma associated with the property?*

2. On page 5, in the fourth bullet point under the "Prescribed documents" heading there is a typographical error – "sale of fall through" should read "sale to fall through".

3. On page 6, in the paragraphs listing the suggested additional documents, an additional paragraph "D. Asbestos Report" should be added.

4. On page 6, under the heading "Pest and Building Inspection Reports", in the second paragraph it should be clarified that pest reports identify other pest activity in addition to termites. Also, the discussion should mention that currently pest and building reports commonly contain extensive disclaimers which reduce their usefulness and reliability. This reinforces the need for building inspectors to be appropriately qualified and regulated.

5. On page 8, under the "Issues for Discussion" heading, please add the following questions:

   - *Should building inspectors be regulated and subject to a minimum set of qualifications?*
   - *Should various compliance matters (for example, window locks, balcony safety, blind cord compliance) be included as mandatory matters to be covered in building reports?*
   - *Should the contents of the building reports be prescribed and standardised?*
   - *Should there be prescribed warranties by the vendor as to compliance with safety and building matters (for example, window locks, balcony safety, blind cord compliance, swimming pools)?*

6. Page 9, under the "Issues for Discussion" heading, there should be some discussion about the role of the certificate under section 109 of the *Strata Schemes Management Act* 1996. Please also add the following question:

   - *Should the certificate pursuant to section 109 of the Strata Schemes Management Act 1996 be a prescribed document?*

7. Page 14, in the first paragraph under the heading "The need for specific disclosure in off-the-plan sales", the last part of the first sentence should include the word "not" so it reads "...or the strata building has not yet been built".

8. Page 14, in relation to swimming pool certificates, it should be considered whether the mechanism should be similar to the off-the-plan sales, i.e. the purchaser is not required to complete until 14 days after the swimming pool certificate has been issued.

The REINSW appreciates the opportunity to provide this submission and welcomes discussion of the issues raised with the legal and policy officers at the department of Land and Property Information.

Yours faithfully,

Tim McKibbin
Chief Executive Officer
The Real Estate Institute of NSW