

Real Estate Institute of New South Wales Limited

Submission

Possible Exemption of Commercial Property Agency Work

25 July 2014

To: Property, Stock and Business Agents Regulation 2014
Policy
NSW Fair Trading
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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