

Real Estate Institute of New South Wales Limited

Submission

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

To:
Property, Stock and Business Agents Regulation 2014
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**);

(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