



Submission

Reforming Licensing in NSW Issues Paper

To:

Regulation Review – Licence Rationale and Design
Independent Pricing and Regulatory Tribunal

Introduction

This submission by the Real Estate Institute of New South Wales (**REINSW** or the **Institute**) is in response to the Reforming Licensing in NSW – Review of Licence Rationale and Design Issues Paper (the **Issues Paper**).

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

The REINSW appreciates the opportunity to lodge this submission and welcomes discussion of the issues raised by this submission with the Members and policy officers from the Independent Pricing and Regulatory Tribunal.

General

The property agency industry in New South Wales has been subject to legislative regulation for nearly 115 years, commencing with the *Auctioneers Licensing Act 1898* (NSW). After several incarnations and amendments, the current legislation governing the licensing and conduct of real estate agents, stock and station agents and auctioneers in NSW is the *Property, Stock and Business Agents Act 2002* (the **Act**) and the *Property, Stock and Business Agents Regulation 2003* (the **Regulation**).¹

Real estate agents deal with what are often their clients' most valuable assets. The REINSW considers that the protection of consumers of agency services should be the fundamental guiding principle for the regulation and licensing of real estate agents. However the system also needs to allow sufficient flexibility to enable agents to accommodate the individual needs of clients. The Institute is an advocate for improved standards and professionalism in the real estate agency sphere to ensure that growing consumer expectations are met and that agents are equipped to operate in the increasingly complex environment in which property is transacted.

Overview of licensing under the PSBA Act

The Act prescribes the regime for licensing of persons who carry on businesses of supplying various categories of property agency services. There is provision for several types of licences according to the activities undertaken by agents as follows:

- real estate agent's licences;
- stock and station agent's licences;
- business agent's licences;
- strata managing agent's licences; and
- on-site residential property manager's licences.

¹ Lang and Morgan's NSW Estate Agency Law and Practice, Pamela Morgan, 6th Edition, Thomson Law Book Co, p 708

Corporations can also be licensed, with a proviso that at least one of the directors of the corporation holds a licence for the type of agency business that the corporation carries on.

Agency employees must hold a certificate of registration in one of the following categories to be able to lawfully undertake the corresponding work:

- real estate salesperson;
- stock and station salesperson;
- business salesperson; or
- registered manager.

Salespersons and registered managers must only operate in the employ and under the supervision of a licensee. Holders of a certificate of registration must not act as auctioneers. The exception is that holders of certificates of registration as a stock and station sales person may auction livestock under the direct and immediate supervision of the holder of an appropriate licence.

There are persons – such as government departments, local authorities, executors and administrators of deceased estates and official receivers in bankruptcy - who are exempt from licensing under the Act.

The Act prescribes eligibility criteria for applicants for licences and certificates of registration, including:

- a minimum age for natural persons;
- fit and proper person criteria;
- criteria for a “disqualified person”;
- educational and competency qualifications requirements;
- continuing professional development requirements; and
- the payment of a licence fee and a contribution to a compensation fund established under the Act.

A licence or certificate of registration may be granted subject to conditions. The holder of a licence must not act as an auctioneer unless the licensee is accredited as an auctioneer under the Act.

Licenses and certificates of registration are required to be renewed annually.

The Act and the Regulation make provision for the conduct of licensees and holders of certificates of registration and the manner in which they conduct their businesses and interact with clients and members of the public and other members of the profession. There are prescriptions and rules of conduct with regard to a variety of matters, including:

- general business practices and the supervision of employees;
- duties to avoid conflicts of interest;
- advertisements and representations;
- the content of and process of entering into agency agreements;
- the conduct of auctions;
- the keeping of records and audits;
- the handling of trust monies.

The Act and Regulations also provide for a disciplinary regime and prescribe a number of offences for breaches.

Rationale for licensing of agents

The licensing and regulation of real estate agents, stock and station agents and auctioneers is aimed to ensure that all individuals practicing in a given discipline meet a minimum set of standards and are accountable according to a common set of rules. The primary consideration is the protection of consumers.

Real estate agents are in a position of trust and confidence and have fiduciary duties to their clients. Consumers trust that their property professional will have the appropriate level of qualifications and professionalism to carry out their duties with due care and expertise.

It is therefore essential that the aspiring property professional should have confidence in the licensing system and that by meeting the prescribed level of qualifications and standards of conduct they will be prepared to operate within the complex regulatory environment of the property market. From the consumer's perspective, it is imperative that the licensing regime gives consumers trust in the ability of the property professional to deliver their services in a competent manner.

The qualifications and conduct standards need to be set at a level which is commensurate with the level of skills and responsibility required to carry out agency work.

The Institute is concerned that over the years there has been a reduction in the requirements for educational qualifications and other pre-requisites for agents in NSW. Under the current regime a person can commence work as an agent (and handle large amounts of trust monies) after only a few days' training and can obtain their licence and be able to operate unsupervised on completion of a course of several weeks' duration without ever having worked in the industry.

The REINSW was alarmed by the proposals set out in the Consultation Regulation Impact Statement for National Licensing for Property Occupations (RIS) published by the Council of Australian Governments' National Licensing Steering Committee issued in August 2012, which sought to further reduce the standards and requirements for agents.

The Institute made a submission strongly opposing several of the proposals in the RIS, including:

- the proposal that licensing requirements for non-residential agency work be removed;
- the proposal that licensing requirements for the sale, purchase and auction of livestock be abolished; and
- the proposal that agents will not be required to undergo continuing professional development as a condition of renewing their licences and certificates.

The Institute submitted that the standards and requirements for licensing should in fact be increased, including by:

- prescribing the educational requirements for licensees at least at Diploma level;
- setting a requirement for a minimum period of industry experience before a certificate holder is eligible to apply for their licence and operate unsupervised;
- introducing a requirement that agents take out and maintain professional indemnity insurance as a condition of issue and maintaining of their licence;
- stricter enforcement of compliance with continuing professional development requirements; and
- introducing licensing for the trading of water rights.

Please find attached a copy of REINSW's submission in relation to the RIS, where the concerns of the Institute are set out in more detail.

Summary

The Institute is opposed to the reduction or weakening of requirements for the licensing of and conduct rules for real estate agents and submits that the standards need to be increased. The requirements for continuing professional development should remain in place and be strictly enforced.

It is submitted that the regulation and licensing of agency work directly impacts on the ability of agents to properly carry out their duties and on the confidence of the consumer in the competence of the profession to deliver sound outcomes. Accordingly the licencing and rules need to keep pace with the multifaceted regulatory regime for transacting property and the changing market expectations.

The REINSW appreciates the opportunity to comment on the Issues paper and would welcome the opportunity to discuss it further.

14 December 2012

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Submission

National Licensing Consultation Regulatory Impact Statement

To: COAG National Licensing Taskforce
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Introduction

The Real Estate Institute of New South Wales (**REINSW** or the **Institute**) submission is in response to the Consultation Regulation Impact Statement for National Licensing for Property Occupations (**RIS**) published by the Council of Australian Governments' National Licensing Steering Committee.

The REINSW 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, and in doing so the REINSW has a substantial role in the formation of regulatory policy in New South Wales.

The REINSW appreciates the opportunity to lodge this submission and welcomes discussion of the issues raised by this submission.

General

The Institute considers that the protection of consumers of real estate services should be a paramount consideration in the development of a national licensing system. The emphasis should be on licensing all facets of agency work, solid qualifications as a pre-requisite to licensing across the board and regulated continuing professional development requirements - all of which would demonstrate a recognition that, in both the residential and commercial sectors, real estate professionals deal with clients' often most valuable assets.

The Institute strongly advocates for mandatory continuing professional development as a prerequisite of certificate and licence renewal. The Institute's position on this issue is consistent with the vast majority of other professions' practise obligations within Australia.

The complexity of property transactions is continually increasing. Consumer expectations of the levels of service to be provided by property professionals are also growing. It is alarming to see that the RIS proposes to substantially reduce the entry-level education requirements for some facets of practise, to de-licence completely other practise areas and to abolish regulated continuing professional development.

The RIS fails to consider the cost to the consumer of reduced education requirements and de-licensing of non-residential agency work, including the consequent loss of income to the Property Services Compensation Fund and the resulting loss of consumer protection. The REINSW believes that the current direction of the RIS, if embraced nationally, will lead to adverse outcomes for consumers, the industry and property professionals.

REINSW position

The REINSW submits that in developing a national licensing system for property occupations the protection of the consumers of real estate agency services should be the primary consideration. On this basis the Institute strongly opposes several of the proposals in the RIS, namely:

- the removal of licensing requirements for non-residential agency work;
- the removal of licensing requirements for the sale, purchase and auction of livestock; and
- the proposal that agents will not be required to undergo continuing professional development (CPD) as a condition of renewing their licences and certificates.

The Institute also submits that:

- the educational requirements for licensees should be prescribed at least at Diploma level;
- there should be a requirement for a minimum period of industry experience before a certificate holder is eligible to apply for their licence and operate unsupervised;
- agents should be required to take out and maintain professional indemnity insurance as a condition of issue and maintaining of their licence; and
- the trading of water rights should also be licensed.

National Licensing

The REINSW welcomes and supports the concept of national licensing for property occupations, however this support is conditional on creating the best system for the industry, consumers and the profession. The RIS on page xv of the Executive Summary talks about “each of the jurisdictions agreeing to a common set of licence categories and eligibility requirements so that there is one system and agreed requirements operating throughout the country”. REINSW is supportive of this, provided that the regulatory environment is also harmonised across all jurisdictions.

However on examination of the RIS it quickly becomes apparent that, if the licensing model proposed by the RIS is implemented, it will be far from a truly national unified model. For example:

- In some jurisdictions it is intended to have/retain licence categories additional to those proposed under the national licensing model (such as the pastoral house licence in Queensland).
- It is proposed that some jurisdictions which currently do not license certain categories of work will not be required to license those types work under the national system (such as strata management work in Queensland, South Australia and Tasmania).
- Some jurisdictions have indicated they will retain different entry-level qualification requirements than those proposed under the national licensing model.
- It is also of concern that Western Australia and the Australian Capital Territory are yet to commit to the national licensing model.

It is submitted that these factors are not indicative of, or conducive to, a unified national approach. It is apparent that there is a long way to go before the various jurisdictions are in agreement as to how to proceed nationally.

It is therefore difficult to see how the national licensing model proposed under the RIS differs from or is more beneficial than the alternative automatic mutual recognition model discussed in the RIS.

The Institute submits that the licence categories under a national system should cover all scopes of work of a real estate agent, not just residential real estate work. All licence categories ultimately regulated under the national licensing system should be implemented nationally and the same licence categories should apply in all jurisdictions. The REINSW sees no benefit to nationalising the licensing system unless the system ultimately developed is a truly national system.

It is submitted also that the harmonisation of the laws governing the property professions should come as a precursor to national licensing. A system cannot be truly national if different sets of laws continue to apply in the various jurisdictions. Consumers will be placed at a greater risk in an environment where agents believe they have the national qualifications because national licensing applies but different sets of laws continue to apply in different jurisdictions. Unless the conduct laws are harmonised, agents wishing to practise in another jurisdiction will have to learn the local conduct laws in that other jurisdiction – this is not conducive of labour mobility.

The RIS estimates at page 44 that it will take 45 minutes for licence holders to understand any new obligations, changes to licensing requirements or scopes of work under national licensing. The feedback from REINSW's experienced trainers is that this is a gross under calculation. If national licensing proceeds without the appropriate harmonisation of legislation and conduct requirements, agents will need to spend significant amounts of time trying to understand the very complicated array of differing legislation which applies across the several jurisdictions. This is fraught with risk both for agents and consumers.

Entry-level qualifications

The Institute is supportive of national licensing and the harmonisation of the regulatory environment within which real estate professionals deliver their services. That support however is contingent upon COAG developing a training framework for entry into the profession that equips the property professional with the requisite skills to deliver a competent service that meets consumer expectations. Equally importantly, the aspiring property professional has an expectation that the training they will receive will prepare them to respond to consumer and regulatory requirements in the market. If that expectation is not met then the trainee entering the market is effectively being set up for failure and consumers are being placed at risk.

Real estate agency professionals are in a position of trust and confidence and have fiduciary obligations to their clients. The consumer expectation of such professionals is that they will have sufficient and current qualifications to be able to discharge their duties with due care and expertise.

The Institute is of the view that entry-level qualifications for agents should be set at a minimum of diploma level. This will ensure a better prepared property professional, and better protection and better outcomes for consumers. To effectively achieve this, sufficient time will need to be allowed in order for those jurisdictions that currently do not require a diploma level qualification to transition to it.

There should also be a requirement for a minimum of 12 months' working experience as a pre-requisite to a certificate-holder becoming a licensee. Practical experience is an invaluable component of a professional's development and would give both consumers and professionals the confidence to know that the competencies learnt in training have been proven and applied in practice before the real estate professional becomes entitled to operate unsupervised. Practical experience is a pre-requisite to the attainment of qualifications for a lot of professions and occupations, and the real estate agent's profession should be no exception.

It is submitted that it should be a requirement for auctioneers to obtain a full qualification as applicable to agents' licences. Auctioneers need to understand real estate and have an in-depth knowledge of the real estate industry and all types of real property (including residential, commercial, rural, industrial etc.). Auctioneers should be familiar with real estate and contract laws as they have the capacity to bind the parties to the contract for sale.

Continuing professional development

The RIS does not address the potential cost to the consumer and the profession of the removal of the requirement for agents to undergo CPD as condition of maintaining their licence. Other professions require members to undergo CPD and the consumers of real estate services are entitled to have the assurance that their agent is legally required to keep up to date with the latest industry and legislative developments.

It is submitted that inadequate policing/auditing of compliance with CPD requirements has contributed to a situation where evasion of obligations has become commonplace and therefore the positive impacts of having the CPD requirements in place are less apparent than if there were full compliance.

In considering the impact on licensees the RIS fails to take into account that the lowering of entry-level educational requirements and the removal of the requirements for CPD cannot have a positive impact on licensees as this will only result in the erosion of consumer confidence in the ability of the profession to deliver sound outcomes.

De-licensing non-residential work

The REINSW vehemently opposes the suggestion that work relating to non-residential property should not be licensed and strongly disagrees with the rationale set forward in the RIS for deregulation of non-residential agency work.

The RIS seems to suggest that anyone at any age with no qualifications, experience, business or financial skills and with no requirements for probity checks can undertake non-residential agency work. Therefore a

15-year old who is not yet permitted to drive a car can become an agent dealing with the life savings of family investors or multi-million dollar assets.

It is nonsense to say that commercial real estate work is to be exempt from licensing requirements whereas business agency work will be regulated. Both kinds of agency work take place in a similar context and environment.

The RIS claims that there are “few complaints to consumer protection agencies” in relation to non-residential property transactions. The Institute submits this is not necessarily indicative of parties taking their disputes to another avenue as claimed in the RIS, but could equally mean that commercial real estate agents are simply conducting their businesses in a professional manner in a licensed environment.

The RIS fails to recognise that the parties to a lot of transactions involving property used for non-residential purposes are not sophisticated business people necessarily accustomed in dealing with commercial real property - there are many small or family business operators who buy or lease commercial property to operate their business from or as an investment. The RIS also fails to acknowledge that the parties affected by the work of a commercial real estate agent are not only the large companies and institutions with unlimited legal budgets at their disposal, but also the smaller and often less sophisticated vendors, purchasers and tenants who transact with such corporations.

The RIS provides no definition of what “non-residential property that is used primarily for the purposes of industry, commerce or primary production” means and makes no mention as to how work in connection with mixed-use properties (of small and large scales) will be treated and where they would fit in the licensing regime. This will lead to confusion within the industry and among consumers, the potential for interpretations based on convenience rather than legal principle and the placing of consumers at greater risk.

To de-license non-residential work will lead to the absurd situation where the parties to a \$10-million sale and purchase of a luxury residence have more consumer protection (including access to the property services compensation fund remedy and the agent’s professional indemnity insurance) than the parties to a \$300,000 corner-store sale and purchase!

The Institute is of the view that in the interest of consumer protection the purchasing, auctioning and selling of livestock should be licensed. These activities are currently licensed in most jurisdictions either as a stand-alone license category or as part of a broader license category.

The RIS makes assumptions that “the seller (and buyer) will have a high level of business acumen” and that the “livestock community is relatively small and the buyer and seller often know each other” without proffering evidence for these assumptions. In any event, the focus should be on whether the auctioneer has the necessary qualifications to carry out the transaction in the best interest of the client, not on the qualifications of or relationship between the vendor and the purchaser.

In addition, given that the majority of the jurisdictions propose to retain a separate goods and chattels and livestock licence category, this should be made a national category. To have a licence category in some jurisdictions only and not nationally defeats the purpose and benefits of the national licensing model.

The RIS on page 16 states:

The rationale for proposing separate categories is to ensure that specialized skills associated with the works of real estate agents, business agents and strata managing agents are recognised and the licensing requirements provide for training in those specialized skills.

The REINSW submits that the same rationale should be applied to the licensing of stock and station agents and commercial agents. This will also ensure that consumers of all types real estate services are protected, not just consumers of residential real estate services.

To remove the requirement for licensing of commercial real estate work, livestock sales and auctioning fails to recognise the specialised skills and knowledge required to carry out these types of work. It would also devalue the substantial investment made by existing licensed commercial and industrial agents, livestock agents and auctioneers in their education and their businesses, and would expose consumers to the risks associated with having persons without the necessary qualifications carry out these categories of agency work.

The RIS does not account for the cost to consumers of non-residential property agency services in having to become more discerning in trying to find an agent as consumers will not have the assurance of dealing with a licensed professional.

The removal of the several categories of licence will also mean that licence fees and contributions to the property compensation fund for those categories of work are not collected and this consequentially deprives consumers of those types of agency services of access to the property services compensation fund remedy. The income received into the property services statutory interest account will also be reduced if there is no requirement for agents engaged in non-licensed work to keep a trust account.

Professional indemnity insurance

The Institute has for some time now advocated that in the interest of consumer protection all licensees should maintain appropriate levels of professional indemnity insurance. The REINSW has applauded the proposal introduced by the Minister for Fair Trading The Hon. Anthony Roberts that from 1 January 2013, all licensees under the *Property, Stock and Business Agents Act 2002* (NSW) will be required to hold a minimum of \$1 million in professional indemnity insurance. The Institute has provided a submission in support of this proposal.

Professional indemnity insurance is an accepted and essential risk management tool to help protect consumers when utilising the services of professional advisors. For real estate business owners, it is also an essential means of financial protection against claims made while delivering their professional services.

In NSW, the majority of service providers connected to the property sector, including conveyancers and legal practitioners, are required to carry professional indemnity insurance. REINSW believes that it would come as a complete surprise to many consumers that real estate agents in NSW have, until now, not been required to carry this type of insurance.

The Institute submits that by legislating for mandatory professional indemnity insurance for licensees consumers will have a much better avenue for redress and compensation for their loss in the event of negligence or wrongdoing on the part of an agent.

Another consequence of de-licensing areas of agency work will be that agents working in those fields will be able to avoid the obligation to maintain professional indemnity insurance and accordingly that avenue of consumer protection will be lost.

Probity requirements

The REINSW considers that in addition to the personal probity requirements proposed in table 3.8 of the RIS, licensees should be subject to checks and declarations as to whether the person has been the subject of disciplinary action, whether they are disqualified from holding a licence, and as to the person's mental capacity (as it is currently required pursuant to section 16(1)(f) of the *Property, Stock and Business Agents Act 2002* (NSW)). The Institute also considers that the issue of whether the licensee is of good fame and character is relevant to determining their suitability to act as a real estate agent.

The REINSW is of the view that the same personal probity requirements in respect of agents should also apply to agent's representatives and auctioneers. All licence categories under national licensing should be subject to the same personal probity requirements.

The REINSW is of the view that the financial probity requirements as set out in Table 3.9 of the RIS in respect of real estate, business and strata managing agents should also apply to agent's representatives and auctioneers. All licence categories under national licensing should be subject to the same financial probity requirements.

It is once again submitted that consumers will be placed at greater risk if areas of agency work are de-licensed as consumers will be dealing with individuals who will not be subject to the probity checks.

Water rights

Water rights are frequently transacted separately from the transaction of land rights, however they are always connected to land. The existence and extent of the water rights a property enjoys (in most cases rural properties) have the ability to influence what the property can be used for and, consequently, the value of the land. There are complex legislative and regulatory requirements as well as the requirements of local water authorities connected with the transacting of water rights. In addition, it is appropriate that this issue be nationally regulated because of the fact that the asset travels across State borders. Accordingly, the REINSW is of the view that agency work in connection with the transacting of water rights should also be regulated.

Draft legislation package

The REINSW was astounded when the consultation legislative package was released by COAG within half an hour of the conclusion of the consultation and information session on the RIS held in Sydney. Clearly the feedback in relation to the RIS could not have been taken into consideration when drafting the legislative package.

As noted above, there are fundamental flaws with the proposals for a national system as set out in the RIS. Until these flaws are resolved and the essential features of a national approach are agreed there is no utility in debating the details of the legislative framework.

Conclusion

Inadequate national licensing standards will harm consumer confidence and damage the profession. The draft national licensing rules proposed in the RIS will result in a dilution of the aggregate skills, knowledge and experience of the profession and, as a consequence, the profession will find it increasingly difficult to respond to consumer expectations and the complex legislative environment in which property is transacted. Unless national licensing is preceded by the harmonisation of the regulatory environment, there will be confusion and risk to both agents and consumers.

The REINSW appreciates the opportunity to comment on the national licensing reform and would welcome the opportunity to discuss it further.

10 October 2012



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