

## ***Consumer Complaints Register: Discussion Paper***

**The Real Estate Institute of New South Wales**

**Submission on the Discussion Paper**

**28 October 2015**

**To:**

Consumer Complaints Register  
Fair Trading Policy  
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## Introduction

This Submission has been prepared by The Real Estate Institute of New South Wales (**REINSW**) and is in response to the Discussion Paper on the Consumer Complaints Register, issued by NSW Fair Trading (**NSWFT**) on 1 October 2015 (**Paper**).

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 supports, in principle, the Government's initiatives designed to provide consumers with access to information about traders and their products and services to deliver better customer service, encourage economic efficiency and growth and to ensure consumers make informed decisions about their purchasing decisions.

However, if the Government introduces the Consumer Complaints Register (**Register**) in the form detailed in the Paper, it will likely mislead consumers and tarnish the reputation and business of traders. REINSW believes that the Register must record accurate, complete and useful information to achieve the Government's objectives. However, those objectives cannot be met with the current proposals. Rather, the Register will potentially prevent consumers from making informed decisions and using valuable traders likely to satisfy their needs.

REINSW has no problem with the concept of NSWFT receiving complaints from consumers, triggering an investigation by NSWFT. However, REINSW opposes those complaints being made publicly available before the conclusion of an investigation and without an adverse determination. That would serve an injustice to consumers, traders and the economy as a whole. Further, traders should be given the opportunity to respond to complaint allegations and to deny them that opportunity, in REINSW's opinion, equates to a denial of natural justice.

## Issues for Discussion

### 1. What information should the Register publish about a complaint and why?

REINSW is of the view that the Register should publish the essence of a complaint only after an investigation and adverse determination has been made.

When considering the essence of a complaint, regard should be had to the distinction between a complaint about a trader's service and a complaint about the quality of a trader's product that has been supplied to the complainant. If the complaint is about a trader's service, then the complaint attaches to the trader. If it is about a product's quality, the complaint attaches to the product and should not be recorded on the Register. Such complaints should be distinguished from a contractual claim at law where the legal liability rests with the retailer and manufacturer.

An example of REINSW's concern is set out in its previous submission dated 21 August 2015 in relation to the contents of the Paper. That example is where an agent accepts, in good faith, representations from a vendor or in documents provided to the agent by the vendor (for instance, survey reports and pest and building reports) and then makes those representations to prospective purchasers believing them to be true. If found to be untrue a

complaint could be made against the agent on the Register, damaging their reputation and business. REINSW considers it unfair and unjust for a vendor of a product or a service provider relying on representations in a report to be held responsible for the product which they receive from a reputable source and passes on the information in good faith. The issue might be with the agent at law but it should not be a complaint against the agent who acted appropriately. REINSW is of the view that NSWFT needs to make this distinction to avoid the Register distorting public perceptions about traders.

So that consumers can engage the best traders to satisfy their needs, it is their right to have access to information about a complaint only after its quality has been assessed and its validity substantiated. To record a complaint on the Customer Assistance System as having no documentation to support the complaint (which would be the case if a complaint was vexatious or a duplicate) could cause commercial harm and damage to the reputation of traders for no reason.

REINSW has no issue with making available transparent and open information, but it must not result in the possibility of substantially damaging the reputation of innocent traders. That is particularly so where no supporting evidence is provided by the complainant or where complaints arise from unreasonable and/or unrealistic expectations of consumers and not from the conduct of traders. For instance, where a vendor or landlord considers the value of their property to be worth more than what it sells or rents for, resulting in a complaint being made against the agent. NSWFT must uphold its duty and responsibility of ensuring the validity and accuracy of a complaint before it is publicly disclosed.

A mere complaint suggests a potential dissatisfaction with a trader but it does not mean that the trader has done anything wrong to warrant the making of the complaint. It may trigger an investigation by NSWFT and REINSW is comfortable that the Register publish adverse determinations. However, REINSW believes it would be unfair and unjust to prevent consumers from conducting appropriate due diligence by providing inaccurate information. It is in the interests of consumers and traders that only valid complaints be recorded on the Register once they have been investigated and assessed on their merits to have adverse findings. For that reason, REINSW is of the view that a complaint found to be vexatious or a duplicate should not be recorded on the Register until properly determined to be a valid complaint. However, if the Government proceeds to publish those types of complaints then they should be removed from the Register (and any archives) immediately if they are subsequently determined to be unsubstantiated, uncorroborated complaints or initially miscategorised as complaints and are actually enquiries.

REINSW believes that the Register should also record information about the complainant. For instance, it is useful for consumers to know how many complaints a complainant has made about other traders, particularly to get a sense of whether they have made a one-off complaint or regularly lodges complaints. That would assist consumers to make informed decisions about their purchasing decisions and how they should treat specific complaints (for instance, with a grain of salt or with sincerity).

## **2. What information should the Register publish about a trader and why?**

REINSW is of the opinion that the trader's registered name, business address and industry should be published on the Register. The service complained of may also be recorded but not a complaint relating to a product (refer to REINSW's response to Question 1).

The Paper states that the Register may include information about a trader's parent company (where relevant), franchise group (where relevant) and licences held (where relevant).

REINSW queries who determines the relevance of these factors and how they are relevant. REINSW would not want to see the unfair situation where a trader's parent company, franchise and/or licences are recorded if they are subsequently found not to be involved. That could tarnish their reputation unnecessarily. REINSW suggests that NSWFT find a nexus between a trader and its parent company, franchise or licence in relation to a complaint before those details are published on the Register.

Nevertheless, REINSW considers it unfair to publish the trader's entire corporate and franchise group on the basis that they are separate legal entities and their reputations should not be affected because of the services of the trader, which is outside of their control. Essentially, where a consumer receives an unsatisfactory service from one trader within the group, it would be unjust for the rest of the group who are not at fault to have reputational damage by being named on the Register.

**3. Should the Register publish data about complaints received or about finalised complaints? Why?**

Please refer to REINSW's response to Question 1.

**4. How many traders should be identified on the Register and what might be the benefits of including more or less?**

REINSW does not recommend the Register be limited in any way if there is an adverse finding following an investigation of a complaint.

As abovementioned, REINSW is of the view that complaints must only be published if they have been investigated and substantiated with adverse findings. If NSWFT determines that a complaint is valid and that a trader has poor service quality then those details should be made available to consumers, regardless of the number of complaints made against that trader. It would reflect badly on NSWFT if it had investigated a complaint and knew the trader's service to be inadequate but did not publish the information because the trader did not have enough complaints against them to reach a minimum threshold or Top 25, 50 or 100.

REINSW considers it reasonable to publish the Top 50 traders who are subject to the most complaints in a given time period but the Register should not stop there. The Register should also record valid complaints that have adverse determinations against a trader even if they only had a few finalised complaints against them. To solely implement a Top 25, 50 or 100 or minimum threshold would be contrary to the concept of transparency and open data because consumers would not be provided with accurate and complete information.

On a side note, REINSW worries that if NSWFT introduces the Register then it may be shooting itself in the foot. If a trader has received a number of complaints worthy of being published on the Register then NSWFT's disciplinary powers (including to de-licence repeat offenders) could potentially come into question.

**5. Should there be a minimum threshold for number of complaints before appearing on the Register? If so, what should it be?**

Please refer to REINSW's response to Question 4.

**6. How often should the Register be updated (eg. monthly, quarterly, six monthly)?**

REINSW considers that the Register should remain current and should be updated quarterly.

**7. What time period should the Register data cover (eg. previous 12 months, previous 3 months) and why?**

REINSW considers 12 months to be an appropriate time period over which the data should cover. That period would allow users to be better informed and to identify trends, changes and patterns in the data.

**8. How long should the Register data remain on the NSW Fair Trading website before being archived?**

The benefits of having available data is the encouragement of higher quality service delivery and product preference. Accordingly, REINSW is of the view that traders should be removed from the Register, NSWFT's website and any archives as a reward for improving their conduct, evidenced by a decreased number of recorded complaints on the Register. Therefore, REINSW considers a sufficient time for a complaint to remain on the Register to be 12 months from the date of publication.

However, there should be other ways in which traders are removed from the Register. For instance, a complaint should be immediately removed if it is determined to be vexatious or a duplicate. In addition, a complaint should not be published if it is resolved to the consumer's satisfaction before the Register is published.

**9. Should the Register data be available to be searched after being archived and for how long?**

Please refer to REINSW's response to Question 8. The Register data should not be available to be searched after being archived as a reward for improving conduct and service.

**10. From what date should complaints data be counted and included in the public Register?**

REINSW recommends publishing complaints data from a specific forward date to give traders the opportunity to improve their customer service and address existing complaints before facing the possibility of being published on the Register. It would be quite draconian to introduce the Register and apply it retrospectively.

**11. Should the Register show information about the size of businesses being complained about?**

REINSW believes that the Register should show information about the number of transactions and size of businesses that are the subject of complaints.

It is expected that larger businesses with more customers might have more complaints made against them than that of smaller traders. The bigger the business the greater opportunity for more complaints. However, small businesses might also end up on the Register due to commercial issues or insolvency.

Essentially, users of the Register could easily be misled if they do not understand the data, including business size of the trader being complained about. REINSW suggests that the Register warn users of its limitations before they are able to access the data to assist with their analysis and understanding.

**12. Is there a practical and simple way of providing information about the size of the business being complained about?**

REINSW considers this whole project to be difficult to implement and this question is a prime example of where the data can mislead the public and damage a trader's business and reputation. The complaint needs to be completely understood, analysed, explained and viewed in context.

In some cases, large traders are able to view the information in context (for example, Telcos or other large companies can contextualise data internally) but not all businesses have the opportunity or ability to do so. REINSW recommends a warning be published on the Register to highlight the fact that different business sizes should be taken into account when considering the data. The Register needs to provide context so that consumers can compare apples with apples, not apples with oranges.

**13. Should complaints about a particular franchise branch be recorded as complaints about the franchise brand as a whole?**

Whilst this project's goals of providing consumers with more information may be admirable, this question highlights a further example where there can be reputational damage to a brand and/or supplier resulting in adverse commercial outcomes. REINSW's concern is that, unless the data is correctly collated and analysed, the data can mislead consumers, particularly unsophisticated consumers.

There is not a one-size-fits-all response to this scenario. For instance, a franchise might be a product provider in which case it may be appropriate to warn consumers on a global scale about the product. However, other franchises might be service-related and complaints may relate to the service of an individual service provider.

REINSW is concerned that a complaint made against a particular franchise in a specific area could unnecessarily affect all franchisees if the Register does not indicate that the complaint is made specifically against the particular branch or employee of that branch.

Unless the data and reporting of complaints is properly presented, analysed and understood, there will potentially be damage to franchisors, franchisees, brands and, most importantly, consumers who will ultimately make poor decisions.

**14. Should the same approach be taken with chains and related companies/corporate groups?**

REINSW's response to Question 13 also applies with respect to chains and related companies/corporate groups.

**15. Should traders be notified in advance that they are going to appear on the Register for the first time? If so, what period of notice should they be given?**

REINSW is of the view that traders should get sufficient notice each time they are going to appear on the Register.

It would be useful for the Government to carry out an analysis on how the tenancy reference model works to encourage good behaviour amongst tenants. In that model, a tenant can only be listed on a tenancy database if:

- (a) the NSW Civil and Administrative Tribunal terminates their residential tenancy agreement; and/or
- (b) an amount exceeding the rental bond for a breach of the residential tenancy agreement is outstanding at the time of being listed.

The tenant cannot be listed if they are not given at least 14 days' notice to review the information and object to the proposed listing. They can also dispute proposed listings in the NSW Civil and Administrative Tribunal. Essentially, if a tenant adequately addresses the relevant issues then they are either removed from the register or do not appear on it at all.

REINSW believes that the incentive for traders should be to do the right thing and that their reward for doing so is not to be recorded on the Register. If they do the right thing and resolve a complaint before the complaint is published on the Register but it is subsequently recorded anyway, REINSW queries what incentive traders have to do the right thing.

**16. What other supporting information should accompany the new Register to explain it to the public?**

As abovementioned, to ensure users of the Register have an understanding of the information for analysis purposes, there should be a warning before they can access the data informing them that the Register does not provide information about a trader's business size and number of transactions.

## Other Issues

- The Paper states that the Register will be available in two formats – a spreadsheet, which can be used by third parties and app developers, and an interactive dashboard.

The Paper fails to discuss how the currency of the data is maintained following its incorporation into different formats. For that reason and to ensure consumers are provided with the most accurate and current information, REINSW is of the view that the data should be locked and not able to be re-published and/or manipulated by users. However, if the data can be sorted and manipulated then REINSW recommends a requirement be introduced that users indicate the date and issue of the Register from which the data has been sourced. REINSW's concern is that businesses could have serious consequences if the data is manipulated incorrectly and that the Paper fails to detail any safeguards and/or controls that will be put in place to prevent misuse, misinterpretations and misunderstandings of the data.

An example of publicly available information being misunderstood or misinterpreted and republished in a way that has a serious detrimental impact on a trader's

reputation would be with respect to the allegations made against McGrath Hornsby for underquoting. Those allegations were televised and also published in an article in the Sydney Morning Herald on 11-12 July 2015, entitled "*Prestige agents accused of underquoting*". The article states that complaints have been made against McGrath Hornsby but that the principal, Mr Mark Saad, is unaware of any such complaints.

- The information recorded on the Register may be adversely used against a trader by its competitors in marketing campaigns to gain a competitive edge.
- Another issue is where journalists, on a quiet media day, turn to the Register for article topics. Those articles might be based on uncorroborated complaints, ultimately tarnishing and potentially destroying the reputations and businesses of innocent traders.

## Conclusion

The proposals in the Paper have significant impacts on consumers, traders and the economy in New South Wales. Whilst REINSW welcomes initiatives designed to improve standards, the delivery of customer service and efficiency in the market, the way forward needs to be carefully considered by Government so that the Register achieves its objectives without detrimentally affecting traders, consumers and the economy.

REINSW would like to remind NSWFT that traders are also consumers of NSWFT's services and are consumers more generally. NSWFT has a responsibility to provide services to traders within the marketplace and should not be developing a Register which will potentially damage their businesses and reputations.

Therefore, if the Government is going to introduce the Register, then REINSW would like to see it record accurate, complete and useful information that will result in the delivery of better customer service and more informed decisions being made by consumers. REINSW is concerned that the proposed particulars of the Register is likely to mislead consumers and tarnish or destroy reputations, and business and commercial interests.

With the deepest respect, REINSW feels that Government often poorly researches and implements projects that ultimately result in substantial issues. Examples of such projects include legislative changes relating to swimming pools, smoke alarms and window safety devices. Whilst the Government's goals are admirable, there are implementation and resourcing problems associated with such projects. This project is no different. Whilst there are benefits to introducing the Register, a lot of work is required to ensure that it does not unnecessarily damage or destroy reputations or mislead consumers by providing them with incomplete, inaccurate and useless information resulting in poor purchasing behaviour and decisions. That would be contrary to its objectives.

The result needs to be a fair Register which takes into account the interests of stakeholders.



REINSW appreciates the opportunity to provide this Submission and would be pleased to discuss it further, if required.

Yours faithfully



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