



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: Property:GUgl1081299

18 January 2016

The Review Panel
Property Training Review
Real Estate & Property
NSW Fair Trading
PO Box 972
Parramatta NSW 2124

By email: propertytrainingreview@finance.nsw.gov.au

Dear Sirs,

A review of training for licensed occupations in the NSW property services industry

The Law Society appreciates the opportunity to comment on the Consultation Paper, *A review of training for licensed occupations in the NSW property services industry*, issued by the Review Panel and commissioned by NSW Fair Trading.

The Consultation Paper has been reviewed by the Law Society's Property Law Committee ("Committee"). The Committee is comprised of experienced and specialist property law practitioners, drawn from the ranks of the Law Society's members, who act for various stakeholders in the conveyancing process.

The Committee has chosen to comment only upon those parts of the Consultation Paper relevant to its experience and expertise.

General comments

The Committee considers that people holding a licence or a certificate of registration should have a sufficient working knowledge of the conveyancing process and the applicable legislation to enable them to meet the reasonable expectations of consumers, as well as work efficiently and seamlessly with other participants in the property industry, such as solicitors and conveyancers.

The Committee notes the comments of Barrett J in *Golding v Vella* [2001] NSWSC 567. In that case the conduct of a salesperson in "assisting" the purchasers to exchange (an attempt which proved ineffective) led His Honour to observe at paragraph 53:

[The purchasers] had very little idea of the legal significance of the events of the evening of 19 April 1999. [The salesperson], I suggest, was in essentially the same position. It was very much a case of the blind leading the blind so far as the legal consequences and legal requirements were concerned. The recognition in s.84AB of the *Property, Stock and Business Agents Act 1941* that there is a legitimate role for real estate agents in the exchange or making of contracts for the sale of residential property is founded on an assumption that such agents and their employees will familiarise themselves with at least the basic legal concepts. Such an assumption was not borne out in this particular case.

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CONSTITUENT BODY

The Committee also notes Rule 1 of Schedule 1, General rules of conduct applying to all persons holding a licence or a certificate of registration, of the *Property, Stock and Business Agents Regulation 2014*:

Knowledge of Act and regulations

An agent must have a knowledge and understanding of the Act and the regulations under the Act, and such other laws relevant to the category of licence or certificate of registration held (including, laws relating to residential tenancy, fair trading, competition and consumer protection, anti-discrimination and privacy) as may be necessary to enable the agent to exercise his or her functions as agent lawfully.

The maintenance of appropriate levels of consumer protection, the ability of holders to discharge their obligations and the need for holders to work efficiently with other participants in the property industry all underpin the Committee's responses to the Consultation Paper.

Specific questions from the Consultation Paper:

1.1 Are there additional risks that should be included in an assessment of training standards?

The Committee considers that there are a number of additional risks that ought to be included in Table 6 of the Consultation Paper, including:

- negligence;
- failure to follow instructions or to obtain adequate instructions;
- failure to explain fully the terms of agency agreements; and
- errors in entering into contracts when exercising the functions conferred in relation to residential property under s 64 of the *Property, Stock and Business Agents Act 2002* ("Act").

Specifically, the Committee has received anecdotal evidence from practitioners that some agents are making alterations to contracts for sale of residential property beyond what is contemplated under s 64(1) of the Act without referring these to the practitioner acting for each party.

1.3 What do you think should be the minimum educational standard for each category and why?

The Committee is generally of the view that the current educational standard for the holders of certificates of registration under the Act is manifestly inadequate given the activities which are routinely undertaken by such persons. The problem is particularly acute where the licensee is a corporation. Since corporate licensees can only act through natural persons, it is especially critical that those performing functions on behalf of such licensees possess adequate knowledge of all laws relevant to the activity he or she is undertaking.

2.2 What are the practical consequences of the absence of a time based requirement to enter the property services industry?

The Committee notes the important role that persons holding a licence or a certificate of registration play in the conveyancing process and the potential public detriment if this role is not exercised with due skill, care and diligence. The Committee considers that the lack of exposure to the day to day operation of the industry and lack of appropriate mentoring inherent in the absence of a time based requirement exposes consumers to unacceptable risk. The Committee also notes that New South Wales appears to be in the minority in terms of not requiring a minimum period of experience as a pre-requisite to qualification (as referred to on page 15 of the Consultation Paper).

The Committee notes that many other professionals are required to have a minimum period of time based experience before obtaining an unrestricted qualification and suggests that this approach is also appropriate for participants in the property services industry, particularly for licensees under the Act.

2.3 What does time based experience achieve?

Time based experience provides exposure to real life issues, mentoring, practical solutions and experience in dealing with clients and other participants in the property industry, such as local councils, auctioneers, practitioners, town planners and property inspectors.

3.1 What needs do the current CPD requirements meet?

The Committee notes that the property industry is a dynamic industry where fundamental change often takes place. Two recent examples are the amendments to the Act effected by the *Property, Stock and Business Agents Amendment (Underquoting Prohibition) Act 2015* and the regulation of sunset clauses in off the plan sales by the insertion of section 66ZL into the *Conveyancing Act 1919*. The implementation of the strata legislation recently passed by Parliament will effect even more significant law reform. This constant change in the industry demands that the working knowledge of the participants in the industry is regularly updated through CPD.

3.2 What are benefits of CPD and what are the costs to business?

The Committee strongly supports an adequate level of CPD as being a key requirement for persons holding a licence or a certificate of registration. One of the hallmarks of a profession is its commitment to continuing development, and it is in the interests not only of clients of property professionals but also the persons holding a licence or a certificate of registration themselves that provisions requiring mandatory CPD be retained.

The Committee appreciates that there is a cost in requiring a level of CPD. The Committee regards this cost as justified both in relation to consumer protection and for the benefit of persons holding a licence or a certificate of registration. An effective commitment to CPD is a risk mitigant which should result in reduced insurance premiums and a consequential reduction in the cost of doing business.

3.3 What are the problems or issues with the existing CPD regime in NSW?

The Committee recognises that access to a comprehensive program of CPD for persons holding a licence or a certificate of registration in rural and regional areas may be problematic due to the additional delivery costs. Some private providers may not be as enthusiastic about servicing the regions compared to delivery in the greater Sydney area. If that proves to be the case it may be appropriate for Government to provide assistance in filling any market gap. Provision of web based learning can also play an important role in providing CPD in rural or regional areas.

The Committee also considers that the provision of the Director General's guidelines is comparatively lengthy and prescriptive. For example, the requirement that most providers need to be approved by the Director General as satisfying learning category three prior to course delivery appears overly bureaucratic. An approach similar to that adopted in relation to continuing professional development for solicitors, with a greater emphasis on the attendee determining the utility of the CPD activity would be beneficial.

3.4 Are the current requirements relevant?

In the Committee's view the current requirements are broadly relevant and should at least be maintained and preferably enhanced.

5.1 What are the key issues in relation to cross border operations of property and achieve?(sic)

One key issue in relation to cross-border operation of property industry participants is the significant differences across jurisdictions in the laws regulating property transactions. For example, the role of a real estate agent in the formation of contracts for the sale of real estate is radically different in New South Wales from the position in Victoria, and different again from the scope of work in Queensland. Any efficiencies that might be gained from mutual recognition must be weighed against the risk to the consumer where an agent undertakes a transaction mistakenly believing that the same legislation and practices apply.

5.3 How might we improve mutual recognition for auctioning of property and livestock?

The Committee notes that stakeholders are seeking greater flexibility to allow stock and station agents to operate across borders without having to go through the formal mutual recognition process (page 22 of the Consultation Paper).

The Committee does not support any further deregulation in the context of mutual recognition if that were to extend beyond the sale of livestock. The Committee is concerned that where the activity relates to rural land rather than livestock, deregulation may fail to sufficiently recognise the different processes for dealing with rural land in different jurisdictions. The Committee suggests that the regulation of electrical tradespersons is not an appropriate model or guideline for regulation in this area.

The Committee would be pleased to participate in further consultation, including any consultative meetings with the Review Panel hosted in Sydney.

Should you have any queries about this letter, please contact Gabrielle Lea, Policy Lawyer for the Committee on 9926 0375 or by email to gabrielle.lea@lawsociety.com.au.

Yours faithfully,



Gary Ulman
President