THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: Property:GUgl1162100

14 June 2016

PS&BA Amendment (Property Reports & Exemption) Regulation
Policy & Legislation
NSW Fair Trading
PO Box 972
PARRAMATTA NSW 2124

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

Dear Sir/Madam,

Property, Stock and Business Agents Amendment (Property Reports and Exemptions) Regulation 2016

The Law Society appreciates the opportunity to comment on the Property, Stock and Business Agents Amendment (Property Reports and Exemptions) Regulation 2016 ("draft Regulation").

1. Records of property reports to be kept by real estate agents.

The Law Society is concerned about the breadth of clause 33A(1)(a). We understand that the intended application of the draft Regulation is limited to pest reports, building reports and inspections of strata records. If that is correct, we suggest that it is preferable to nominate each of the three classes of report, as has been proposed in the case of strata record inspections. A generic description referring to a "physical inspection" of the property may encompass other reports prepared after physical inspection of a property such as reports prepared by a surveyor, valuer or architect. It may also encompass inspections by an accredited certifier or council officer (for example, where the property has a swimming pool). We suggest clause 33A(1)(a) should be redrafted to refer to building and/or pest reports.

Clause 33A(1)(b) should also be amended to refer to inspections under s 26 of the *Community Land Management Act 1989*.

The Law Society suggests that clause 33A(2) does not make it sufficiently clear whether the obligation to disclose the details of the property report to any prospective purchaser is discharged by disclosing once only (at the time a copy of the contract is requested) or whether there is an ongoing obligation to update all prospective purchasers. If the former is intended then the first in time prospective purchaser will not possess information gleaned from subsequent prospective purchasers. If the latter is contemplated there will be serious administrative burdens on licensees especially if the property generates considerable interest. The scope of the obligation should be clearly specified.

In relation to clause 33A(3), we suggest that the concept of what constitutes particulars that "cannot be reasonably obtained by" a licensee should be clarified. This will be of greatest importance where the report involves an inspection of strata (or community) scheme records, as typically those inspections occur without the knowledge or involvement of the licensee (while the other reports will usually involve the licensee providing access to the property).

The Law Society considers that clause 33A(4)(d) places an undue compliance burden on licensees and should not be included. Whether or not a report is available for repurchase is a matter between the report provider and its client or customer, best addressed by anyone interested in repurchasing contacting the provider directly, using the details supplied under clause 33A(4)(c).

2. Exemption for persons acting as real estate agents for certain properties

The Law Society notes that this issue was raised in 2014 as part of the Review of the *Property, Stock and Business Agents Regulation 2014* ("Regulation"), subsequent to the release of the Regulatory Impact Statement for the draft Regulation. At that time, the Law Society expressed concern about the possible diminution of consumer protection if partial deregulation occurred. The Law Society still has concerns in that regard, but notes the Government's commitment to providing the exemption, in accordance with recommendation 17 of the Final Report issued by IPART in September 2014, "Reforming licensing in NSW - Review of licence rationale and design".

In relation to clause 46A(b), we suggest that the "market value" test in subclause (b)(i) should be limited to work which involves selling, purchasing, exchanging or otherwise dealing with property. The "total gross floor area" test in subclause (b)(ii) should be limited to work which involves leasing or management functions.

Where a licensee is instructed to act on behalf of an owner dealing with a "site" which is to be further subdivided or leased, the operation of the relevant threshold requires further clarification. Suppose a licensee acquires a listing for commercial property, with the site to be subdivided into a strata scheme and sold or leased to individual purchasers or tenants. The total site exceeds one of the two triggering thresholds, but the disposal by sale or lease of individual parts does not. The relevant consideration should be the individual areas or values of the parts to be dealt with by sale or lease, rather than the whole area or value of the total site. The Law Society considers that due to the possible inequality of bargaining power between the owner and potential buyers or tenants, such transactions should require the agent to be licensed.

3. The definition of "commercial property agency work"

The Law Society notes that the proposed definition excludes "residential property or rural land". The definition of "residential property" for the purposes of the draft Regulation is set out in s 3(1) of the the *Property, Stock and Business Agents Act 2002* ("Act"): "***residential property*** has the same meaning as in Division 8 of Part 4 of the *Conveyancing Act 1919.*"

The key definition of that Division is s 66Q of the *Conveyancing Act 1919,* which provides:

(1) For the purposes of this Division, ***residential property*** is:

(a) land on which are situated (or in the course of construction) not more than two places of residence, and no other improvements, or

(b) vacant land on which the construction of a single place of residence alone is not prohibited by law, or

(c) a lot or lots (including a proposed lot or lots) under the *Strata Schemes (Freehold Development) Act 1973* or the *Strata Schemes (Leasehold Development) Act 1986*, comprising not more than one place of residence alone, whether constructed or in the course of construction, and including any place used or designed for use for a purpose ancillary to the place of residence.

(2) Residential property does not however include:

(a) land or a lot that is used wholly for non-residential purposes, or

(b) land that is more than 2.5 hectares in area (or such other area as may be prescribed).

(3) For the purposes of this section, ***place of residence*** means a building or part thereof used, or currently designed for use, as a single dwelling only, and includes outbuildings or other appurtenances incidental to any such use.

On one interpretation, the combined effect of subsections (1) and (3) may be that an agent who has a listing comprising, for example, a residential triplex, or two "places of residence" in an existing strata scheme, would not be selling or leasing "residential property". While it is unlikely this would result in such an agent not being regulated (because the thresholds in clause 46A(b) would not be met), in our view the issue has much wider implications beyond the operation of the draft Regulation. For example, whether a property is residential property or not determines the required form of an agency agreement under Schedules 8, 10, 12 and 13 of the Regulation. It also determines whether the transaction is subject to the requirements detailed in Part 5 of the Act, such as the requirement for an agent to hold a copy of the proposed sale contract under s 63. We suggest that this issue could be further considered and clarified as part of the next review of the Act.

Should you have queries about this letter, please contact Gabrielle Lea, Policy Lawyer on (02) 9926 0375 or by email to gabrielle.lea@lawsociety.com.au.

Yours faithfully,

Gary Ulman
President