



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: Property:REgl871865

13 June 2014

Property, Stock and Business Agents Regulation 2014
Policy,
NSW Fair Trading
P.O. Box 972
PARRAMATTA NSW 2124

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

Dear Sir/Madam,

Property, Stock and Business Agents Regulation 2014

The Law Society appreciates the opportunity to comment on the proposed Property, Stock and Business Agents Regulation 2014 ("draft Regulation"). The Law Society's Property Law Committee ("the Committee") has reviewed the draft Regulation.

The Society appreciates the opportunity to participate in the Roundtable discussions held on 3 June 2014. Comments made by the Committee in relation to the proposed deregulation of commercial property agency work are based on the material distributed on the proposal at the Roundtable.

1. Draft Regulation

The Committee notes that it is proposed to remake the *Property, Stock and Business Agents Regulation 2003* ("current Regulation") as part of the postponed statutory review process. In the Committee's view, the bulk of the draft Regulation is uncontroversial and the minor changes that are made either streamline or update the operation of the current Regulation, having regard to other legislative changes or technological changes.

The Committee supports the proposed change to Clause 3 definitions by deleting the definition of "bank" and changing the references to "bank" throughout the Regulation to "authorised deposit-taking institution". However the Committee notes that not all authorised deposit-taking institutions would be appropriate for inclusion and consideration should be given to effectively including only those authorised deposit-taking institutions which are also a bank, a building society or a credit union. For example, Paypal is an authorised deposit-taking institution but would not be appropriate for the payment of trust money.

The proposal to introduce the provision of a unique identifying number when opening or maintaining a trust account is supported. The Committee understands that NSW Fair Trading is staggering the introduction of this requirement to new and existing accounts and is additionally taking steps to ensure that industry is assisted in complying with the new requirement.

The Committee draws to your attention what appears to be a minor omission in Schedule 15 of the draft Regulation. The Regulatory Impact Statement refers to the insertion of a penalty for both a corporation and an individual in relation to proposed clause 6, (clause 10 of the current Regulation) "Provision of financial investment advice". However in Schedule 15, in relation to penalties under s 46(2), no figure has been inserted in Column 3 for the corporate penalty.

2. Additional suggestions

The Committee has noted an increasing trend in the terms of real estate agency agreements to provide that a vendor may be liable for the payment of a real estate agent's commission even where the contract for sale of land has not proceeded to completion.

As a matter of consumer awareness, the Committee suggests consideration be given to adding to the draft Regulation a requirement for a mandatory warning to be inserted into agency agreements where commission may be payable even if the sale does not complete. Such a warning could follow the approach adopted in items 1 and 2 of Schedule 8, and could similarly be added to Schedules 10 and 11.

The Committee suggests that there is a need for greater clarification as to what constitutes a "material fact", under s 52 of the *Property, Stock and Business Agents Act 2002*. The Committee submits that industry requires guidance as to what steps a real estate agent must take to discharge his or her obligation, particularly in the context of a violent crime having occurred in the property while owned by the vendor.

The Committee notes that clause 7 of the *Residential Tenancies Regulation 2010* gives some guidance as to what constitutes a "material fact" in the context of representations made to a prospective tenant in relation to a residential tenancy agreement, by prescribing certain items as material facts. Clause 7(c) prescribes as a material fact that the residential premises have been the scene of a serious violent crime within the preceding 5 years. A similar clarification may provide some assistance to the industry.

3. Proposed Deregulation of Commercial Property Agency Work

The Committee understands that the proposed reform will not apply to residential or rural property agency work and is intended to apply to the leasing, management and sale of commercial property.

The Committee notes with concern that the reform is likely to be added to the draft Regulation, which is to commence on 1 September 2014, even though the additional provisions do not currently appear in the draft Regulation and have not been taken into account in the Regulatory Impact Statement.

The Committee understands that the proposal is to exempt certain work from the requirement to be conducted by a licence holder, where:

- (a) a corporation performs commercial property agency work on an affiliate's behalf; or
- (b) an agent undertakes commercial property work in relation to a property which exceeds a designated total floor area (such as 10,000 square metres), or a designated total estimated value (such as \$10,000,000).

The Committee notes that NSW Fair Trading is likely to circulate a draft of the proposed provisions to stakeholders and it will provide more detailed comments once that draft has been reviewed. However, the Committee has a number of general concerns with the proposal which it sets out by way of preliminary comments.

In the Committee's view, both limbs of the proposal do not take into account that licensing not only protects the clients of the agent but also third parties such as purchasers and tenants. While it is true that some third parties are protected to an extent by consumer protection laws and the *Retail Leases Act 1994*, the Committee understands that the scope of the proposal would extend to premises not subject to the *Retail Leases Act 1994*. In any event, the protection afforded by, for instance, the Rules of Conduct under the current Regulation is, in the Committee's view, significantly wider than that afforded by general consumer protection statutes or legislation such as the *Retail Leases Act 1994*.

The Committee understands that proponents of the suggested deregulation argue that the requirement for a licence adds unnecessary compliance costs for a sophisticated commercial entity which will have already adopted best practice. The Committee does not agree that this will always be the case. Additionally, where compliance costs ultimately protect less sophisticated or inexperienced small businesses or individuals, the Committee does not regard those compliance costs as unnecessary.

The Committee also understands that proponents of the reform contend that the educational requirements for obtaining and maintaining the licence can be largely irrelevant to the daily activities of persons such as leasing agents of large shopping centres. This is not a sound basis for an exemption to hold a licence; it rather highlights the need for better targeted educational programs.

In the Committee's view, if the proposal were to proceed, the provisions will need to be clearly drafted in relation to the meaning of "commercial property". To take one example, any definition should make clear whether commercial property is intended to include industrial property.

The Committee notes that there is a definition of commercial property agency work in clause 13B of the current Regulation:

"commercial property agency work means selling, purchasing, exchanging, leasing, managing or otherwise dealing with property that is not residential property".

Presumably the reference to residential property imports the definition of residential property in s 3 of the *Property, Stock and Business Agents Act 2002*:

"residential property has the same meaning as in Division 8 of Part 4 of the Conveyancing Act 1919."

Section 66Q of the *Conveyancing Act 1919* then defines the meaning of residential property.

The Committee strongly suggests that, in drafting the new provisions, a more straight-forward approach to the definition of commercial property be adopted.

The Committee looks forward to receiving a draft of the proposed provisions for this reform, and would welcome the opportunity for further consultation with NSW Fair Trading. Should you have queries about this letter, please contact Gabrielle Lea, Policy Lawyer for the Committee on (02) 9926 0375 or by email to gabrielle.lea@lawsociety.com.au.

Yours faithfully,



Ros Everett
President