

***Draft Property and Stock Agents Regulation 2022
(NSW)***

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

***Submission in response to the Public Consultation Draft
Property and Stock Agents Regulation 2022 (NSW)***

12 July 2022

TO:

Better Regulation Division
Department of Customer Service

By email:

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1. Introduction

This Submission has been prepared by The Real Estate Institute of New South Wales Limited (**REINSW**) in response to the draft *Property and Stock Agents Regulation 2022* (NSW) which is currently open for public consultation.

REINSW is the largest professional association of real estate agents and other property professionals in New South Wales. REINSW 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.

This submission has been prepared with the assistance of REINSW's Property and Stock Agents Sub-Committee (**PSA Sub-Committee**), being a Sub-Committee formed specifically and proactively for the purpose of this review. It comprises representatives of each of REINSW's Chapter Committees to cover all the different practice areas and to ensure that this submission represents the views of members across all specialisations of the property industry.

These members are licensed real estate professionals with experience and expertise in their respective fields and they have a working knowledge of how the PSA Regulation, a foundation piece of legislation for the property industry, applies in practice. They offer a unique perspective into how it affects the day-to-day work of real estate agents and the community more broadly.

This submission sets out issues and recommendations for the Department of Customer Service (**Department**) to consider when reviewing the PSA Regulation and its effectiveness in practice.

2. Submission Terminology

For ease of reading, REINSW will use the following terminology in this submission:

- a) "Draft PSA Regulation" to refer to the draft *Property and Stock Agents Regulation 2022* (NSW) presently undergoing public consultation;
- b) "Current PSA Regulation" to refer to the *Property and Stock Agents Regulation 2014* (NSW) currently in force and which is to be repealed at the beginning of 1 September 2022;
- c) "PSA Act" to refer to the *Property and Stock Agents Act 2002* (NSW); and
- d) "PSA Regulation" to refer to the *Property and Stock Agents Regulation* (both current and in draft form) more generally as the subordinate legislation to the PSA Act.

3. Buyers' Agents Submission

On 12 August 2020, REINSW's Buyers' Agents Chapter Committee took the initiative to prepare a submission on *Buyers' Agents under the PSA Act and PSA Regulation* (**Buyers' Agents Submission**).

REINSW **encloses** the Buyers' Agents Submission as Annexure A to this submission and requests that the Department reconsider it as part of its review. REINSW understands that some of the matters raised in the Buyers' Agents Submission extends beyond the scope of this review. However, REINSW strongly urges the Department to consider the Buyers' Agents Submission in its entirety and, if it agrees with REINSW's recommendations, amend not just the PSA Regulation but relevant provisions in the PSA Act and Continuing Professional Development (**CPD**) requirements. This is because:

- a) Changes to the PSA Act may be necessary to support REINSW's recommendations in relation to the PSA Regulation, as these pieces of legislation work in tandem.
- b) The Buyers' Agents Submission was lodged, proactively, with the Department as far back as 12 August 2020 raising issues which REINSW felt were imperative to bring to NSW Fair Trading's attention given the impact they had on consumers and the day-to-day practice of buyers' agents. To date, almost two years later, these issues are still not resolved and no clarification has been received despite their impact on this sector of the property industry.
- c) NSW Fair Trading's communications with REINSW about the Buyers' Agents Submission were to the effect that the document would be considered as part of the review of the PSA Regulation and, therefore, REINSW believes it appropriate for the entirety of the Buyers' Agents Submission to be considered during this public consultation process, even though some of the areas fall outside the scope of this review (as defined in the Regulatory Impact Statement).

The Buyers' Agents' Submission provided commentary and recommendations on a number of important areas of concern for buyers' agents in New South Wales as they relate to the PSA Act and the PSA Regulation, including the need for:

- a) a clearer definition of a "buyers' agent" in the PSA Act and PSA Regulation (refer to paragraph 2 of the Buyers' Agents Submission);
- b) an accreditation pathway for buyers' agents so that they are appropriately trained and meet specific qualification standards (refer to paragraph 3 of the Buyers' Agents Submission);
- c) amendments to the PSA Regulation to allow buyers' agents to receive referral fees in two situations where such fees are currently prohibited under the PSA Act and PSA Regulation (refer to paragraph 4 of the Buyers' Agents Submission); and
- d) rules of conduct within the PSA Regulation that are specific to buyers' agents (refer to paragraph 5 of the Buyers' Agents Submission).

These issues are explained at length in the Buyers' Agents' Submission, to which we refer the Department. However, we also wish to elaborate on some of these issues, specifically as they refer to the Draft PSA Regulation.

a. Definition of Buyers' Agents

It is important for the PSA Act and PSA Regulation to include a clear definition of a “buyers’ agent” to prevent confusion and misunderstanding about the nature and scope of this role within the industry. Buyers’ agents have, over the years, evolved into a designated sector and it is important that the PSA Act and PSA Regulation appropriately reflects the nature and functions of this area of practice. This is particularly important so that consumers understand the distinction between a specialised buyers’ agent who acts only for purchasers in transactions as opposed to sales agents who act occasionally for a buyer.

REINSW notes that the Draft PSA Regulation has included an amended definition of a buyers’ agent, being a real estate agent or assistant real estate agent “acting for a buyer, or a prospective buyer, of land”. While it is imperative that there be a definition of a buyers’ agent, REINSW opposes this amended definition and recommends that the Department adopt the definition of a “buyers’ agent” proposed by REINSW in the Buyers’ Agents Submission.

REINSW’s view is that the proposed definition in the Draft PSA Regulation is too general as it could relate to any real estate agent acting for a purchaser. REINSW’s view is that it is particularly important that the definition contain a reference to an agent acting under a “buyers’ agency agreement” to bring the PSA Regulation into alignment with industry best practice and to remove the ambiguity that any real estate agent can “act” for a buyer.

REINSW recommends that this definition should be amended to clarify that a buyers’ agent is a real estate agent or assistant real estate agent who:

- a) “acts only for a buyer of land under a buyers’ agency agreement and is accredited as a buyers’ agent under the Act (including, without limitation, a buyer’s advocate, buyer’s representative and other similar classes of persons)”; or alternatively but less preferable,
- b) “acts only for a buyer of land under a buyers’ agency agreement and includes (without limitation) a buyers’ advocate, buyers’ representative and other similar classes of persons.

REINSW also refers the Department to paragraph 2.3 of the Buyers’ Agents Submission for a list of amendments which we recommend should be made to the PSA Act and PSA Regulation relating to the definition of a “buyers’ agent” in order to create a clearer understanding about the nature of this role.

b. Referral Fees

Paragraphs 4.2 of the Buyers’ Agents Submission contains four hypothetical examples of where it might be possible for a buyers’ agent to receive a referral fee. However, two of those examples are currently prohibited by the PSA Act and Current PSA Regulation. We refer the Department to these examples. REINSW is of the view that they show that there is no real likelihood of a conflict of interest arising between the buyers’ agent, client and third party in such circumstances.

REINSW recommends that the Draft PSA Regulation (specifically, item 9F of Schedule 2 to the Current PSA Regulation which is item 17 of Schedule 2 in the Draft PSA Regulation) be amended to permit a buyers' agent to accept a referral fee in these two currently prohibited circumstances, provided they have made the required disclosure under section 47 of the PSA Act. We note, in this regard, that it is often a "good synergy" for sales agents and buyers' agents to work together. In fact, doing so in a professional manner can be of benefit to consumers who are provided with recommendations of competent and capable real estate professionals from a person with a thorough understanding of the industry.

c. Rules of Conduct Specific to Buyers' Agents

Currently, the rules of conduct for buyers' agents appear in Part 1 of Schedule 2 to the Current PSA Regulation, within the same Part as the rules applying to sales agents or agents who "perform...sales or leasing functions in relation to the sale or purchase of land and business agent functions": item 1A of Part 1 of Schedule 2 to the Current PSA Regulation. REINSW's view is that it is necessary, given the growth of their scope of practice in recent years, that the rules applying to buyers' agents are separated from those applying to sales agents. In the Buyers' Agents Submission REINSW recommended that clauses 9A-9F of Schedule 2 to the Current PSA Regulation (items 12-17 of Schedule 2 to the Draft PSA Regulation) should be moved to a separate schedule. However, REINSW understands that such a recommendation may not be feasible having regard to the context and structure of the PSA Regulation and this Schedule and so REINSW would like to recommend that, instead, rules specific to buyers' agents be included in a different Part within Schedule 2 to the PSA Regulation. REINSW proposes that Part 1 could relate to sales agents, Part 2 relate to property management and Part 3 relate to buyers' agents. It is REINSW's view that this change would distinguish the rules of conduct for buyers' agents from those of sales agents and highlight their distinct role within the real estate industry.

For the reasons given in paragraph 5, of the enclosed Buyers' Agents Submission, REINSW also recommends deleting items 16 and 17 of Schedule 2 in the Draft PSA Regulation (items 9E and 9F of the Current PSA Regulation).

4. Conditions on Buyers' Agents Licences

Paragraph 5.1.1 of the Regulatory Impact Statement states that one of the reasons for amending the definition of a "buyers' agent" is because the definition in clause 3 of the Current PSA Regulation is outdated, post the 23 March 2020 industry reforms. The current definition of a buyers' agent states:

...a real estate agent whose licence is subject to a condition that restricts the holder to acting as a real estate agent for a prospective purchaser of land.

The condition on a buyers' agent's licence is inconsistent with the current definition of a buyers' agent as it does not restrict them to acting for a purchaser and states:

...the holder only exercises real estate sales or leasing functions or on-site residential property manager functions.

However, for reasons similar to those discussed in paragraph 3.a above, REINSW's view is that the conditions attached to buyers' agents' class 1 and 2 licences should be amended to reflect this specific scope of practice. REINSW's view is that the current condition on a buyers' agent's licence that came into effect during the 23 March 2020 reforms is too general and does not accurately capture the nature and functions of buyers' agents. Buyers' agents do not exercise sales, leasing, or on-site residential property manager functions, rather, they act on behalf of a purchaser for a particular transaction. REINSW is concerned that the lack of specificity of this condition may be confusing for consumers because it suggests that the licence holder acts as a sales agent or in a property management capacity as opposed to recognising the nature and expertise of an accredited buyers' agent.

To resolve the issues above, REINSW recommends that the Department insert into the above current licence condition the words "or buyers' agent functions" after "real estate sales" so that buyers' agents are specifically captured within this condition.

5. Making of the Bidder's Record

a. Recording of Bids when Property not Sold

Clause 14(1)(g) of the Draft PSA Regulation concerns information which must be recorded in the Bidder's Record if the property is not sold at an auction. This sub-clause has been amended so the Bidder's record must record "the highest bid accepted, and the vendor bid, if any, at the auction".

REINSW's interpretation of this proposed sub-clause is that both the vendor bid and the highest bid must be recorded. However, REINSW's view is that only the highest bid accepted should be included as sometimes there are many subsequent live bids between the vendor bid and the highest bid accepted. For example, a vendor may bid \$500, there might be subsequent bids up until \$550 at which point the property is passed in.

REINSW's view is that the vendor bid is not of value to consumers and so REINSW recommends that it would be clearer if only the highest bid accepted be recorded in the Bidder's Record should the property fail to sell at auction as this is the critical figure.

b. Multiple Properties Offered for Sale

Proposed clause 14(5) of the Draft PSA Regulation appears to contain inconsistent requirements for the making of a Bidder's Record when multiple properties are offered for sale.

REINSW's interpretation of these provisions is that proposed clause 14(4) of the Draft PSA

Regulation permits a single Bidder's Record to be made in relation to multiple properties that are offered for sale at the same auction. This is confirmed by subclause 14(5)(a) which states that a person bidding for any of the properties on offer need only record their details in the Bidder's Record once. However, proposed subclause 14(5)(b) requires the information contained in 14(1) and (2) (being prescribed details to be included in the Bidder's Record) to be "recorded separately in relation to each of the properties". The latter requirement appears inconsistent with the former as it effectively creates a separate Bidder's Record for each respective property.

Where a bidder is out-bid in relation to one property they may bid on other properties as an alternative. This often occurs in the case of investors or where there are multiple units offered for sale. REINSW recommends that proposed subclause 14(5)(b) be re-drafted to rectify this apparent inconsistency and to confirm that only one Bidder's Record is required in such circumstances.

6. Sighting Documents Electronically and Establishing Proof of Identity by means of Certified Copies of Documents

REINSW's view is that clause 14(1) of the Current PSA Regulation (clause 17(1) of the Draft PSA Regulation) should, for the purposes of entry in a Bidder's Record, be updated to allow:

- a) for proof of identity documents to be sighted electronically; and
- b) to clarify in clause 14(1) of the Current PSA Regulations and section 69(2) of the PSA Act that certified copies of documents are also acceptable forms of establishing Proof of Identity so that the PSA Regulation is consistent with paragraph 4.3 of the *Secretary's Guidelines for Proper Supervision of the Business of a Licensee under section 32 of the Property and Stock Agents Act 2002* (**Supervision Guidelines**).

It is an offence, pursuant to section 69(1) of the PSA Act, to enter a person's details into a Bidder's Record unless their proof of identity has been established and, additionally, where a person bids for another person, that person's proof of identity and a letter of authority to bid has been established. In addition to an Australian Passport or Drivers Licence specified in section 69(2) of the PSA Act, the PSA Regulation prescribes other documents which can be used to establish proof of identity. However, it is REINSW's interpretation that, to establish proof, the original of these documents must be sighted.

However, in practice, it is not always practicable, or even possible, to sight original documents. For example, where persons are bidding interstate or overseas or where auctions are conducted online or by digital means as was prevalent during the COVID-19 pandemic when restrictions were in place. REINSW's view is that the PSA Regulation needs to evolve to take into consideration the widespread use of technology in today's modern world.

REINSW understands that the important policy objectives for requiring proof of identity is to minimise the risk of fraudulent property transactions and that there is a concern that fraudulent activity will increase if sighting of documents were permitted electronically. However, REINSW's view is that the practical benefits of allowing proof of identity documents to be sighted electronically need to be balanced against the risk of using technology for this process. Based on feedback from members, REINSW believes that the practical benefits far outweigh the risks involved if appropriate safeguards are in place to mitigate the risk of fraud.

Technology will continue to evolve and REINSW believes that it is better that the legislation supports this evolution, while working out ways to mitigate the risks, rather than preventing technological methods being used altogether – particularly in circumstances where they can greatly improve the ease of property transactions and expedite the process for consumers. Therefore, REINSW recommends inserting into clause 17 of the Draft PSA Regulation a provision permitting in certain circumstances proof of identity to be established by sighting relevant documents by electronic means.

Additionally, section 69(2) of the PSA Act and clause 14(1) of the Current PSA Regulation appear to be silent on whether certified copies are permitted to establish proof of identity for entry in a Bidder's Record. REINSW notes that paragraph 4.3 of the Supervision Guidelines allows both original and certified copies of documents when verifying a person's identity for the purpose of entering into an agency agreement. This paragraph also shares a similar policy objective, to guard against fraud, as explicitly mentioned in the heading of paragraph 4 of the Supervision Guidelines. As the Supervision Guidelines permit certified copies of documents for identity verification purposes, REINSW recommends amending clause 17 of the Draft PSA Regulation to clarify that certified copies of the documents listed are also permitted for the purpose of establishing a person's identity for entry in the Bidder's Record.

7. Digital and Online Auctions

For reasons similar to those raised above in paragraph 6 of this submission, REINSW's view is that the language in Part 3 of the Draft PSA Regulation, as it relates to auctions, should be updated to support circumstances in which auctions are conducted online, or where certain auction related processes (for example, bidding processes) occur digitally.

Online auctions and digital processes were instrumental in allowing real estate agents to continue to service the industry and the general public throughout the COVID-19 pandemic. Even outside the context of COVID-19 restrictions, it is important to have access to digital alternatives where, for example, vendors or prospective purchasers live interstate and overseas. The language of Part 3 of the PSA Regulation should be updated to reflect the ever-evolving technological landscape.

REINSW recommends that the language in Part 3 of the PSA Regulation should be updated to better support digital processes and online auctions, including as discussed above in paragraph 6, allowing for the electronic sighting of proof of identity documents.

8. Agency Agreements not to Contain Prescriptive Terms

REINSW's view is that the PSA Regulation should contain fewer prescriptive terms required to be included in agency agreements in Schedules 7-14 of the Current PSA Regulation (Schedules 5-12 of the Draft PSA Regulation). In addition, it is REINSW's belief that the Department should amend section 55(1) of the PSA Act so that licensee's do not automatically lose their entitlement to their commission or expenses for instances of non-compliance with the PSA Regulation. Instead, REINSW proposes that sections 55(1) and 55A of the PSA Act should be consolidated into one provision and amended so that licensees remain entitled to their commission unless a consumer can prove, in relevant proceedings before a Court or Tribunal, that they have suffered a loss and that the loss was caused because of the agency agreement's non-compliance with the PSA Regulation. Furthermore, if such a loss is established, the penalty should be limited to a fine as this is consistent with other penalty provisions throughout the PSA Act and PSA Regulation. It is REINSW's view that it is too harsh a penalty (considering how much time, resources and work is invested by licensees in a matter) to prevent a licensee from being entitled to their commission or expenses where instances of non-compliance occur, even with respect to minor, non-substantive or trivial non-compliances.

Pursuant to section 55(1) of the PSA Act, licensees are not entitled to receive a commission or expenses unless they performed the services under a written and signed agency agreement that is compliant with the PSA Regulation. This requirement is also reflected in item 19 of Schedule 1 to the Current PSA Regulation (item 18 of Schedule 1 to the Draft PSA Regulation) which prohibits agents from entering into an agency agreement unless compliant with the PSA Regulation. Schedules 7-14 of the Current PSA Regulation (Schedules 5-12 of the Draft PSA Regulation) list terms which are prescribed under certain property-related industry agreements, and agency agreements must contain these exact provisions in the specific location prescribed by the Current PSA Regulation in order for a licensee to be reimbursed for their services.

REINSW understands that prescribed terms achieve consistency within the industry by creating a standardised set of clauses across the board and can also protect consumers by ensuring that agreements contain important clauses that a consumer might not otherwise have considered.

However, REINSW's view is that preventing a licensee from receiving the entirety of its payment for services rendered because a clause does not exactly match the prescribed term within the relevant Schedule or is not exactly located in the prescribed position, is onerous and harsh, particularly if the non-compliance is minor or due to an accidental omission (for example a phrase or word being mistakenly deleted or omitted). It also encourages consumers to over-scrutinise agency agreements to try to avoid paying for the agent's services. REINSW's view is that consumers will be unjustly enriched if they do not have to pay an agent for their services, simply because the agency agreement is non-compliant with the PSA Regulation without first establishing that that non-compliance caused them to suffer loss.

Licensees can, in certain circumstances, apply to a Court or Tribunal for relief where an agency agreement fails to comply with the PSA Regulation, pursuant to section 55A of the PSA Act. However, this is a time consuming and costly process for all parties involved in order for agents to be reimbursed for their work, particularly where the non-compliance was proportionately small. Instead, the onus should be on the consumer to establish that they have suffered a loss and that the loss is a result of the non-compliance. This way the parties only have to proceed to hearing before a Court or Tribunal where necessary.

Accordingly, REINSW recommends that:

- a) the PSA Regulation should include fewer prescriptive terms and REINSW is willing to work collaboratively with the Department in determining the prescriptive terms that should be removed;
- b) sections 55(1) and 55A of the PSA Act should be consolidated into one provision and amended so that licensees remain entitled to their commission unless a consumer can prove, in relevant proceedings before a Court or Tribunal, that they suffered a loss and that the loss was caused because of the agency agreement's non-compliance with the PSA Regulation. This will prevent agents having to go to a Court or Tribunal to obtain their hard-earned commission arising from minor non-compliances, for example, typographical errors or accidental omissions, a process which is costly and time consuming for all parties and takes up valuable Court and Tribunal resources which could be better used for other purposes;
- c) Furthermore, if such a loss is established, the penalty should be limited to a fine as this is consistent with other penalty provisions throughout the PSA Act and PSA Regulation; and
- d) So too, should the corresponding rule in item 18 of Schedule 1 to the Draft PSA Regulation be amended so that, again, agents are not prevented from entering into an agency agreement which substantially complies with the PSA Regulation.

9. Definition of “Major Property Holding”

REINSW opposes the new proposed definition of a “major property holding” in proposed clause 4(2) of the Draft PSA Regulation which halves the aggregate market value criteria from \$40 million to \$20 million and the aggregate gross floor area from 20,000 to 10,000 square metres.

Clause 4(1)(b)(ii) of the Draft PSA Regulation and the Current PSA Regulation provides that commercial property agents who work on behalf of a major property holding owned entity are not considered to be carrying out real estate agent functions pursuant to section 3A(1) of the PSA Act. This proposed amendment will mean a large number of commercial agents will not be required to hold a licence or be subject to a regulatory framework because significantly more entities will be able to meet the proposed threshold definition of a “major property holding”.

REINSW strongly opposes this amendment, and any de-licensing or deregulation within the real estate industry for the same reasons raised in paragraph 1.5 of *REINSW's Submission on the Easy and Transparent Trading – Empowering Consumers and Small Business Consultation Paper (Easy and Transparent Trading Submission)* which was lodged on 22 August 2018 (**enclosed** as Annexure B to this Submission) and paragraph 3 of *REINSW's Submission on the Review of the Property, Stock and Business Agent's Regulation 2014 (NSW)* which was lodged on 13 June 2014 (**enclosed** as Annexure C to this Submission). As these submissions show, this is an issue that REINSW has been lobbying about for many years because of the significant detrimental impact it would have on consumers and the wider real estate industry. REINSW refers the Department to, and re-iterates the arguments raised in both of these enclosed submissions (noting that while the arguments in paragraph 1.5 of the Easy and Transparent Trading Submission relate to de-regulation of auctioneers many of the reasons given in that submission are also directly applicable to de-regulation of commercial property work). However, in brief, a few reasons for opposing this change can be summarised as follows:

- a) **Consumer Protection Issues:** Such an amendment would be of risk to consumers because there would be no requirement for commercial property agents who undertake work for entities within the scope of this definition to undergo probity checks, training, CPD or to adhere to the legislative framework of the PSA Act or PSA Regulation. Consumers could be at risk from unqualified or, worse, unscrupulous individuals who are not subject to the same levels of oversight this complex industry requires. There would also be no security for consumers with regards to trust account protection or other important protections offered by a regulatory framework. In short, broadening the scope of the definition of a major property holding would lead to more consumer complaints and consumer protection issues.

Presumably, one reason for permitting the de-regulation of commercial property agents who work for major property holdings is because of an assumption that larger entities have more resources and commercial experience to be able to ensure that their workers meet certain standards and expertise. Firstly, such an assumption is a generalisation and not always correct. While larger entities may, on balance, have more resources and business acumen, sometimes larger entities can cut corners prioritising profits over people and without a regulatory body to oversee such activities. Secondly, regulatory schemes are primarily in place for the protection of consumers (eg. prospective purchasers and tenants) irrespective of an individual entities' size, resourcing capacity or level of commercial experience. Consumer protection issues can arise at any time, in any entity, and it is important that professionals are held accountable to a regulatory scheme to prevent issues occurring as much as possible, or to mitigate the harm done and take action if they do. This is particularly important as when issues do arise there is often an imbalance between a major property holding entity's level of experience and resources as compared with that of a consumer, even within the commercial space.

- b) **Education, experience and the real estate industry's credibility:** The regulatory environment allows the real estate industry to maintain a high standard of practice by ensuring that professionals have appropriate qualifications, training, and experience to undertake their roles and day-to-day duties. CPD requirements also ensure that professionals stay up-to-date with legislative changes in this complex area of practice.

Where persons are carrying out real estate related functions without the necessary skill, knowledge and expertise they will be unable to deliver the same standard of service and may cause consumers harm. REINSW is concerned that this will cause damage to the real estate industry's reputation overall and will breed a distrust by consumers which will echo beyond the commercial property sector and to the wider industry.

- c) **Persons carrying out real estate functions will not be held accountable for breaches or unethical actions:** The regulatory framework holds professionals to account and to a set of ethical standards. To achieve this, NSW Fair Trading has powers to investigate and audit agencies and to take action against those within the industry who fail to meet these standards. For example, they can suspend or revoke licences or impose penalties. Pursuant to the PSA Regulation, persons who undertake commercial property work for major property holdings are not subject to NSW Fair Trading's regulatory powers and so NSW Fair Trading, as the key industry regulator, has no recourse against an individual or entity who caused harm to a consumer by way of negligent or questionable practices. REINSW is concerned because this issue is significantly magnified if the thresholds in the definition of "major property holding" are decreased pursuant to the Draft PSA Regulation.

REINSW is also concerned that because persons undertaking commercial property work for a major property holding do not need a licence to practice, lowering the thresholds may attract even more persons whose licences have been suspended or revoked in addition to those who are simply untrained or unqualified. It might also encourage unscrupulous operators to set up unlicensed trade. This lack of oversight significantly impacts the real estate industry's credibility and professionalism.

- d) **Professional indemnity insurance consequences:** REINSW is concerned about the impact that de-regulation of commercial property agents, who are undertaking work on behalf of a major property holding, might have on professional indemnity insurance requirements. One purpose for requiring agents to hold a threshold level of insurance cover is to protect consumers in the event that they make a claim against the agent. It ensures that the consumer can pursue the agent or agency for damages without worrying that they will go bankrupt. De-regulation of commercial property agents will mean that they are not required to carry this threshold level of professional indemnity insurance because they will not be subject to the insurance related provisions within the PSA Regulation. However, it is possible that it will also affect the ability for commercial property agents who may not need to, but want to, purchase cover as such persons will not be "licensed" real estate agents. Such persons may not be subject to risk management processes, best practice and ongoing training, which will make them difficult to insure. Furthermore, there are also issues around disclosure. Will consumers be aware that the agent that they are dealing with in respect to such commercial property agency work is uninsured? In order for a consumer to establish whether the commercial property agent they are dealing with holds a licence and is subject to legislative insurance requirements, they will have to check NSW Fair Trading's website which is more onerous on consumers. Do such agents have to disclose this information? REINSW's view is that the de-regulation of commercial property agents undertaking work on behalf of a major property holding (or the decrease in thresholds) will have a serious flow on effect for consumers who go to make a claim against a particular agent.

REINSW recommends against any de-regulation of commercial property agents as per the submissions contained in Annexures B and C. In view of this, REINSW suggests that all persons carrying out commercial property agency work be required to hold a licence where they perform real estate agent functions, irrespective of whether they work for a “major property holding”. In the alternative, though not as preferable, REINSW suggests that no changes should be made to the definition of a “major property holding” in clause 4(2) of the Draft PSA Regulation other than to amend it so that all commercial property agents must be licensed.

10. Tenant Representatives

REINSW is aware of what may be an emerging scope of practice within the commercial sector of the real estate industry, namely “tenant representatives” who undertake functions similar to that of a buyers’ agents but in relation to a leasing, rather than a sales, transaction.

This role is different to that of a tenant representative within a strata scheme (being a tenant who lives within a strata scheme and represents the interests of other tenants at strata meetings, without remuneration). Instead, tenant representatives within the commercial space appear to be undertaking duties such as searching for, inspecting properties and negotiating commercial terms on behalf of their clients.

REINSW’s view is that these tasks fall within the scope of “real estate functions” as defined in section 3A of the PSA Act as well as clause 4 of the Current PSA Regulation and so tenant representatives, and more broadly any person exercising the functions of a real estate agent, should be required to hold a licence. For similar reasons to those raised in paragraph 9 above, REINSW’s view is that this is necessary to protect consumers, ensure that those carrying out such functions have adequate qualifications and training to discharge their duties to a high standard and that they are held accountable to a regulatory and legislative framework.

Accordingly, REINSW recommends including an additional provision within clause 4(1) of the PSA Regulation to the effect that any person, including persons in emerging scopes of practice, who carry out functions of a real estate agent pursuant to section 3A of the PSA Act should be required to hold a licence.

11. Confirmation of Specific Instructions for Commercial Properties

As per questions raised in paragraph 5.8.5 of the Regulatory Impact Statement, REINSW recommends that items 26 and 27 of Schedule 2 to the Draft PSA Regulation (items 18 and 19 of Schedule 2 to the Current PSA Regulation) should also apply to commercial property. These provisions concern obtaining written confirmation of matters pertaining to the extent of an agent’s authority before, or when, entering into an agency agreement. REINSW believes that extending such provisions to management and leasing of commercial property would

provide clarity about the scope of an agent's authority to exercise certain functions and duties in commercial matters.

12. Definition of Residential Property

Clause 3 of the Draft PSA Regulation defines "commercial property agency work" as:

"...selling, purchasing, exchanging, leasing, managing or otherwise dealing with property other than residential property or rural land".

However, it is difficult to know what a "residential property" encompasses as such a term is not defined by the PSA Regulation. Certain properties are clearly of a residential nature, for example, homes. However, other kinds of properties may fall into both the residential and commercial spheres. For example, aged care facilities can be considered both residential (as persons live in them) as well as commercial and community serviced in nature. Other similar examples where properties can fall within both categories can include caravan parks, boarding houses or commercial premises with a flat upstairs.

Defining "residential property" and any exemptions is important as it affects whether certain "dealing[s] with properties" fall within the scope of "commercial property agency work". This, in turn, affects other provisions in the PSA Regulation, for example:

- a) whether a person is undertaking "commercial property agency work" for an entity that is a major property holding for the purpose clause 4(1)(b)(ii) of the Draft PSA Regulation; or
- b) whether a licensee is exempt from certain insurance requirements relating to certain types of commercial property agency work pursuant to proposed clause 12(6) of the Draft PSA Regulation.

For this reason, REINSW recommends inserting into the Draft PSA Regulation a definition of "residential property" similar to that in section 66Q of the *Conveyancing Act 1919* (NSW).

13. Materials Facts

REINSW supports proposed clause 47 of the Draft PSA Regulation which states that the requirement to disclose material facts arising from section 52(1)(b) of the PSA Act does not apply to residential tenancy agreements (with a non-exhaustive list of prescribed material facts contained in clause 54(1) of the Current PSA Regulation). These provisions intersect with the requirement for a landlord to disclose certain information to tenants pursuant to section 26(1) of the *Residential Tenancies Act 2010* (NSW) (**RT Act**) and clause 8 of the *Residential Tenancies Regulation 2019* (NSW) (**RT Regulation**). REINSW welcomes the elucidation that, for residential tenancy agreements, real estate agents and assistant agents need only comply with the latter provisions.

However, REINSW's view is that the non-exhaustive list of material facts in the Draft PSA Regulation which require mandatory disclosure should be consistent with the non-exhaustive list of material facts in the RT Regulation. Currently, the two lists are similar but include discrepancies including, for example, the following:

- Clause 54(1)(b) of the Current PSA Regulation requires disclosure of "significant health or safety risks" whereas Clause 8(1)(b) of the RT Regulation only requires disclosure of "significant health or safety risks that are not apparent to a reasonable person on inspection of the premises".
- Clause 54(1)(h) of the Current PSA Regulation requires disclosure of building work rectification orders, prohibition orders or a stop work order, whereas such a material fact is not included in the RT Regulation;
- Clause 54(1)(d) requires disclosure only if the property was the scene of a murder or manslaughter, whereas clause 8(1)(d) requires disclosure if premises was the scene of a "serious violent crime".

These material facts are prescribed by each set of Regulations because they would be of concern to purchasers or tenants. REINSW's view is that the prescribed material facts are intended to list facts which would significantly influence the decision of a purchaser or tenant to buy or rent a property. As such, factors are likely to apply to both tenants and purchasers and, to avoid confusion, REINSW believes the two lists should be uniform. REINSW recommends the Draft PSA Regulation update this list of material facts in clause 54(1) so that they are consistent with those in the RT Regulation.

REINSW recently lodged a submission with the Office of the Registrar General on the remake of the *Conveyancing (Sale of Land) Regulation 2017 (NSW)* (**Conveyancing Submission**) dated 16 June 2022 (**enclosed** as Annexure D to this submission). In that submission, REINSW recommended that the obligation to disclose material facts should extend to vendors as well as to agents. Although REINSW understands that the PSA Regulation primarily governs the practice of real estate agents, REINSW's view is that agents are often reliant on vendors and landlords to make them aware of material facts about a property, particularly if such material facts are of a latent nature or something that a real estate agent could not be aware of from an inspection of the property. For the reasons given in the Conveyancing Submission, to which REINSW refers the Department, REINSW recommends that the obligation to disclose material facts under section 52(1)(b) of the PSA Act and clause 54(1) of the PSA Regulation should also be extended to vendors and, for that matter, to landlords.

14. Co-operation with Self-Managed Owners Corporations

REINSW agrees in principle to the proposed amendment in item 1 of Schedule 4 to the Draft PSA Regulation (item 1 of schedule 6 to the Current PSA Regulation) which requires strata managing agents to co-operate with records, access and transfers in circumstances where the owners' corporation has terminated the strata managing agent's agency agreement and has decided to self-manage.

However, REINSW's view is that a person seeking access to the administrative and capital works funds pursuant to proposed item 1, clause 3(b) of Schedule 4 to the Draft PSA Regulation should be required to prove that they have written authority on behalf of the owners corporation to take control of these funds (for example, meeting minutes which prove that the owners corporation gave them authority to access such funds during a properly convened meeting).

Such a provision is not necessary where management is being transferred to another strata manager as both professionals are subject to the same duties and obligations under their respective agency agreements and the legislative scheme. However, where a strata scheme has chosen to self-manage, it is not always clear that the person asking to access the funds has the level of authority to do so, or that a meeting purportedly granting them authority was properly convened.

It is important that strata managers have proof of a person's authority before handing over such funds to prevent misuse or misappropriation of what can be a significant sum of money that is the property of the owners corporation. Even the administrative and capital works funds in small strata schemes can contain a large amount of money. Were a strata manager to hand over access to such funds without clearly establishing a person's authority, it might open the owners corporation up to significant risk of fraud or misappropriation of funds. It could also leave the strata manager at risk of liability.

For these reasons, REINSW recommends that clause 3(b) of item 1 in Schedule 4 to the Draft PSA Regulation be amended to include the following phrase after the words "capital works funds":

"...upon written evidence that a person has authority to access such funds on behalf of the owners corporation by way of properly convened meeting minutes".

REINSW believes that such an amendment would ensure that the owners corporation would be provided with prompt access to such funds, while safeguarding against unscrupulous acts which could lead to misuse or misappropriation of funds.

15. Termination Provisions in Strata Management Agency Agreements

Paragraph 5.9.1 of the Regulatory Impact Statement refers to feedback received from the *Report on the Statutory Review of the Strata Schemes Development Act 2015 and Strata Schemes Management Act 2015 (Strata Review Report)* that some owners corporations have had difficulty terminating strata management agency agreements and posed a question about whether the PSA Regulation should contain "mandatory terms about how and when an agency agreement can be terminated?"

REINSW's view is that normal contractual remedies are sufficient to determine disputes. There should not be more punitive termination provisions imposed on strata managing agency agreements compared to the contractual provisions of other service providers in this industry.

REINSW recommends that no prescribed termination provisions should be added to a strata management agency agreement, and we re-iterate our recommendations in relation to prescribed terms more generally in paragraph 8 above.

16. Grace period for the Implementation of the new PSA Regulation

REINSW understands that the new PSA Regulation must come into effect on 1 September 2022 as the Current PSA Regulation is repealed at the beginning of this date pursuant to section 10(2) of the *Subordinate Legislation Act 1989* (NSW). However, REINSW recommends that the Department provide the industry with a transitional period to allow consumers, industry stakeholders and real estate agents to adjust to the new legislation.

The PSA Regulation is a foundational piece of legislation which affects every sector of the real estate industry. REINSW is concerned that consumers, real estate professionals, industry stakeholders and registered training providers will need to familiarise themselves with the legislative changes and how it might affect them. These changes go to the heart of agency practice and real estate agencies will need time to adjust their policies, procedures and practices, while registered training organisations and industry bodies will need time to update materials to reflect the new legislation.

Importantly, these legislative changes will affect a significant number of agency forms and agency agreements used by the industry on a day-to-day basis and REINSW, as a major industry provider of such template documents, is concerned about the impact these changes will have on its templates and the industry as a whole. REINSW has raised its concern with NSW Fair Trading in recent communications and a meeting about the process involved for REINSW to update its forms and agreements so that they remain compliant with the new legislation. As the Department can appreciate, when new legislative reforms occur, REINSW must cease trading old forms and agreements for compliance reasons. However, REINSW cannot start updating new copies of these forms and agreements until it sees a final copy of the PSA Regulation, which is currently only in draft form. This will make it extremely difficult for REINSW to provide compliant template forms and agreements to the market by the date that the PSA Regulation is due to commence (namely, on 1 September 2022).

This issue is not unique to REINSW but will affect other industry providers of template forms and agreements and REINSW is concerned that without a transitional period there would be a lack of compliant template forms and agreements for the industry to use. Since such forms and agreements are used in everyday practice, this would cause significant concern and turmoil within the industry – especially as there are serious penalties and consequences for

agencies and real estate agents who use non-compliant forms and agreements. For example, as mentioned above in paragraph 8 (and noting REINSW's recommendations to amend such provisions) the PSA Regulation contains in its schedules prescribed terms which must be included in relevant agency agreements or real estate agents will lose their commission and reimbursement for expenses pursuant to section 55(1) of the PSA Act.

REINSW raises such matters from past experience. REINSW has experienced legislative reforms where it has not been given sufficient time to update these documents before the commencement date – a matter that REINSW has raised with the Department in the past. However, REINSW has also seen, first-hand, the benefits of the grace period provided by NSW Fair Trading regarding the real estate and industry reforms which commenced on 23 March 2020. REINSW welcomed the six months grace period provided by NSW Fair Trading with respect to these reforms, during which the focus was on education, rather than enforcement action per the Commissioner for Fair Trading's signed *Statement of Regulatory Intent: Reforms to the Property and Stock Agents Act 2002* (NSW). REINSW's view is that this greatly aided in the smooth transition and implementation of such reforms and its view is that the industry would similarly benefit from a grace period with respect to the PSA Regulation, particularly bearing in mind that 1 September 2022 is fast approaching.

REINSW recommends that if the PSA Regulation is remade on 1 September 2022 then the industry be given a transitional period until 1 March 2023 so that it can be educated and prepared for the new legislative changes. In addition, this would ensure that agencies have time to use up any hard copy forms and agreements that they have in stock and to purchase new stock compliant with the new reforms, whilst industry providers have time to update their forms and agreements so that they are compliant by the end of the transitional period.

17. Summary

In summary, REINSW recommends that the Department:

1. consider and make REINSW's recommendations outlined in the Buyers' Agents Submission;
2. amend clause 3(1) of the Draft PSA Regulation to the definition of "buyers' agent", and make the other proposed amendments to the PSA Act and PSA Regulation, set out in paragraph 2.3 of the Buyers' Agents Submission;
3. amend item 17 of Schedule 2 to the Draft PSA Regulations (item 9F of Schedule 2 to the Current PSA Regulation) to allow buyers' agents to accept referral fees in circumstances where they make this disclosure to their clients pursuant to section 47 of the PSA Act;
4. move items 12-17 of Schedule 2 to the Draft PSA Regulation (items 9A-9F of Schedule 2 to the Current PSA Regulation), being rules of conduct specific to buyers' agents to a separate Part within Schedule 2 to the Draft PSA Regulation;

5. for the reasons stated in paragraph 5 of the Buyers' Agents Submission, omit items 16-17 of Schedule 2 to the Draft PSA Regulation (9E-9F of Schedule 2 to the Current PSA Regulation);
6. insert the words "buyers' agents" after "real estate sales" in the current licence condition issued by NSW Fair Trading;
7. amend proposed clause 14(g) of the Draft PSA Submission so that it requires only the highest bid accepted to be recorded should the property fail to sell at auction;
8. re-draft proposed clause 14(5)(b) of the Draft PSA Regulation to rectify an apparent inconsistency between it and proposed clause 14(5)(a) and to confirm that only one Bidder's Record is required in such circumstances;
9. insert into clause 17 of the Draft PSA Regulation a provision permitting in certain circumstances proof of identity to be established by sighting relevant documents by electronic means;
10. amend clause 17 of the Draft PSA Regulations to clarify that certified copies of the documents listed are also permitted for the purpose of establishing a person's proof of identity for entry in the Bidder's Record;
11. update the language in Part 3 of the Draft PSA Regulation to apply to support online auctions and digital processes; and
12. update the PSA Regulation so that it contains fewer prescribed terms for agency agreements in the schedules with fewer prescriptive locations of those terms;
13. consolidate sections 55(1) and 55A of the PSA Act into one, and amend this provision, so that licensees remain entitled to their commission unless a consumer can prove, in relevant proceedings before a Court or Tribunal, that they suffered loss and that the loss was caused because of the agency agreement's non-compliance with the PSA Regulation. Furthermore, where such a loss is established, the penalty should be limited only to a fine as is consistent with other penalties in the PSA Act and PSA Regulation;
14. require all persons carrying out "commercial property agency work" to hold a licence irrespective of whether they carry out such work for a "major property holding". In the alternative, though not as preferable, REINSW recommends that no changes are made to the definition of "major property holding", rather, keep the wording and aggregate market value and the aggregate gross floor area criteria the same as the Current PSA Regulation;
15. include an additional provision in clause 4(1) of the PSA Regulation to the effect that any person, including persons in emerging scopes of practice, who carry out functions of a real estate agent pursuant to section 3A of the PSA Act should be required to hold a licence;
16. should make proposed clause 47 of the Draft PSA Regulation with respect to material facts;

17. should update the prescribed list of material facts in clause 54(1) of the PSA Regulation so that they are consistent with those in the RT Regulation;
18. should extend the obligation to disclose material facts in section 52(1)(b) of the PSA Act and clause 54(1) of the PSA Regulation to vendors and landlords as well as real estate agents;
19. extend the provisions in items 26 and 27 of Schedule 2 to the Draft PSA Regulation (items 18 and 19 of Schedule 2 to the Current PSA Regulation) so that they also apply to commercial property;
20. include in the PSA Regulation a definition of “residential property” similar to that in section 66Q of the *Conveyancing Act 1919* (NSW);
21. amend clause 3(b) of item 1 to Schedule 4 to the Draft PSA Regulation to require a person to prove that they have written authority on behalf of the owners corporation before a strata manager is required to hand over access to the administrative and capital works funds;
22. do not prescribe mandatory termination provisions in strata management agency agreements;
23. provide the industry with a transition period. While the PSA Regulation would commence on 1 September 2022, this transition period would allow consumers, industry stakeholders and agencies time in which to be educated on, and implement, these changes (including, without limitation, updating template agency agreements and forms for compliance) to ensure a smooth transition and continued compliance with the new PSA Regulation.

18. Conclusion

REINSW has considered the Draft PSA Regulation and has provided its comments above, aiming to provide input on as many pertinent aspects of the Draft PSA Regulation as possible. However, REINSW's resources are very limited and, accordingly, it does not have the capacity to undertake a thorough review and is unable to exhaustively investigate all potential issues in this submission. Nonetheless, REINSW has identified a number of matters that it believes will cause significant consumer detriment, some of which appear above.

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

Annexure A

The following pages include REINSW's Buyers' Agents Submission under the *Property and Stock Agents Act 2002* (NSW) and *Property and Stock Agents Regulation 2014* (NSW) dated 12 August 2020

The Real Estate Institute of New South Wales Limited

Submission

Buyers' Agents under the *Property and Stock Agents Act 2002 (NSW)* and *Property and Stock Agents Regulation 2014 (NSW)*

12 August 2020

To:

Better Regulation Division
Department of Customer Service

By email:

1. Introduction

This Submission has been prepared by The Real Estate Institute of New South Wales Limited (**REINSW**) upon its own initiative and is intended to highlight several key areas of consideration that concern buyers' agents in New South Wales.

REINSW is the largest professional association of real estate agents and other property professionals in New South Wales. REINSW represents 7,500 individual members and seeks to promote their interests 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.

This Submission has been prepared with the assistance of the REINSW Buyers' Agents Chapter Committee. These members are licenced real estate professionals with experience and expertise in their field. Accordingly, the REINSW Buyers' Agents Committee has taken the initiative to comment on and provide recommendations to NSW Fair Trading on the following areas of consideration:

- (a) creating a clear definition of a 'buyers' agent' in the *Property and Stock Agents Act 2002* (NSW) (**Act**);
- (b) creating an accreditation pathway for buyers' agents to prove their competency; and
- (c) amend the *Property and Stock Agents Regulation 2014* (NSW) (**Regulation**) to allow buyers' agents to receive referral fees.

Although NSW Fair Trading has not invited the public to comment on these matters, REINSW feels it is imperative for this Submission to be brought to the attention of NSW Fair Trading. By doing so, REINSW hopes that NSW Fair Trading will take its comments and recommendations on board and implement them to further the betterment of the buyers' agency profession and the property industry generally.

2. Creating a Clear Definition of a Buyer's Agent

2.1 REINSW Proposal

REINSW is of the view that a clear definition of a "buyer's agent" is required in the definitions section of the Act, mainly to eliminate consumer confusion and misunderstanding in respect of a buyers' agent's role in the market.

2.2 Background

The Act, Regulation and Real Estate Industry Award 2010 (**Award**) all had their genesis in an era when real estate agents were sellers' agents and where buyers' agents were not as significant or prevalent in the market as they are today. The current legislation fails to reflect the modern reality of the increased use of buyers' agents and fails to accurately

identify the role and purpose of such agent. One of the clearest examples that generated this confusion is the inappropriate use of the word “salesperson” that has recently been omitted from the Act (as a result of the industry reforms on 23 March 2020) because the expression was used to describe licensees who acted for both buyers and sellers.

Buyers’ agents are now formally recognised in the 2014, 2016, 2018 and 2019 editions of the standard form Contract for the Sale and Purchase of Land. They are recognised as key stakeholders having a designated sector within the industry, and their prominence and significance requires them to formally engage with other associated industry bodies, including The Law Society of New South Wales and other key stakeholders. Despite this, consumers remain very confused both as to the existence of, and the role performed by, buyers’ agents.

In addition to not reflecting the now established role played by buyers’ agents, the Act and Regulation contribute to further confusion by failing to distinguish between specialised buyers’ agents and those sellers’ agents who may act for buyers, on occasion, without the necessary experience and qualification of a specialised buyers’ agent.

Such confusion is not only undesirable on policy grounds but, importantly, it is also prejudicial to consumers who, because of that confusion, may buy property unaware of the value of a buyers’ agent and risk losing the benefit that they add to the buying process. Without constituting an exhaustive list, those benefits include:

- (a) allowing consumers to work with a specialised professional that is trained and licensed, and bound by the professional rules of conduct (including those specific to buyers’ agents);
- (b) providing consumers with a broader choice of properties not limited to those listed by a seller’s agent or associates of that seller’s agent – noting that buyers’ agents have access to databases and information not readily available to the public (including properties that are not promoted in the market);
- (c) consumers are able to:
 - (i) have independent representation untainted by any actual or apparent conflict of interests;
 - (ii) receive specialist due diligence skills to identify a variety of economic, regulatory, planning and environmental risks;
 - (iii) receive the benefit of strong negotiation skills to develop auction and private treaty sales and industry awareness of the motivation and strategies of vendors and sellers’ agents;
 - (iv) receive guidance and advice on industry standards;
 - (v) receive local property market knowledge where buyers’ agents can find and shortlist properties meeting consumers’ search criteria, also assisting them in saving time, stress and money;
 - (vi) receive objective information and assessments of the positive and negative aspects of a property, in line with the Act and Regulation;

- (vii) have an independent assessment of the purchase price compared to the selling agent's listing price, noting that buyers' agents research properties to determine a fair price;
- (viii) be kept informed of each stage of the negotiation of the purchase price as required by the rules of conduct; and
- (ix) obtain the best possible purchase price, without the buyers' agent breaching standards of ethical behaviour or engaging in conduct that is contrary to good agency practice.

2.3 Proposed Amendments

In order to resolve the issues outlined above, REINSW proposes that the following amendments be implemented to create a clear understanding of the role, and accreditation required, of 'buyers' agents' in the Act and Regulation:

- (1) Each reference in the Act and the Regulation to "buyer's agent" be checked by the drafters to determine whether the context requires a change in reference to "buyers' agent".
- (2) The definition of "*buyer's agent*" be removed from section 47(3) of the Act.
- (3) The following definition of "*buyer's agent*" be included in section 3(1) of the Act:

"buyer's agent" means a real estate agent or an assistant real estate agent who in any particular transaction:

- (a) acts only for a buyer of land under a buyers' agency agreement; and
- (b) is accredited as a buyer's agent under this Act,

and includes (without limitation) a buyer's advocate, buyer's representative and other similar class of persons."

- (4) The definition of '*buyer's agent*' in clause 3(1) of the Regulation be replaced by the following:

"buyer's agent" means a real estate agent or an assistant real estate agent who in any particular transaction:

- (a) acts only for a buyer of land under a buyers' agency agreement; and
- (b) is accredited as a buyer's agent under the Act,

and includes (without limitation) a buyer's advocate, buyer's representative and other similar class of persons."

- (5) The following be inserted as a new clause 9G in Part 1, Schedule 2 to the Regulation:

Clause 9G - Accreditation of Buyers' Agent

A real estate agent or assistant real estate agent must not act as a buyer's agent without being accredited as a buyer's agent under the Act.

(6) The following be inserted as a new section 21A of the Act:

Section 21A – Special Condition Requiring Buyers' Agents to be Accredited

- (1) *Every real estate agent's licence is subject to the condition that the holder of the licence must not act as a buyer's agent unless the licensee is accredited as a buyer's agent under this section.*
- (2) *The Secretary may accredit the holder of a real estate agent's licence as a buyer's agent if the Secretary is satisfied that the holder has such qualifications in connection with the functions of a buyer's agent as the Secretary may approve from time to time by order published on the NSW legislation website.*
- (3) *Without limiting the Secretary's power to approve qualifications, the Secretary may approve qualifications by reference to any one or more of the following—*
- (a) the completion of a course of study,*
 - (b) the completion of a period of training in a particular activity, and*
 - (c) the attainment of a standard of competency in a particular activity.*

(7) Section 47(1) be amended to read as follows:

"A seller's agent acting on the sale of land and a buyers' agent acting on the purchase of land must disclose the following to the person for whom the agent is acting (the client) and (in addition, in the case of a seller's agent) any prospective buyer of the land..."

(8) The Act, Regulation and Award be amended mutatis mutandis to reflect the suggested amendments set out in paragraphs 2.3(1)-(7) above.

2.4 Purpose of the Amendments

REINSW acknowledges that there are a number of issues that arise as a result of the ambiguous manner in which buyers' agents are currently defined in the Act and Regulation. Accordingly, the purpose of these amendments will be to clarify the definition and remove the confusion that presently surrounds it. This will be achieved by more accurately aligning the wording of the legislation to reflect what currently occurs in the industry. As a result, confusing industry terminology (for instance, an "exclusive buyers' agent") will disappear and cease to create uncertainty within the world of real estate.

In addition to resolving these issues, the amendments will also protect consumers by:

- clearly defining what buyers' agents do per se to distinguish themselves from sellers' agents who, from time to time, act for buyers but are remunerated, whether directly or indirectly, by the relevant sellers;
- helping prospective buyers/consumers make an informed choice when identifying which professional will best meet their needs and, in particular, when deciding whether or not to retain a buyers' agent;
- improving the reputation of real estate agents generally;
- eliminating potential conflicts of interest which could arise, or be seen to arise, where sellers' agents, from time to time, act for buyers but are remunerated, whether directly or indirectly, by sellers;
- ensuring that selling agents who, from time to time, act for buyers are only permitted to do so after completing the same training and higher education standards as that which is required for buyers' agents;
- ensuring that sellers' agents who, from time to time, act for buyers are both obliged and competent to find properties other than those which their associates may list, and to undertake due diligence for their buyer client's with respect to a variety of economic, regulatory and environmental risks; and
- helping the real estate industry transition from being an industry to a respected and reputable profession.

3. Creating a Pathway for the Accreditation of Buyers' Agents

REINSW believes that the role of a buyers' agent has evolved over time to the extent that there is now a need for buyers' agents to be accredited and recognised as specialists in their field, much the same way as auctioneers are accredited as specialists in the real estate industry.

Buyers Agency is a specific scope of practice that is rapidly gaining traction and wider community acceptance. It is imperative that buyers' agents are appropriately trained and meet specific qualification standards as there is a different skill set involved with delivering their services.

REINSW is of the view that it is in consumers' best interests to only have agents who have done the appropriate training carry out the role of a buyers' agent. There is currently no specific accreditation for this area of expertise. Considering that buyers' agents fulfil a unique role as specialists within the real estate industry, REINSW proposes that buyers' agents should be required to undergo specific training to obtain accreditation and be recognised for their distinctive expertise. To this end, REINSW proposes that the legislative changes set out in section 2.3 of this Submission be adopted and that it be made mandatory in the new Certificate IV in Real Estate Practice for agents who wish to practice as buyers' agents to not only complete CPPREP4101 *Appraise property for sale or lease* as a prerequisite but also the following units of competency as outlined in the **enclosed** Training Package released on 21 March 2019:

- (a) CPPREP4171 *Represent buyer in sales process;*
- (b) CPPREP4172 *Develop and promote property industry knowledge – buyers’ agent;*
and
- (c) CPPREP4173 *Complete purchase of property as buyers’ agent.*

The units of competency in paragraphs 3(a)-(c) above are optional at this stage but REINSW insists that they be mandatory if an agent wishes to perform the role of a buyers’ agent.

REINSW confirms that this recommendation does not aim to exclude licensed agents from delivering buyers’ agency services, but it will require agents who wish to provide such services to have completed the relevant units of competency, have practical experience and decide what scope of practice they wish to promote and pursue.

REINSW suggests that to receive accreditation a buyers’ agent will be required to have completed at least 2 years of relevant practical work experience. This will ensure that sellers’ agents who, from time to time, act for buyers are only permitted to do so after completing the same training and higher education standards required of buyers’ agents.

Requiring buyers’ agents to obtain accreditation will enable consumers to more easily identify which agent has the best experience and expertise to deliver the services they require. Thus, not only will this change guarantee that buyers’ agents are recognised for their unique specialities, but that consumer’s accessibility to them and their services will be more readily available.

REINSW recognises that the process whereby auctioneers obtain accreditation has been finessed over time. In consideration of this, REINSW is willing to work closely with NSW Fair Trading, the REINSW Buyers’ Agents Chapter Committee, and the relevant industry experts and stakeholders to ensure that the most appropriate accreditation pathway is formulated in the best interest of consumers.

4.Improved Rules of Conduct - Referral Fees

4.1 Background

It is often perceived that there is “good synergy” in both selling agents and buyers’ agents working together to assist their clients in a professional manner and such a relationship is often beneficial to vendors and purchasers who may often find it difficult to find an appropriate agent. Who better to recommend a successful and professional agent than someone already working in the industry? There are incentives for agents in doing so, including satisfied clients, recurring business and a monetary incentive to improve the market by way of referral fees.

All agents have a duty to act in the best interests of their clients at all times unless it would be contrary to the Act or Regulation or otherwise unlawful to do so. With that in mind, REINSW finds it difficult to understand how a buyers’ agent who refers a client to a selling agent (for example, with properties for sale in suburbs of interest to the buyer)

would not be acting in their client's best interest by making that referral and, to compensate, receiving a fee.

4.2 Scenarios in which a Buyers' Agent may receive a Referral Fee

The REINSW Buyers' Agents Chapter Committee has discussed at their meetings four scenarios in which buyers' agents could be entitled to receive a referral fee. However, two of these scenarios currently prohibit the receipt of such fees due to the Act and Regulation.

REINSW hopes to highlight for the benefit of NSW Fair Trading how these two scenarios, whilst prohibited, do not pose any real risk to threatening a buyers' agents' duty to avoid conflicts of interest, and respectfully recommends that the legislation be amended to permit buyers' agents to receive referral fees in these circumstances (described in more detail below).

(a) Scenario 1

Selling Agent makes referral to Buyers' Agent – No agency agreement in place

A selling agent from Ray White (**Selling Agent**) wishes to refer a potential lead (**Buyer**) to a buyers' agent from ABC Property Finders (**Buyers' Agent**). The Buyer has had trouble finding time to search for property and does not know the market in the area in which they are buying. In the vast majority of cases, referrals would be made to buyers' agents that assist sales agents' clients outside of the local area in which the sales agents operate. The Selling Agent is NOT acting as exclusive sales agent for the Buyer and the Buyer is simply someone that the Selling Agent has met via their networking activities.

In this scenario, REINSW is of the view that a conflict of interest is very unlikely as there is no exclusive sales agency agreement in place between the Selling Agent and the Buyer so the Selling Agent is not acting for the Buyer in breach of clause 7 of Schedule 2 to the Regulation. In this scenario, clause 7 is not applicable; rather the Selling Agent is referring a potential prospect to a buyers' agent who is willing to pay a fee for the referral. However, in the instance that the Buyers' Agent ended up recommending a property listed by the Selling Agent, the Selling Agent would be unable to accept a referral fee because they are already getting paid by the vendor.

The issue of inducement does not appear applicable here as the Selling Agent has only identified an opportunity to refer a lead. The Selling Agent is not "inducing" the Buyer ("*any other person*") to sign up by paying the Buyer a fee. Instead, the Buyers' Agent is willing to pay a fee if the Selling Agent wishes to refer a prospect. Since an "inducement" is a pledge or promise that causes an individual to enter into a particular agreement, in this scenario, the Selling Agent is simply giving the contact details of the Buyers' Agent to a prospective lead and leaves it to the Buyer to make contact with the Buyers' Agent. There is no promise or pledge in these circumstances and, therefore, no inducement.

(b) Scenario 2

Selling Agent makes referral to Buyers' Agent – Agency agreement in place

A selling agent from Ray White (**Selling Agent**) wishes to refer their client, Bob Bashfield (**Buyer**) to a buyers' agent from ABC Property Finders (**Buyers' Agent**). The Selling Agent has listed the Buyer's house for sale under an exclusive sales agency agreement and is running an associated active marketing campaign.

In this scenario, REINSW is of the view that the chance of a conflict of interest arising is unlikely. In the event the Buyer enters into a buyers' agency agreement with the Buyers' Agent and purchases one of the Selling Agent's listed properties, the Selling Agent would not be entitled to any referral fee from the Buyers' Agent.

(c) Scenario 3

Buyers' Agent makes referral to Selling Agent – No agency agreement in place

A buyers' agent from ABC Property Finders (**Buyers' Agent**) wishes to refer a buyer, Wendy Wu (**Buyer**), to a selling agent from Ray White (**Selling Agent**). The Buyer wants to sell their house. The Buyers' Agent does not sell property and the Buyer has asked the Buyers' Agent if they know of any good sales agents in the area.

The Buyers' Agent is NOT currently acting as an exclusive buyers' agent for the Buyer – they are simply someone whom the Buyers' Agent has met via their own networking activities.

REINSW is of the view that, in this scenario, issues regarding conflicts of interest are not applicable as the Buyers' Agent is simply referring a potential prospect to the Selling Agent.

Clause 9F of Schedule 2 to the Regulation does not appear applicable given that the Buyer is not under an exclusive buyers' agency agreement and the Buyers' Agent is not acting for the Buyer. Accordingly, there is no breach of clause 9F of Schedule 2 to the Regulation.

Similarly, it is unlikely there will be any issues of inducement because all that has happened is that the Buyers' Agent has identified an opportunity to refer a lead. In this case, they are not "inducing" the Buyer ("*any other person*") to sign up to an agency agreement by paying the Buyer a fee. Instead, the Selling Agent is simply willing to pay a referral fee to the Buyers' Agent for referring a potential client. In this scenario, the Buyers' Agent is giving the contact details of the Selling Agent to the Buyer and leaves it to the Buyer to contact the Selling Agent. They are not promising or pledging anything to the Buyer and, therefore, REINSW is of the view that an inducement has not occurred.

(d) Scenario 4

Buyers' Agent makes referral to Selling Agent – Agency agreement in place

In this scenario, a buyers' agent (**Buyers' Agent**) wishes to refer their client (**Buyer**) to a selling agent from Ray White (**Selling Agent**). The Buyers' Agent is currently acting as the exclusive buyers' agent for the Buyer and is searching for the Buyers' new home.

Again, REINSW is of the view that issues regarding conflict of interest will not arise in this situation. If the Buyer sells their property and the Buyers' Agent purchases it for one of their other clients, then the Buyers' Agent would not be entitled to a referral fee from the Selling Agent.

REINSW notes that this scenario is considered problematic because the current legislation prohibits the Buyers' Agent from receiving a referral fee even in circumstances where:

- (a) either no conflict of interest exists or where a conflict exists but the relevant disclosures have been made and accepted by the client; and
- (b) where the Buyers' Agent is acting in the best interests of their client by making the referral.

4.3 Proposed Amendments and Position

REINSW is of the opinion that the legislation (specifically, clause 9F of Schedule 2 to the Regulation) should be amended to permit referral fees in all the above circumstances but also to remove the broad, "catch-all" nature of the clause. Clause 9F of Schedule 2 also fails to address the unfair balance between what selling agents can and what buyers' agents can't do in this space. For instance, whilst buyers' agents are prohibited from receiving referral fees for referring clients to selling agents, selling agents are entitled to receive them for referrals to other selling agents (for example, where they do not have the resources to take on the sale themselves).

Regarding Scenario 4 in section 4.2(d) above, although there is a fine line between acceptable conduct and a potential conflict of interest, if there is no benefit to be obtained by the Buyers' Agent other than the referral fee, repeat business and a satisfied client, then REINSW is of the view that there should be no reason as to why a conflict of interest should arise in this circumstance, particularly since the referral fee must be disclosed to the client under section 47 of the Act, and accepted by the client.

Hypothetically, the Buyers' Agent is referring their client to an independent agency – if the Buyers' Agent was referring their client to another selling agent within their office or to a family member, then REINSW sees that this could lead to a conflict of interest. Nonetheless, if there is no business, family or fiduciary relationship between the referrer and referee, REINSW sees no reason as to why a referral fee cannot be accepted.

With this in mind, REINSW draws your attention to the requirement for buyers' agents to make a disclosure under section 47 of the Act if these types of relationships or referral fees occur. In particular, the duty for buyers' agents to disclose in such circumstances

should give the comfort required to ensure that if there is a conflict of interest then there is no detriment to the client if they choose to proceed with the transaction based on the disclosure made and the transparency created. Hence, REINSW believes that the legislation should be amended to permit buyers' agents to receive a referral fee on the basis that clients have the requisite transparency necessary to make an informed decision on whether or not to proceed with the transaction having considered the agent's section 47 disclosures.

Whilst REINSW appreciates that the overriding principles are to ensure that buyers' agents are not "double dipping" nor are they to create a situation where there is a conflict of interest, there should be nothing preventing a conjunction arrangement between selling and buyers' agents where they share the commission relating to the sale. REINSW sees no reason why a good, responsible agent should not be entitled to their reward when acting for the benefit of their clients.

REINSW also suggests redefining the concept of a "referral fee" to a situation of conjunction whereby selling agents and buyers' agents share the commission for their work rather than receiving a "fee" per se. In light of this, REINSW considers the only requirement to be that set out in section 33 of the Act so that a licensee must only act in conjunction with another licensed individual, further supporting the notion that licensed selling agents and buyers' agents should be able to enter into arrangements whereby one receives a benefit for referring the services of the other to their client when acting in good faith.

In summary, provided that an agent makes the relevant disclosures required by section 47 of the Act, scenarios such as Scenario 4 above should be considered acceptable and buyers' agents should be permitted to receive a referral fee or shared commission. Whilst mechanisms should remain in place whereby the buyers' agent waives any right to a referral fee where there is a conflict of interest or where the buyers' agent stands to benefit at the expense of their client, such mechanisms should not hinder those who have disclosed such conflicts which have been accepted by their clients, and they are acting in good faith, for a proper purpose and in the best interests of their clients.

5. Rules of Conduct Specific to Buyers' Agents

Due to the importance and continual growth of buyers' agents in the market, REINSW sees the need for more relevant rules of conduct to apply to buyers' agents. Accordingly, REINSW suggests that clauses 9A-9F of Schedule 2 to the Regulation be amended as per the **enclosed** proposed clauses 9A-9E, by omitting clauses 9E and 9F, namely "*Information to be given when expression of interest deposit paid*" and "*Agent must not accept payment for a referral*", respectively, and including a new clause 9E dealing with the accreditation of buyers' agents.

The rationale for deleting clause 9E of Schedule 2 is because it contemplates a very rare circumstance and only leads to confusion for purchasers. Such confusion stems from the use of a similar phrase in the industry with respect to selling property, namely, an "expression of interest". REINSW is of the view that an expression of interest deposit is archaic and, since it does not take the property off the market and serves to cause confusion, REINSW questions its purpose and inclusion as a rule of conduct. Further, REINSW is aware of very experienced buyers' agents who have never had to deal with an

expression of interest deposit. This corroborates the point that it is archaic and should be removed from Schedule 2.

The deletion of clause 9F of Schedule 2 is a consequential change resulting from REINSW's position set out in section 4 of this Submission.

Similarly, the inclusion of the proposed new clause 9E of Schedule 2 is a consequential change resulting from REINSW's position set out in sections 2.3, 2.4, and 3 above.

6. Conclusion

REINSW advocates for providing buyers' agents with a fair opportunity to distinguish and pursue their profession within the property industry.

REINSW makes the recommendations set out in this Submission with the hope of creating a fair, balanced, recognised and specialised profession for buyers' agents. Buyers' agents will then receive official recognition for their unique skills and expertise, which ultimately benefits consumers.

REINSW envisages that these recommendations will remove any confusion in respect of the profession and will enhance consumer confidence, trust and awareness when it comes to purchasing a property (being, their most prized possession).

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

Yours faithfully

Tim McKibbin
Chief Executive Officer



Australian Government

CPP41419 Certificate IV in Real Estate Practice

Release 1

CPP41419 Certificate IV in Real Estate Practice

Modification History

Release 1 This version first released with CPP Property Services Training Package Release 8.0.

Supersedes and is not equivalent to:

- CPP40307 Certificate IV in Property Services (Real Estate)
- CPP40407 Certificate IV in Property Services (Stock and Station Agency)
- CPP40507 Certificate IV in Property Services (Business Broking)
- CPP40611 Certificate IV in Property Services (Operations).

Qualifications were merged to reduce duplication and to provide clearer alignment with licensing outcomes.

Qualification Description

This qualification reflects the role of real estate professionals who apply knowledge of real estate practice legal agency and compliance requirements, ethical standards and consumer preferences to conduct real estate functions.

This qualification applies to people working in both residential and commercial property, including business broking, and stock and station transactions.

Occupational titles may include:

- Auctioneer
- Stock and Station Agent
- Business Broker, Business Agent, Franchise Broker
- Property Manager, Body Corporate Manager
- Real Estate Agent
- Real Estate Representative, Real Estate Salesperson, Real Estate Sub-agent, Property Portfolio Officer, Buyer's Agent.

Staff who hold this qualification are commonly engaged with:

- analysing data, industry intelligence and leads to identify prospects
- developing, building and maintaining relationships with lessors, tenants, vendors and buyers
- providing advice to lessors, tenants, vendors and buyers on the sale, purchase or lease of commercial, residential, stock and station, and property real estate
- implementing systems, forms and documents to ensure real estate agency transactions are compliant with regulatory requirements; managing risk to agency and agent, and demonstrating high standards of ethical practice

- transacting, accessing, and preserving the integrity of trust accounts to minimise customer and agency risk
- establishing, maintaining, executing and concluding contracts with lessors, tenants, vendors and buyers, including by auction
- building and promoting the agency and individual brands.

Licensing, legislative, regulatory or certification requirements

Licensing, legislative, regulatory or certification requirements apply to real estate practices in all states and territories. Relevant state and territory regulatory authorities should be consulted to confirm those requirements.

Note: Occupational licensing outcomes are associated with some of the specialisations packaged in this qualification. The units packaged in the specialisations of this qualification have also been developed as Skill Sets: please note that not all Skill Sets are associated with licensing outcomes.

Code	Title
CPPSS00065	Residential Property Sales
CPPSS00066	Residential Property Management
CPPSS00067	Property Management Business Development
CPPSS00068	Auctioneering
CPPSS00069	Buyer's Agent
CPPSS00070	Onsite Property Management
CPPSS00071	Commercial Sales and Leasing
CPPSS00072	Commercial and Property Management
CPPSS00073	Business Broking
CPPSS00074	Stock and Station, Stock
CPPSS00075	Stock and Station, Station
CPPSS00076	Administration Management/Office Support

Entry Requirements

There are no entry requirements for this qualification.

Packaging Rules

To achieve this qualification, competency must be demonstrated in:

- 18 units of competency:
 - 5 core units
 - 13 elective units.

The elective units must ensure the integrity of the Australian Qualifications Framework (AQF) qualification alignment, contribute to a valid, industry-supported vocational outcome and are to be chosen as follows:

- all the elective units in any two elective groups from Groups A–L listed below must be chosen
- the remaining elective units may be chosen from the general elective units listed below or the CPP Property Services Training Package.

Core units

CPPREP4001	Prepare for professional practice in real estate
CPPREP4002	Access and interpret ethical practice in real estate
CPPREP4003	Access and interpret legislation in real estate
CPPREP4004	Establish marketing and communication profiles in real estate
CPPREP4005	Prepare to work with real estate trust accounts

Elective units

Group A - Residential Property Sales

CPPREP4101	Appraise property for sale or lease
CPPREP4102	Market property
CPPREP4103	Establish vendor relationships
CPPREP4104	Establish buyer relationships
CPPREP4105	Sell property

Group B - Residential Property Management

CPPREP4101	Appraise property for sale or lease
CPPREP4102	Market property
CPPREP4121	Establish landlord relationships

CPPREP4122 Manage tenant relationships

CPPREP4123 Manage tenancy

CPPREP4124 End tenancy

CPPREP4125 Transact in trust accounts

Group C - Property Management Business Development

CPPREP4101 Appraise property for sale or lease

CPPREP4141 Establish and maintain property management portfolio

CPPREP4142 Promote property management products and services

Group D - Auctioneering

CPPREP4161 Undertake pre-auction processes

CPPREP4162 Conduct and complete sale by auction

CPPREP4163 Complete post-auction process and contract execution

Group E - Buyer's Agent

CPPREP4101 Appraise property for sale or lease

CPPREP4171 Represent buyer in sales process

CPPREP4172 Develop and promote property industry knowledge - buyer's agent

CPPREP4173 Complete purchase of property as buyer's agent

Group F - Onsite Property Manager

CPPREP4181 Manage onsite residential property

Group G - Commercial Sales and Leasing

CPPREP4102 Market property

CPPREP4201 Appraise commercial property

CPPREP4202 Establish and maintain vendor and lessor relationships and networks

CPPREP4203 Complete commercial property sale

CPPREP4204 Establish commercial property lease

CPPREP5201 Develop and maintain commercial property market intelligence

Group H - Commercial and Property Management

CPPREP4231	Manage commercial property maintenance
CPPREP4232	Manage commercial property financial reports
CPPREP4233	Manage lessee relationships - commercial
CPPREP4234	Manage lessor relationships - commercial
CPPREP4235	End commercial property lease

Group I - Business Broking

CPPREP4261	Appraise business for sale
CPPREP4262	Establish vendor relationships in business broking
CPPREP4263	Manage buyer relationships in business broking
CPPREP4264	Manage the sales process in business broking

Group J - Stock and Station, Stock

CPPREP4301	Confirm and market livestock for sale
CPPREP4302	Prepare livestock for sale
CPPREP4303	Establish vendor and buyer relationships in livestock sale
CPPREP4304	Complete the sales process - livestock

Group K - Stock and Station, Station

CPPREP4101	Appraise property for sale or lease
CPPREP4102	Market property
CPPREP4103	Establish vendor relationships
CPPREP4104	Establish buyer relationships
CPPREP4105	Sell property
CPPREP4123	Manage tenancy
CPPREP4125	Transact in trust accounts
CPPREP5311	Develop and maintain rural property market knowledge and intelligence

Group L - Administration Management/Office Support

BSBHRM405 Support the recruitment, selection and induction of staff

SIRXMGT001 Supervise and support frontline team members

General Elective Units

BSBDIV301 Work effectively with diversity

CPPREP4501 Prepare to complete the sales process - off the plan properties

CPPREP4502 Support providers of social and community housing

CPPREP4503 Present at hearings in real estate

CPPREP4504 Deliver presentations to clients in real estate

CPPREP4505 Value goods, chattels, plant and equipment

CPPREP4506 Manage offsite and lone worker safety in real estate

CPPREP4507 Provide property sustainability information in real estate

CPPREP4508 Conduct livestock auction

CPPREP4509 Auction goods, chattels or equipment

CPPREP4510 Manage short-term or holiday letting

Qualification Mapping Information

CPP Property Services Training Package Release 8.0	CPP07 Property Services Training Package	Comments	Equivalency statement
CPP41419 Certificate IV in Real Estate Practice.	<ul style="list-style-type: none"> CPP40307 Certificate IV in Property Services (Real Estate) CPP40407 Certificate IV in Property Services (Stock and Station Agency) CPP40507 Certificate IV in Property Services (Business Broking) CPP40611 Certificate IV in Property Services 	<p>Supersedes and is not equivalent to:</p> <ul style="list-style-type: none"> CPP40307 Certificate IV in Property Services (Real Estate) CPP40407 Certificate IV in Property Services (Stock and Station Agency) CPP40507 Certificate IV in Property 	N

	(Operations)	<p>Services (Business Broking)</p> <ul style="list-style-type: none">• CPP40611 Certificate IV in Property Services (Operations). <p>Qualifications were merged to reduce duplication and to provide clearer alignment with licensing outcomes.</p>	
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Links

An Implementation Guide to this Training Package is available at -

<https://vetnet.education.gov.au/Pages/TrainingDocs.aspx?q=6f3f9672-30e8-4835-b348-205dfcf13d9b>

Clauses 9A-9G of Schedule 2 - Rules specific to buyers agents

(Clause 7)

Note.

Clause 7 provides that a reference in this Schedule to an agent includes a reference to a assistant agent to whom the Schedule applies.

9A Statement of property details

At the time of entering into an agency agreement with a person on behalf of whom an agent is to act as buyer's agent, the agent must prepare and give the person a statement of property details that is signed by the agent and specifies the following:

- (a) details known to the agent of the type of property to be purchased,
- (b) details of any special instructions about the property to be purchased (for example, an instruction that vacant possession is required in the case of a rented property).

Note. These details can be changed by agreement between the parties or as provided by the agency agreement.

9B Person on behalf of whom agent is acting as buyer's agent to be informed of negotiations

- (1) An agent acting as a buyer's agent for a person must keep the person informed of each stage of the negotiation of a purchase price as instructed by the person.
- (2) This clause does not apply to bids made in the course of an auction.

9C Buyer's agent to obtain best possible purchase price

An agent acting as a buyer's agent must use the agent's best efforts to obtain the best possible purchase price, without breaching standards of ethical conduct or engaging in conduct that is contrary to good agency practice.

9D Buyer's Agent not to exceed maximum purchase price fixed by client in negotiations or at auction

- (1) In negotiations for the purchase of a property, an agent acting as a buyer's agent for a person (the **client**) must not exceed the maximum price fixed by the client without the express written authorisation of the client or a person authorised by the client.
- (2) When the bidding at an auction exceeds the maximum price fixed by the client, the agent must not continue bidding without the express authorisation of the client or a person authorised by the client.

9E Accreditation of Buyers' Agent

A real estate agent or assistant real estate agent must not act as a buyer's agent without being accredited as a buyer's agent under the Act.

Annexure B

The following pages include REINSW's Submission on the *Easy and Transparent Trading – Empowering Consumers and Small Business Consultation Paper* dated 22 August 2018



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

**Submission on the *Easy and Transparent Trading –
Empowering Consumers and Small Business
Consultation Paper***

22 August 2018

TO: Easy and Transparent Trading Consultation Paper

Introduction

This Submission has been prepared by The Real Estate Institute of New South Wales Limited (**REINSW**) and is in response to the Easy and Transparent Trading – Empowering Consumers and Small Business Consultation Paper as issued by the Department of Finance, Services and Innovation (**Department**) in July 2018 (**Paper**).

REINSW is the largest professional association of real estate agents and other property professionals in New South Wales. REINSW 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.

This Submission responds to the issues raised in the Paper that are relevant to real estate agents, namely:

- the proposal to remove real estate auctioneer licences;
- removing categories of home building licences;
- the repeal of redundant legislation;
- a potential review of the Continuing Professional Development (**CPD**) requirements;
- rental bond surety products; and
- allowing strata lot owners to choose their own utility providers.

These topics are discussed below in detail, reflecting the same section references and question numbers as those used in the Paper.

1.5 Real estate auctioneer licence

10. Would there be any unintended consequences with implementing the above option?

Unfortunately, this is not the Government's first attempt at deregulation of the auctioneer's profession. The Government has gone down this disastrous path before and it seems that no lessons have been learnt from its failed delicensing regime. Under the *Statute Law (Miscellaneous Provisions) Act 1993 (NSW)*, the *Property, Stock and Business Agents Act 1941 (NSW)* (formerly, the *Auctioneers and Agents Act 1941 (NSW)*) was amended by removing "an auctioneer" from section 20 such that auctioneers no longer required a licence to trade. Not surprisingly, on 1 September 2003, due to problems with the auction system arising from the deregulation and delicensing of auctioneers, the *Property, Stock and Business Agents (Auctioneers Qualifications) Order* commenced which reintroduced licensing requirements for auctioneers. Accordingly, REINSW questions why deregulation occurred in the first place since licensing requirements were subsequently reintroduced into the profession. Considering the amount of Government time and resources invested in this current proposal and the failed delicensing regime in the past, REINSW wonders why the Government thinks it is a good idea to go down the same path that previously failed. With respect, REINSW believes that before the Government starts "solving problems" by deregulating a profession, it should determine whether there is an actual problem to solve.

REINSW would like to point out that the goal of Part 1 of the Paper states that it is "*centred on removing unnecessary obligations that do not improve consumer outcomes...*". However, removing the requirement to hold an auctioneer's licence and the deregulation of the auctioneer's practice achieves quite the opposite effect.

REINSW opposes de-licencing and deregulation within any area of the real estate profession. In a de-licenced and deregulated environment, there are no requirements for probity checks of service providers and, alarmingly, no training. Without the requisite competencies, knowledge and skills required to deliver services in this complex area, consumers will be exposed to significant risks and the industry and profession will be damaged. These points are discussed below at length.

REINSW also wishes to highlight that if the Department moves forward with the proposed deregulation, it will be the only State in Australia to do so.

Training Reforms and Damage to the Credibility of the Industry

As the Department is aware, REINSW has been heavily involved in the Government's drive to improve the professionalism, standards and credibility of the real estate industry. REINSW is of the view that the removal of the requirement to hold a licence to be an auctioneer is counter-productive to the overall effort to improve levels of compliance, transparency, accountability and fair trade in the real estate sector. An effect would be damage to the credibility of both the industry and the Government because the new training package and licensing reforms have the intention of moving to a more highly educated, licensed and compliant industry, not the opposite which would result from the proposed deregulation.

REINSW believes that the proposed deregulation undermines the interests of the consumer and will likely lead to an increase in consumer complaints, ultimately damaging the credibility of the industry and real estate professionals. REINSW is concerned that this will also undermine the push towards improving the knowledge, education and professionalism of the industry as a whole.

Education

In practice, education and awareness of an auctioneer's obligations can prevent non-compliant activities and adequately equips an auctioneer with the resources to address issues such as dummy bidding, collusive practices and complex buying situations (such as when a purchaser wishes to act on behalf of a trust or company when making a bid). Amongst many other things, auctioneers need to be adequately licenced and trained to effectively manage events and occurrences that may expose the vendor to legal action or damages.

While the Department's preference is to encourage selling agents and auctioneers from other fields to conduct auctions of real estate or stock without training, REINSW strongly urges the Department to change its preference to maintaining the status quo. The licensing regime puts hurdles in place to ensure real estate professionals are compliant and ethical. Deregulating the licencing of auctioneers threatens to invite untrained, inexperienced, underqualified operators into the marketplace, thus undermining recent efforts in increasing the professionalism of the real estate industry (which is discussed in more detail below).

REINSW would like to highlight that NSW Fair Trading states on its website the following:

"Property, Stock and Business Agents Act 2002 and the Property, Stock and Business Agents Regulation 2014 regulate the way that auctions of residential property and rural land are

conducted in New South Wales. ***Real estate agents, stock and station agents and auctioneers need to understand their responsibilities [emphasis added].***¹

Quite clearly, the legal obligations on auctioneers are strict and abundant in nature. The auctioneer also has many duties and responsibilities that are not patently obvious. REINSW has been informed by some of its Members that, in practice, it is the auctioneer who is often guiding the selling agent as to what is to be done on the day of, and at, an auction, not the other way around. To rely on a selling agent's limited knowledge and application of an auctioneer's legal obligations is profoundly dangerous for consumers and the economy. It is a mistake to think that selling agents are well versed in auction compliance as most agents themselves are not aware of an auctioneer's legal obligations under the relevant legislation.

Further, REINSW questions who, in a de-licensed environment, is required to comply with the auction conditions and other legislative provisions imposed on auctioneers (for instance, section 21, Part 5 Division 2 and Part 6 of the *Property, Stock and Business Agents Act 2002* (NSW) (**PSBA Act**) as well as clause 15 of the *Property, Stock and Business Agents Regulation 2014* (NSW)). What enforcement mechanisms will be in place to ensure compliance? Without being a trained and qualified auctioneer, REINSW doubts whether the inexperienced and unqualified person conducting the auction would be aware that those auction conditions even exist. Accordingly, for consumer protection purposes, REINSW recommends that a significant amount of training is necessary to educate these agents and auctioneers in other fields before they become real estate auctioneers. This will inevitably increase Government resources and red tape, which is contrary to the intention of the Paper.

REINSW is of the view that there is no substitute for a properly trained and regulated service provider. The proposed deregulation ultimately undermines the value of those auctioneers who have spent years to build on their experience to be adequately trained and licenced in their area of practice.

Threats to the consumer

REINSW does not consider it to be in the best interest of consumers to allow an unlicensed auctioneer who may also be an undischarged bankrupt or convicted felon to be able to auction consumers' most valuable and prized possessions. Unfortunately, this undesirable scenario is inevitable in an unlicensed environment.

Auctioneering is a very visual aspect of the property services industry in action and, like all experts, the auctioneer makes it look easy. However, the theatrical nature of an auction often takes away from the fact that the auctioneer and the auction itself is a key role in the making of a contract for an extremely valuable asset. Accordingly, REINSW is concerned that the proposed deregulation is likely to severely impact the quality of services being offered to the consumer. Such a decrease in quality may also lead to an increase in non-compliant and/or non-binding sales that consumers are left to deal with. The purpose of licencing laws, as mentioned in the Paper, is to ensure that auctioneers discharge their functions in a fair, lawful and honest manner. REINSW is of the opinion that deregulation is a reckless proposition that threatens the protection of consumers in many ways and in a manner that is counterproductive to the intentions of the Paper.

The Paper states that "*Auctioneers from other fields may be willing to conduct auctions of real estate or stock **without the training and costs imposed by the current system [emphasis***

¹ <https://www.fairtrading.nsw.gov.au/housing-and-property/property-professionals/working-as-a-property-agent/auction-laws-and-conditions>

added]". REINSW challenges this statement on the basis that it is fundamentally flawed and offers no protection to consumers. Rather than remove the costs imposed by the current system, REINSW is concerned that an effect of delicensing auctioneers is that costs payable by consumers will significantly increase.

Whilst the intention is to improve competition and reduce costs of auctioneers, the actual cost to the consumer is likely to be higher if an inexperienced and underqualified agent is used to auction a property. Through the use of unlicensed and potentially unskilled auctioneers, vendors may experience situations whereby their property sells for a significantly lower price than may be achieved by a qualified, experienced auctioneer. Saving a few hundred dollars in auction fees could ultimately cost the vendor tens of thousands or even hundreds of thousands of dollars in reduced sale prices. Inexperienced auctioneers may also expose the vendor to unnecessary and costly litigation, potential redress by the purchaser and total loss of a secured sale through the non-compliant actions of an unlicensed auctioneer.

Costs to consumers may also be in the form of the mishandling of sale proceeds and other funds without any protection mechanisms in place in an unregulated industry. REINSW has significant concerns regarding the operation of a trust account for auctioneers who are unlicensed and inexperienced, specifically, stock and station auctioneers who are less likely to engage a listing agent to manage the holding of funds. Section 86 of the PSBA Act lists stringent requirements for the operation of a trust account and the handling of trust funds. What happens to such requirements in dealing with trust funds in an unlicensed environment? Will there be a requirement for unlicensed auctioneers to hold money in trust accounts in situations where the listing agent is not holding such funds? An unlicensed stock and station auctioneer could be holding sale proceeds in a personal account without any protection being afforded to consumers. As emphasised above, it is not in the best interest of consumers to allow an unlicensed auctioneer who may also be an undischarged bankrupt or convicted felon to be able to freely deal with sale proceeds without strict requirements and the enforcement of same.

REINSW believes that with the ability for inexperienced, underqualified and untrained sales agents to act as auctioneers, consumers will experience an increase in illegal, unscrupulous and non-compliant auction activity. This may occur due to an agent's sheer ignorance or a lack of incentive or imperative to act in a compliant manner. Without limitation, REINSW envisages that, as a consequence, there will be an increase in the following activity that will have significant negative impacts on consumers, the industry and the Government:

- (a) a failure to recognise or take action to prevent dummy bidding and collusive practices;
- (b) misrepresentation of the reserve price to buyers or selling the property below the reserve price;
- (c) non-compliance with the placement and number of vendor bids (for example, situations where the vendor bids above the reserve or where there are multiple vendor bids);
- (d) selling the property without proper authority;
- (e) loss of a secured sale for the vendor as a consequence of a failure to understand the rights of the auctioneer (for example, failure to understand that an auctioneer can sign on a buyer's behalf should they fail to sign the contract post-auction or any other behaviour that may expose the vendor to subsequent legal action);

- (f) a failure to understand the correct process surrounding the execution of auction day contracts, again putting the validity of the sale in jeopardy;
- (g) a failure to identify bids that may be against the best interest of the vendor(s); and
- (h) any other general behaviour that is non-compliant during communications with the buyers on the action floor.

Undoubtedly, the proposed deregulation will likely lead to an increase in non-compliant, illegal and unscrupulous activities and, ultimately, a spike in dissatisfied consumers. This, in itself, will increase the number of consumer complaints lodged with NSW Fair Trading, increasing the amount of Government resources invested in resolving complaints. REINSW recognises that this is counter-productive to the Department's intention of making it easier to do business and reducing Government red tape and resources. Accordingly, REINSW urges the Department to reject the proposal to de-licence and deregulate auctioneers.

Disincentive for Compliance

REINSW believes that if an auctioneer relies on their licence for their livelihood, compliance and professionalism is paramount to the success of their career. For the casual or occasional auctioneer, the issue of compliance is likely to be less of a concern. Licenced auctioneers risk their licence when undertaking non-compliant or illegal practices in the course of their auction. The incentive to ensure that auctioneers are compliant with legislation acts as a self-regulating mechanism whereby auctioneers are unlikely and unwilling to risk suspension or cancellation in circumstances of illegal or non-compliant activities. Quite simply, a licence cannot be taken away from someone who does not have one in the first place – expecting someone to act in good faith without any form of enforcement or sanction mechanism in an unlicensed environment is unrealistic and is not likely to encourage compliance. REINSW is concerned that, with a disincentive for compliance, what protection is afforded to consumers?

Professional Indemnity Insurance and Public Liability Insurance

REINSW has further concerns surrounding insurance coverage and policies to be taken out by inexperienced and unqualified auctioneers. REINSW is of the opinion that it is very unlikely and extremely difficult for inexperienced and unqualified auctioneers to take out and maintain the appropriate level of coverage of insurances. REINSW questions whether the Department, along with Government, will ensure that all persons engaging in auctions of property and stock will hold the relevant insurances. If so, how will this be monitored and enforced in such an unlicensed and deregulated environment? Does the Government expect the insurances of selling agents to cover the activities of auctioneers because, if it does, then the relevant premiums will drastically increase but, regardless, auctioneers should have their own professional indemnity insurance in place (which would be difficult to obtain without any experience or qualification)?

This raises questions regarding the level of protection for consumers in a deregulated industry. REINSW is of the opinion that it is reckless and counter-intuitive for the Government to allow auctioneers to deal with consumers' greatest and most valuable assets in such a manner that affords little to no protection to the consumer themselves.

Without the appropriate coverage under relevant insurance policies (including, without limitation, professional indemnity and public liability insurance policies), the negligent and non-compliant actions of inexperienced and unqualified auctioneers create a significant risk exposure for both the auctioneer and consumers at large. REINSW recommends that

sufficient insurance coverage be required to ensure that there is the appropriate level of redress available to consumers to protect them when something inevitably goes wrong.

Selling Agents and Others to Comply

REINSW does not support the proposition that selling agents or other auctioneers in different fields are able to assume the licensed auctioneer's compliance obligations. REINSW questions whether that will mean that these people must be licensed agents. If that is the intention, then a practical burden is placed on agencies whereby principals or licensed agents will need to be present at auctions. This is particularly so where selling agents hold certificates of registration and auctioneers in other fields hold no real estate qualification. An unintended consequence of the proposed deregulation is that it removes the autonomy of selling agents in their daily practice and it may not be feasible for some agencies from an employment management perspective for licensed agents and principals to attend all auctions.

Another problem arises where an auctioneer in an unlicensed environment is acting for a commercial sales agent who is not required to be licensed under the PSBA Act. Both are unlicensed so REINSW questions who is responsible in that scenario?

Further, there is a distinct difference between real estate auctioneers and goods and chattel auctioneers. They are like chalk and cheese when it comes to the auction process, speed of auction and value of the item being auctioned. More often than not, real estate is a vendor's biggest and most valuable asset and REINSW is opposed to it being auctioned by a selling agent or auctioneer other than a real estate auctioneer on the basis that the former are likely to be inexperienced and unqualified to carry out a compliant auction.

1.6 Removing 13 Categories of Home Building Licences

11. Do you support the removal of the above 13 licence categories? If not, which do you believe need to be retained and why?

REINSW's position in response to the deregulation of the 13 categories of home building licences is much the same as its position on the deregulation of auctioneers, as set out in detail above. Again, REINSW questions the problem that the Department is trying to solve by introducing this proposal. The industry works very well, with the licenses providing an incentive for legislative compliance.

REINSW appreciates that the *Home Building Act 1989* (NSW) is not the only source for consumer protection (as referenced in the Paper), however, it has serious concerns regarding the suggested reforms. REINSW proposes that consumer protection law is not the only factor to consider in the potential removal of these categories of licences, and that consideration needs to be given to the dangers of the proposed changes.

The current status quo of prohibiting a person from trading or working in an industry or occupation without an authority to trade being granted by the regulator offers the most protection to consumers and the real estate industry. For example, landlords have an obligation to provide and maintain the premises in a reasonable state of repair. For property managers, this means engaging *qualified* tradespersons on behalf of their landlords to carry out maintenance, installation and repair work in properties. In these situations, licences indicate and almost guarantee that the tradesperson engaged is competent and experienced in their field of work.

The Paper itself states:

“requiring that an independent regulator assess a person’s fitness and propriety prior to their trading in a certain industry or working in a certain occupation reduces the likelihood that the person will engage in conduct that is relevantly against the public interest.”

In light of the above statement, REINSW strongly urges the Department to reconsider its proposal to remove these categories of building licences. If the licenses were removed, insurance premiums would sky-rocket commensurate with the significant increase in risk from unqualified tradespeople. There would also be a spike in contractors who would breach statutory warranties under the *Home Building Act* but who are unlicensed such that section 18B and associated provisions under that Act would not apply, leaving the consumer unprotected and exposed.

Consumer Safety

Deregulation of the subject professions will have significant effects on consumer safety. Without proof that the regulator is satisfied of a person’s fitness and propriety to trade and work, REINSW questions how consumers can guarantee that they are engaging a competent and qualified tradesperson to carry out maintenance and work in their home. Whilst the Department has proposed a scheme whereby traders who fail to satisfy certain standards may be required to pay compensation, this is an inadequate remedy where their negligence or failure to carry out the work in a competent manner results in significant cost, damage, loss, death or serious injury, which are real consequences of the reforms. The responses proposed are reactive rather than proactive and fail to prevent unqualified or incompetent tradespersons from carrying out work. REINSW is of the view that licensing schemes do not create barriers to entry but are hurdles in place to protect the consumer, particularly by ensuring that only those who are competent and licenced can trade. REINSW does not believe this produces a negative outcome for consumers.

Although the Department’s argument is that there are fees associated with the licensing scheme which drives up prices, thus causing a spike in the number of complaints the Government has to deal with, REINSW is of the belief that (as with the de-licensing of auctioneers) removal of the licensing scheme will not solve this issue. In fact, such de-licensing is likely to increase the number of complaints as a result of incompetent tradespersons being able to trade and carry out work without a licence. An increase in complaints lodged with NSW Fair Trading means an increase in Government resources invested in resolving those complaints, which is not a positive outcome for consumers, taxpayers or the Government.

The trades listed on page 17 of the Paper have been considered to “*not appear to justify the pre-assessment, the additional revenue raising or knowledge which requires refreshing through training*”. The Paper further states that these trades appear to involve less complex tasks which, if done badly, are not likely to give rise to major safety risks. REINSW strongly opposes the Department’s position in this respect and discusses some of these licence categories below in an effort to demonstrate how important it is for these tradespeople to be licensed.

Glazing

NSW Fair Trading defines glazing as “*the work involved in installing glass, acrylic or other like materials in prepared openings, such as windows, door panels, screens, fences, balustrades*

or partitions”². REINSW finds it difficult to believe that this is a trade that involves “less complex tasks”. With cases such as *Jones v Bartlett*³, it is evident that an inability to install and maintain the relevant safety standard of glass throughout the home can pose significant risks to tenants and occupants. In this case, the respondents rented a house to tenants whose son sustained injuries when he walked into a glass door in the house. The glass door complied with the relevant building standard at the time the house was built in the late 1950s but did not comply with the relevant building standard at the time the house was rented to the respondents, which provided for thicker toughened safety glass. Had an expert glazier been called to conduct an inspection of the property for safety purposes, it was contended that they would have been able to detect that the glass in the door was not of the required standard. As the door was in good working order and appeared to operate smoothly, the expert glazier in the case claimed that the general public would not be capable of knowing whether the glass complied with the appropriate standards. As this case demonstrates, unlicensed tradespeople or even the layman who does the job themselves might not be aware that they must comply with the relevant building standard, posing safety and other risks to consumers.

If tradespersons are not licenced and, therefore, do not require “refreshing through training”, renewed safety standards and improved practices will not be made known to such tradespersons, likely to lead to significant injury or even death if adequate safety standards are not in place for the installation of glass throughout the home.

This argument can also be applied to shower screen installations.

Splashback installation

Splashbacks are often installed next to or behind ovens and other cooking implements which require a certain clearance to avoid the risk posed by potentially combustible materials. Such requirements are regulated by the Building Code of Australia and a failure to comply with the Code could result in catastrophic consequences. REINSW does not see how this trade can be considered as “less complex” or unlikely to lead to significant risks “if done badly”. If anyone is able to install a splashback within a home, the risks of non-compliance increase along with the potential fire and safety hazard if incorrect materials are used or there is not enough distance between cooking appliances and the installed product.

Fencing

Statistical evidence as provided by NSW Fair Trading indicates that inadequate pool fencing is a major contributing factor to drownings.⁴ There are three different Pool Safety Standards that apply in NSW depending on when the pool was constructed. These requirements are defined under the relevant Australia Standard and the *Swimming Pool Act 1992* (NSW) as amended from time to time. Swimming Pools operate under a Certificate of Compliance scheme, one that is complex and has stringent requirements. Requirements not only apply to the height of fences themselves but also to the doors in pool barriers, the latches on such doors, and general pool fence and gate maintenance for bolts, screws, fasteners, hinges and locks. REINSW struggles to comprehend how an unlicensed fencer will be equipped with the required knowledge to adequately construct and install fencing around swimming pools without leading to significant safety risks (including, without limitation, serious injury or drownings). This goes against the intention of the swimming pool legislation. As emphasised

² <https://www.fairtrading.nsw.gov.au/trades-and-businesses/licensing-and-qualifications/licence-classes-and-qualifications/glazing>

³ *Jones v Bartlett* (2000) 176 ALR 137

⁴ <https://www.fairtrading.nsw.gov.au/housing-and-property/building-and-renovating/pools-and-pool-safety/pool-fencing-requirements>

for several trades throughout this section of the Submission, it is concerning to classify fencing as unlikely to lead to significant risks “if done badly”.

Other Trades

Inadequate paving can result in a trip hazard and, in some circumstances, can cause serious injury or even death (for instance, where an individual trips on loose or protruding paving and hits their head). Whilst paving may not be considered to possess the same level of complexity as other trades, if done badly, there are serious dangers to human safety.

Plastering is another significant concern for REINSW. Gyprock and plastering work often involves repairs, maintenance and installation of walls and ceilings within the home. If not done correctly, ceilings may collapse on people, causing serious harm and injury. Again, while this task may be subjectively less complex than others, REINSW considers the potential danger or threat to safety that can arise from negligent or careless acts of unlicensed plasterers to be significant.

For many years, REINSW has been lobbying the Government to address the dangers associated with lead paint and asbestos in the home (amongst other products that are incredibly dangerous). To remove the licensing requirements for painters is not the solution REINSW had in mind and recommends against it, particularly since painters need to be adequately educated and qualified to deal with these potential safety issues. Exposure to particles of lead or asbestos can be poisonous and, therefore, caution must be taken when renovating or carrying out works in the home. Accordingly, REINSW has grave concerns for the misconception that if a painter carries out their work inadequately, it is unlikely to lead to significant risks. It is often overlooked that there is more to painting than simply applying a coat of paint to surfaces. If asbestos or lead paint is in poor condition, or is disturbed or removed, REINSW considers that the best way forward is for a professional to be contacted to arrange for the safe handling of such contaminants. It is unlikely to believe that unlicensed painters will be adequately trained or knowledgeable in this respect to handle this type of scenario, not to mention the many others that may come to light.

Maintain the Status Quo

As emphasised under heading 1.5 above, REINSW opposes de-licencing and deregulation within *any* area of the property industry, including those rules and regulations that govern builders and tradespersons who play a pivotal role in the real estate industry.

To reiterate, in a de-licenced and deregulated environment, consumers will be placed at risk. Whilst not all of the 13 categories have been explicitly referenced above, REINSW overall opposes the proposal with respect to all 13 categories and encourages the Department to “maintain the status quo”.

1.12 Repealing Redundant Statutes

23. Would there be any unintended consequences with taking this possible action?

- (a) Landlord and Tenant (Amendment) Act 1948***
- (b) Landlord and Tenant Act 1899***

REINSW’s position is that, before the *Landlord and Tenant (Amendment) Act 1948* is repealed, the Government must not only be aware of the number of properties protected under the Act but must also be prepared to immediately provide re-housing for those living in the

protected properties. If succession rights are removed and the Act is repealed, the Department must be conscious of the fact that some of the affected individuals depend on protected (or cheap) rent in order to survive. They are unlikely to be able to afford the rent charged by private landlords. REINSW is concerned that, once the Act is repealed, these individuals may be without housing and will require immediate intervention from the Government. REINSW suggests that this may be in the form of prequalifying for immediate social housing or assistance with relocating to housing that is affordable based on their particular financial circumstances. In any event, REINSW is of the opinion that this is a matter for Government and not private landlords.

REINSW has submitted two submissions (dated 25 October 2011 and 23 January 2013) in response to the repeal of the *Landlord and Tenant (Amendment) Act 1948* and *Landlord and Tenant Act 1899*. For ease of reference, REINSW **encloses** these submissions.

To reiterate, REINSW is, in principle, supportive of measures to simplify, repeal and reform existing legislation. Accordingly, REINSW has previously stated that it does not oppose the repeal of the *Landlord and Tenant (Amendment) Act 1948* and *Landlord and Tenant Act 1899*. In fact, REINSW has strongly expressed the view that there is no merit in maintaining the current *Landlord and Tenant (Amendment) Act* or carrying forward these provisions in other legislation. However, REINSW recognises the need for the Government to deal fairly and immediately with the protected tenants affected by the repeal.

1.15 Review of Continuing Professional Development requirements

- 26. What issues should be considered in the proposed review of CPD arrangements?**
- 27. Should a review of CPD requirements be undertaken across the whole of the NSW Government first rather than commence in the Innovation and Better Regulation portfolio?**

REINSW has been working with NSW Fair Trading as part of the Real Estate Reference Group (**RERG**) for three and a half years to improve training in the property services industry and to make real estate professionals aware of the continuous development of legislative and regulatory instruments imposing obligations on their profession.

REINSW is extremely disappointed that no warning was provided to it and other members of the RERG in relation to the Government's contemplation of a review of CPD requirements. To REINSW's surprise, it became aware of this proposal only upon reviewing the Paper. REINSW strongly opposes a review of CPD being undertaken within the Innovation and Better Regulation portfolio as this completely undermines the work completed by the RERG to date. Instead, REINSW recommends that if the Department has an issue with the CPD requirements then a more appropriate, effective and efficient way to resolve the matter is to raise its concerns directly with the experts who comprise the RERG.

2.7 Rental bond surety products

- 40. What option do you support? Why?**

REINSW is strongly opposed to options 2 and 3 set out in Section 2.7 of the Paper and, therefore, supports maintaining the status quo.

Whilst the mechanics of the proposal set out in the Paper are not entirely clear, REINSW strongly opposes the creation of more red tape and the implementation of a scheme that does not seem to secure rental bonds and their payments. In principle, it is only fair that landlords have the unfettered discretion to choose the type of security they require to protect their property. It should not be left to an obligatory statutory regime, one which does not guarantee the recovery by landlords of the rental bond from their tenants. From REINSW's perspective, a new landlord has no relationship with the tenant's previous landlord and if a tenant does not have the capital or funds to cover a bond for a new property, these types of tenants are high risk and are unlikely to have the funds to cover their rental payments for the duration of the tenancy.

REINSW questions how this proposal fits in with break fees. The Paper states that, under the new regime, tenants could pay a smaller upfront fee at the start of the tenancy (as little as 5-10% of the bond amount), instead of the 4 weeks rent required for a bond. REINSW recommends the Department clarify how this will affect break fees because it is REINSW's interpretation that the current proposal means that if a tenant breaks their lease early on in the tenancy, landlords are unlikely to have enough bond to cover the break fee. Surely, this is not the intention of the proposed reform.

REINSW wishes to bring to the Department's attention that there are services currently available for tenants to seek short-term loans in order to fund rental bonds, noting that tenants are charged a fee for such services. For example, *easyBondpay*⁵ provides same day rental bond loans which can be repaid over 6 or 12-months. REINSW is not opposed to these third-party loan arrangements provided that the landlord receives 100% of the bond at the commencement of the tenancy and that the bond is lodged with the Rental Bond Board. To agree otherwise would reduce the revenue received by the Rental Bond Board, which is surely not the intended consequence of the proposed reforms. With services like these already out in the market, there is no need to introduce complex statutory regimes which upset the current status quo.

REINSW supports the status quo on the basis that it is simple, understood and accepted by tenants, provides surety to landlords and minimises red tape compared to other more complex arrangements.

Despite the above, if Government nonetheless elects to continue with the broadening of rental bond security options, REINSW emphasises the need to ensure that neither of the introduced security options are imposed on landlords without their consent or acceptance to participate in such a scheme. Any changes introduced must be on an 'opt-in' basis only.

2.8 Allowing strata lots to choose their own utilities provider

41. Would legislative reform assist in addressing this issue?

42. Which option do you support and why?

REINSW, in principle, does not oppose the proposed legislative changes to allow residents in strata schemes to have more freedom when choosing their own utility providers. Specifically, REINSW is strongly opposed to the current status quo whereby developers and owners corporations lock in residents to particular utility providers. REINSW does not see that it meets the objectives of the proposed regulatory reforms.

⁵ <http://easybondpay.com.au/>

In terms of the options supported, REINSW is not explicitly opposed to either options 2, 3 or 4, provided that consideration be had to the varying circumstances that have bearing on the choices a consumer makes when engaging utility providers. For example, pensioners may base their decision solely on those providers who offer pensioner discounts or those who charge the least amount in comparison to competitors. Others may choose a provider based on the loyalty programs they have to offer or their affiliation with other products and services that the consumer may benefit from. With a wide range of variables that consumers are entitled to take advantage of, utility providers may offer incentives that are more favourable to some consumers compared to others. Accordingly, REINSW is of the view that it should not be for developers and owners corporations to lock in residents to particular utility providers.

When deciding about the appropriate mechanism to be implemented, the Department should note the possible practical issues that comes with each of the proposed solutions. For example, option 4 may have some practical issues with its application. As the market is always changing, what is attractive at the commencement of a contract may not be the case in the future. It would also be impractical to impose such a scheme when it is often difficult to compare rates and network charges that are constantly changing based on peak and off-peak timings.

Conclusion

In conclusion, REINSW reiterates its encouragement in removing industry red tape and Government's overall goal at improving trading for consumers. However, REINSW emphasises and is adamant on the fact that these changes cannot be at the expense of much needed regulation, licenses, education and safety standards in the manners discussed above.

When changes stand to increase consumer risk and safety, REINSW strongly opposes those changes. For this reason and for those set out in this Submission, REINSW recommends that the Department reconsider its proposals for deregulation as set out in the Paper.

With respect to the proposal to review the CPD requirements across licensing regimes, REINSW encourages the Department to consult the Real Estate Reference Group if it believes those requirements need to change. REINSW considers this to be a more appropriate, effective and efficient way to address the issue as it involves the experts out in the field.

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

Red Tape Review
Fair Trading Policy
PO Box 972
PARRAMATTA NSW 2124

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

23 January 2013

Dear Sirs,

Reducing Regulatory Burden Issues Paper
Landlord and Tenant Act 1899 and Landlord and Tenant (Amendment) Act 1948

This submission by the Real Estate Institute of New South Wales (**REINSW** or the **Institute**) is in response to the *Making NSW Number 1 Again: Reducing Regulatory Burden 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.

General

The Issues Paper seeks comment on the proposed repeal of six separate pieces of legislation relating to various industries. The REINSW is an industry body representing real estate professionals and is therefore not in a position to comment on aspects other than those directly affecting the property sector. Accordingly the Institute's comments will be confined to the *Landlord and Tenant Act 1899* and the *Landlord and Tenant (Amendment) Act 1948*.

Landlord and Tenant Acts

The Institute is in principle supportive of measures to reduce regulatory burden and the cost of transacting business in NSW. REINSW believes that reducing costs and unnecessary red tape in the property sector will stimulate activity, which will in turn bring the associated benefits to the NSW economy.

The Institute does not oppose the repeal of the *Landlord and Tenant Act 1899*.

It is the Institute's view that the *Landlord and Tenant (Amendment) Act 1948* should be immediately repealed because it:

- is outdated and uncompetitive;
- disadvantages landlords as it prevents them from being able to use or deal with their properties; and
- adversely affects values of properties which are subject of protected tenancies.

Whilst the Institute recognises that the interests of any remaining protected tenants in vulnerable circumstances should be protected, it is submitted that it is the function of Government to make appropriate arrangements for the care of protected tenants in such situations.

The Issues Paper suggests two options for streamlining the legislation in order to preserve key protections for existing protected tenants. It is submitted that the costs of re-drafting the legislation would possibly outweigh the costs of Government providing alternative accommodation and care for any remaining protected tenants.

The REINSW is therefore of the view that the *Landlord and Tenant (Amendment) Act 1948* should be repealed and that the NSW Department of Housing should put in place a plan to accommodate and care for any affected vulnerable protected tenants who are placed in a position of hardship as a result of the repeal of the legislation.

The REINSW has commented on these issues on a previous occasion – please find enclosed a copy of the Institute's letter to the Commissioner of Fair Trading of 25 October 2011, which contains more detail as to the Institute's reasoning for its position on these issues.

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

Yours faithfully,

Tim McKibbin
Chief Executive Officer

Rod Stowe
Commissioner for Fair Trading
PO Box 972
PARRAMATTA NSW 2124

COPY

25 October 2011

Dear Commissioner,

Thank you for your letter of 13 September 2011 (copy **enclosed**).

Landlord and Tenant Act 1899

The REINSW does not oppose the repeal of the *Landlord and Tenant Act 1899*.

Landlord and Tenant (Amendment) Act 1948 (the Act)

Put plainly, this Act constitutes rent control legislation for residential premises. Rent control has few, if any, remaining proponents and even the tenants union concedes that such measures are tough on landlords and that this legislation is not "...a model for contemporary tenancy law..."¹.

The Act affects properties under residential leases existing before 1986 which means there are now no, or very low numbers of, affected properties. Fair Trading's best estimate in 2009 was that the Act probably governed "only a few hundred" properties; a decrease from estimated figures of around a thousand at the turn of the century; and down from around 200,000 in 1960. The experience of the REINSW is that the actual number is now probably much less than the "few hundred" previously estimated by Fair Trading.

The REINSW believes that there is absolutely no merit in maintaining the current Act, or carrying forward these provisions in other legislation, unless the actual number of affected properties can actually be determined with certainty. If there are next to no controlled properties left, there is really no barrier to immediately repealing the legislation entirely. After canvassing its entire Residential Property Management Chapter Committee (who have a vast and diverse range of managements between them), the REINSW was only able to locate 1 protected property. This single tenancy is about to end as the tenant has recently given notice. Locating past examples of hardship to landlords, their heirs and dependants, was far easier.

New South Wales' first steps towards fixing rents came with the *Fair Rents Act 1939 (NSW)* which was then partially displaced by Commonwealth regulations. The policy of rent control, when first enacted, was intended to provide security of housing for servicemen and their families 'for the duration'. It was not originally intended to have everlasting operation.

¹ <http://tunswblog.blogspot.com/2009/08/landlord-and-tenant-act.html>

That much is evident from the fact that all new lettings and leases were exempted from the operation of the Act in 1954. Further measures to de-control controlled premises came into effect in 1956 and 1958. In 1960, nearly two thirds of all private rentals were still controlled which prompted a Royal Commission, whose recommendations to further unwind the operation of the Act (including a 60% increase of controlled rents (which simply demonstrated how uncommercial controlled rents had become over 20 years)) were ignored.

It is no secret that the Act has encouraged dereliction of properties and was one of the most technically incomprehensible pieces of legislation ever enacted in NSW.

The Act is outdated and uncompetitive. It does not recognise the hardship the legislation places upon a landlord or their dependants or their heirs. Such effects include denying them the ability to live in their own premises, should their own circumstances require it. Having protected tenants also destroys the market value of any protected property denying the landlord any benefit that they may otherwise derive from the equity in the property.

The argument that the repeal of the Act would result in windfall gains for landlords is disingenuous, as it fails to take in to account the tremendous losses incurred by these landlords over many years through the inability to sell or lease their properties at full market rates. The REINSW also rejects that the assertion that no action should be taken as it will impose housing costs upon the government; after all, that is one of Government's functions and, as such, that sort of comment is merely an admission that the sole purpose of the Act is to continually impose an obligation to provide social housing upon private landlords. That was a policy that the then Minister for Fair Trading expressly disavowed during the genesis of the *Residential Tenancies Act 2010*.

The Tenants' Union's argument that the Act should remain on the statute books because old tenancy agreements have been made under it and, that accordingly, they should never be altered is flawed in that it means that policy decisions of one government would never be subject to review by later governments.

The real fact is that many successors in title to the original landlords have never had any opportunity to revisit arrangements which were imposed at a time of vastly different social circumstances.

The immediate repeal of the Act would have an effect on only a very small number of tenants, who could still be able to seek protection in the CTTT. This could be achieved by simply deeming any protected tenancy agreement to be a tenancy agreement for the purposes of the *Residential Tenancies Act 2010* (RTA 2010) to bring them within the provisions of that act. Any affected tenant will also always have recourse to Social housing or, if subjected to a manifestly excessive rent increase following the repeal of the Act, recourse through section 44 of the RTA 2010.

Similar legislation has been abolished in all jurisdictions other than NSW and Victoria. The former government and NSW Fair Trading made much of the principal of adopting the 'best' policy outcomes and legislative provisions from other jurisdictions when drafting the RTA 2010. The REINSW submits that the current government should take note of the complete

absence of this sort of legislation in other jurisdictions and heed their own policy mantra by immediately repealing the Act.

The REINSW submits that the time has come for both Acts under review to be immediately repealed to achieve the Government's stated intention of reducing red tape.

Anything less than a full repeal would be a 'clayton's' repeal as the weight of the statute books would not actually be reduced, as one act would simply be subsumed by another with no real net impact of the amount of 'red tape' governing properties in NSW.

Thank you for the opportunity to contribute to the policy discussion in relation to these important issues.

Yours sincerely,

Tim McKibbin
Chief Executive Officer



Fair Trading

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Ref: M11/3784

Mr Tim McKibbin
Chief Executive Officer
Real Estate Institute of New South Wales
30-32 Wentworth Avenue
SYDNEY NSW 2000

Dear Mr McKibbin

The New South Wales Government has given a commitment to a 20 percent reduction in red tape and introduced a 'one on, two off' policy for new regulation.

As part of this process, the Government has identified a range of possible reforms to existing legislation to achieve these goals. One such proposal involves the *Landlord and Tenant (Amendment) Act 1948*.

New South Wales and Victoria are the only two remaining States with this legislation on the statute books. Victoria is moving towards transferring tenancies covered by its Act to the general tenancy laws, while at the same time preserving the key protections of the remaining 'protected tenants'. A similar proposal is now being considered in NSW.

The proposal is a preliminary one at this stage and the Government is keen to seek the views of key stakeholders. Before considering a way forward, it is important to identify the approximate number of protected tenancies still in existence. Your advice on how many protected tenants you believe there are in NSW would be appreciated.

It is also proposed to repeal the outdated *Landlord and Tenant Act 1899*. As you may recall this was a recommendation arising from the recent review of the tenancy laws. However, it was not acted upon because it was suggested by some stakeholders that this Act may still be in use. It would be appreciated if you could please advise of any actual cases you are aware of from the last five years where the 1899 Act applied and the circumstances involved.

Your views on the above proposals will be important in shaping the preferred options. Advice on the above matters is sought by 14 October 2011. If you wish to discuss any of the above please contact

Yours sincerely

Rod Stowe
Commissioner for Fair Trading

13/9/11

A division of the Department of Finance and Services

Annexure C

The following pages include REINSW's Submission on the Review of the *Property, Stock and Business Agents Regulation 2014* (NSW) dated 13 June 2014

Real Estate Institute of New South Wales Limited
Submission

*Review of the Property, Stock and Business Agents
Regulation 2014 (NSW)*

To:

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

Email:

Real Estate Institute of New South Wales

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1. INTRODUCTION

This Submission has been prepared by Real Estate Institute of New South Wales Limited (**REINSW**) and is in response to the draft *Property, Stock and Business Agents Regulation* 2014 (NSW), issued by NSW Fair Trading on 16 May 2014 (**Draft Regulation**).

REINSW is proud to be the largest professional association of real estate agents and other property professionals in New South Wales, with members specialised in one or more practice areas, including property management, strata management, residential sales, commercial/industrial, project marketing/management, project investment, stock and station, holiday and short-term rentals, business agents, buyers' agents, auctioneers and valuers.

REINSW's business objectives include:

- (a) promoting the interests of its members and the property sector on property-related issues;
- (b) promoting and facilitating professional standards in real estate practice;
- (c) assisting members in the conduct of real estate practice;
- (d) promoting the benefits of REINSW's membership, home ownership, property and business investment.

In order to achieve the above objectives, it is imperative for REINSW to have a substantial role in the formation of regulatory policy in New South Wales. By representing its members in that way, members have a voice in shaping the legislative and regulatory framework of their industry.

REINSW has reviewed the Draft Regulation together with its accompanying Regulatory Impact Statement (**RIS**), and this Submission sets out REINSW's comments on the Draft Regulation.

REINSW agrees in principle with the intention of the Draft Regulation and to the majority of proposed changes set out in Table 2.7.1 of the RIS. REINSW appreciates that those amendments are required to:

- (a) bring the *Property, Stock and Business Agents Regulation* 2003 (NSW) (**Existing Regulation**) up-to-date with the times, particularly with respect to modern technology;
- (b) rectify unworkable, convoluted, obsolete and repetitious provisions;
- (c) give effect to, and achieve, the objectives of the *Property, Stock and Business Agents Act* 2002 (NSW) (**Act**);

(d) maintain an industry where agents are continually required to act in a professional and ethical manner; and

(e) increase consumer confidence when dealing with agents.

Whilst REINSW agrees in principle with the intention of the proposed changes, the drafting of some amendments require further attention to give effect to the true intention of the changes. This Submission sets out the relevant provisions that require redrafting or clarification.

REINSW has taken the opportunity to also include in this Submission other proposed changes and improvements to the Draft Regulation as well as its comments on, and reasons as to why it does not support, the deregulation of commercial property agency work, abolishing the need for certain agents to hold a licence.

2. COMMENTS ON THE DRAFT REGULATION

Itemised Account - clause 5(2) of the Draft Regulation (clauses 9(2) and 9(3) of the Existing Regulation)

Clauses 9(2) and 9(3) of the Existing Regulation have been combined into one clause in the Draft Regulation (namely, clause 5(2)). That way, repetition is avoided and the clause is simpler and easier to read. Those clauses have also been amended to allow a request for an itemised account to be electronically served on a licensee and to be electronically provided to the person who made the request. However, the drafting of the combined clause requires further attention because, unlike a licensee, a *person* might not have a place of business for the purpose of serving an itemised account. REINSW believes that the reference to “place of business” should specifically relate to the licensee as it does in clauses 9(2) and 9(3) of the Existing Regulation. Accordingly, REINSW proposes that clause 5(2) of the Draft Regulation read as follows:

“A request for an itemised account under section 36(3) or 101 of the Act may be served on the licensee concerned, and an itemised account may be provided to the person who made the request, by:

(a) delivering it personally to the licensee or person, or

(b) leaving it:

(i) for the licensee at a place of business of the licensee; or

(ii) for the person at an address specified as the person’s address in the request or, if not specified, in an agency agreement, or



(c) sending it by post to the licensee at the address of a place of business of the licensee or to the person at an address specified as the person's address in the request or, if not specified, in an agency agreement, or

(d) sending it by facsimile transmission to a number specified by the licensee or person (in correspondence or otherwise) as a number to which facsimile transmissions to the licensee or person may be sent, or

(e) transmitting it electronically to the email address specified by the licensee or person (in correspondence or otherwise) as an email address to which electronic transmissions to the licensee or person may be sent."

Provision of financial and investment advice – clause 6 of the Draft Regulation (clause 10 of the Existing Regulation)

The RIS states that a penalty will be included on the basis that clause 10 of the Existing Regulation lacks any penalty for enforcement. However, there is no reference in clause 6 of the Draft Regulation to a maximum penalty of 40 penalty units for a corporation and 20 penalty units in any other case, as the RIS suggests. There is, however, a "Note" that has been included in clause 6 that refers to section 46 of the Act and states that "a real estate agent who fails to comply with a requirement to provide information or warning specified in the regulations is guilty of an offence".

Section 46(2) of the Act provides that a real estate agent who fails to comply with a requirement of the regulations under section 46 is guilty of an offence, with a maximum penalty of 200 penalty units.

REINSW seeks clarification on why the proposed changes to clause 10 of the Existing Regulation (as set out in the RIS) have not been included in clause 6 of the Draft Regulation, and why a "Note" has been included that cross-refers to section 46 of the Act. REINSW presumes it is intentional and because the inclusion of penalty units in clause 6 of the Draft Regulation would be inconsistent with the penalty set out in section 46(2) of the Act. However, clarity is required in that regard.

In any event, if the drafting of clause 6 of the Draft Regulation remained, REINSW recommends that the words "a person with" be included after the reference to "provide" and that "warning" should be replaced with "warnings".

Contents of agency agreements – clause 8 of the Draft Regulation (clauses 13(4)(a) and (b) of the Existing Regulations)

For clarity, REINSW suggests a minor drafting change to clause 8(4)(a)(iv) of the Draft Regulation. That amendment would be to include "electronic" after the reference to "person's".

Proof of identity for Bidders Records – clause 14 of the Draft Regulation (clause 17(1) of the Existing Regulation)

Clauses 17(1)(a)-(e) of the Existing Regulation have been redrafted in clause 14 of the Draft Regulation for the purpose of combining the subclauses. Again, that would avoid repetition and it makes the provisions easier to read. To completely achieve that objective, REINSW recommends combining clauses 14(1)(a) and 14(1)(c) of the Draft Regulation. By doing so, clause 14(1)(c) is deleted and clause 14(1)(a) would read as follows:

“(a) a card or document that is issued by the government or a statutory authority of New South Wales, the Commonwealth, another State or Territory, or by an authorised deposit-taking institution, and:

- (i) shows the name and address of the person; or*
- (ii) shows the name of the person, together with a statutory declaration by the person as to the person’s address,”.*

Provision of unique identifying number when opening or maintaining a trust account – new clause 19 of the Draft Regulation

REINSW is not opposed to the introduction of a unique identifying number for general trust accounts to ensure that deposit-taking institutions are accountable for interest paid into the Statutory Interest Account.

However, REINSW is concerned that there is no process in the Draft Regulation (or accompanying it) that explains how to obtain the unique identifying number, other than an agent must obtain it from the Department of Finance and Services. REINSW recommends further consideration take place on what the process involves, the timeframe and practicality for agents to apply to the Department and be given a unique identifying number.

REINSW also recommends clarification be given, perhaps by way of a definition in the Draft Regulation, as to what is a “unique identifying number”. REINSW assumes the intention is for the Department to issue each agency with a specific number to separately identify them from other agencies; however, that is only an assumption.

Section 31 exemptions – person in charge at place of business – clause 39(2) of the Draft Regulation (clauses 6(1) and (2) of the Existing Regulation)

Since the matters specified in clause 39(2) of the Draft Regulation are to be taken into account by the Director-General, from a drafting perspective, REINSW recommends the words *“For the purposes of subclause (1)”* be inserted at the very beginning of the preamble of subclause (2).

**Conditions of sale by auction – clause 15(3)(d) of the Draft Regulation (clause 18(2A)(d) of the Existing Regulation)**

REINSW suggests that clause 15(3)(d) of the Draft Regulation be deleted because attendees at an auction (including other bidders) do not need to know the identity of any co-owner, executor or administrator or any person registered to bid on behalf of those people.

REINSW is of the view that disclosing the identity of potential bidders might impact on whether or not other prospective purchasers might bid on a property. Further, REINSW does not consider clause 15(3)(d) to offer buyers or sellers any consumer protection which they are entitled to receive.

Definitions – clause 11 of the Draft Regulation (clause 14 of the Existing Regulation)

REINSW is of the view that the definition of “property” in clause 11 of the Draft Regulation should exclude rural land with an area of greater than 20 hectares. The reason for that position is because land that is greater than 20 hectares in size is essentially considered to be commercial real estate, having regard to the commercial use of that property. Therefore, rural property that is predominantly commercial should be treated differently to residential rural property. There needs to be a clear distinction between the two.

Bidding at auctions of residential property or rural land is covered in Division 2 of Part 5 of the Act. Those provisions place restrictions on vendor bids and require bidders to register and be identified at auctions with respect to the sale of residential property or rural land. As a result, potential buyers of rural land might be reluctant to register as bidders and participate in auctions.

Those provisions do not apply to vendors and purchasers of non-rural commercial land. Therefore, they should equally not apply to vendors and purchasers of rural land with a commercial purpose.

3. DEREGULATION OF COMMERCIAL PROPERTY AGENCY WORK

REINSW has been invited to comment on the possible deregulation of commercial property agency work, which would make certain work exempt from the requirement to hold a licence.

REINSW opposes de-licensing and deregulation within any area of the real estate profession, including commercial practice. In a de-licensed and deregulated environment there are no probity checks of service providers and, alarmingly, no training. Without the requisite competencies, knowledge and skills required to deliver services in this complex area of our society, consumers will be placed at risk and the industry and profession will be damaged.

REINSW's position is that the licensing requirements in New South Wales is currently grossly inadequate and should be modelled against the training requirements offered in other jurisdictions, where a broader skill-set is required to that in New South Wales. For

instance, the licensing requirements in the Northern Territory, South Australia and Tasmania recognise the importance of a broader skill-set through agents needing to hold a higher level qualification to gain their licence.

In the instance of entry level training into the profession, the number of units of competency required across jurisdictions varies dramatically. For example, in the Northern Territory, South Australia, and Tasmania the units of competency vary from 17-21, as opposed to just 4 units in New South Wales. Whilst the number and selection of units of competency required for entry into the profession is reflective of each jurisdiction, in New South Wales the required 4 units have no relevancy to commercial property agency practice. REINSW would welcome a review of the number of entry level unit requirements in New South Wales which would create a more consistent and relevant approach for the State, as well as reflect training regimes in other jurisdictions.

The deregulation of commercial property agency work would be going further in the wrong direction and would be counterproductive for consumer protection in the commercial space. REINSW considers it imperative for all types of agents to be properly trained and licensed, including commercial agents, whether that is underpinned by a full qualification or a skill-set from a nationally accredited training package or non-accredited short courses relevant to the area of commercial practice. This learning requirement should be determined by the State regulator (being, NSW Fair Trading) in consultation with the industry, the needs of the market in New South Wales and legislative requirements.

Accordingly, REINSW suggests that the selection of units of competency for the entry and licensing requirements be reviewed to allow for additional and more relevant units specific to the area of commercial practice.

REINSW is of the view that there can never be a substitute for a properly trained and regulated service provider. The proposal to deregulate commercial property agency work will adversely affect the consumer, the industry and the profession. REINSW does not support the proposal and strongly recommends that it be rejected.

REINSW is concerned that the result of deregulating commercial property agency work would be that anyone could carry out that type of work without having completed a qualification or skill-set that underpins a regulatory requirement, and without any experience, training, probity checks, minimum age requirements, regulatory environment, rules of conduct and requirement for professional indemnity insurance (to name a few).

The industry, its professional standards and reputation would diminish. In addition, there would be a potential lack of trust from consumers who would face no security, trust account protection and other consumer protections that accompany a regulated profession.

REINSW is concerned that the industry may become corrupt with commercial property agents, who might have had their licenses suspended or cancelled, being able to practice again if there was no licence requirement for that type of work.

Ironically, the ability to practice without a licence goes against everything that the Government's campaign to amend the Existing Regulation stands for. As set out in the RIS, the Draft Regulation benefits consumers by:

- (a) prescribing rules of conduct which require agents to treat their clients and customers professionally and ethically;
- (b) requiring agency agreements to include fair terms and warnings for clients about cooling off rights and circumstances in which more than one commission might be payable;
- (c) requiring agents to give clients warnings and information when giving investment advice;
- (d) ensuring itemised accounts are delivered to clients correctly;
- (e) ensuring that all prospective bidders are able to register to bid at auctions of residential or rural property by providing for flexible registration and proof of identity requirements;
- (f) requiring warnings about bidders' rights and obligations to be given at auctions;
- (g) protecting consumers' funds held in trust by agents by prescribing trust accounting and record keeping requirements;
- (h) ensuring that agents whose licences have been suspended remain accountable to former clients;
- (i) providing access to information on the public Register about licences and certificates issued under the Act and the compliance history of agents; and
- (j) providing for payment of contributions to the Compensation Fund, which is available to compensate consumers in the event of trust account.

The removal of the requirement for certain agents to hold licenses would be in contrast to the intention of the Act and Existing Regulation and would strip consumers of any benefit they receive by the profession's regulatory framework.

In addition, REINSW does not support the proposition to exempt providers of real estate services to be licensed for large property holders for the following non-exhaustive reasons:

1. tenants and consumers need to be protected from business operators behaving in a manner that has no control mechanisms, such as the Act and Existing Regulation;
2. the industry must be protected from allowing non-licensed people opening up real estate consultancies/agencies using the exemption as a precedent to trade unlicensed; and

3. operators must be continually updated with the industry, relevant laws and other significant issues affecting their business through the benefit of compulsory continuing professional development required as a condition of licensing.

REINSW is concerned that the exemption would open up a precedent that could affect the entire real estate industry. It would damage the integrity of existing licensed operators and would pave the way for unscrupulous operators to act as they choose without any governing act or regulations. To support the exemption would be to ridicule the importance of compliance and potentially place tenants and consumers at risk.

3. CONCLUSION

REINSW commends NSW Fair Trading and the Hon Matthew Mason-Cox, MLC, Member of the Legislative Council, Minister for Fair Trading, and Member of the Liberal Party, for the opportunity to amend the Existing Regulation.

Whilst REINSW welcomes the changes to the Existing Regulation, it requests NSW Fair Trading consider this Submission and amend the Draft Regulation so that it reflects the comments and suggestions set out herein.

For the record, REINSW does not support the possible deregulation of commercial property agency work, which would exempt providers of real estate services to be licensed with respect to large commercial property.

REINSW thanks you for the opportunity to provide this Submission. Should NSW Fair Trading wish to discuss it further prior to finalisation of the Draft Regulation, REINSW is more than happy to do so.

Yours faithfully

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

Annexure D

The following pages include REINSW's Submission - Review of the *Conveyancing (Sale of Land) Regulation 2017* (NSW) dated 16 June 2022

Office of the Registrar General
Department of Customer Service

Dear

Submission – Review of the *Conveyancing (Sale of Land) Regulation 2017 (NSW)*

The Real Estate Institute of New South Wales Limited (**REINSW**) understands that Government is currently reviewing the *Conveyancing (Sale of Land) Regulation 2017 (NSW)* (**Regulation**) and would like to take this opportunity to provide some comments which we hope will be of assistance in this process. In particular, we request Government consider including a provision in the Regulation requiring mandatory disclosure by the vendor to the purchaser of any material facts which may affect a property, including whether the property is listed on the New South Wales Loose-fill Asbestos Register (**Asbestos Register**). REINSW also recommends that such disclosures be annexed to the contract for sale to ensure the purchaser is clearly aware of this information before signing it.

Although real estate agents are obliged to disclose to purchasers material facts about a property (including pursuant to a non-exhaustive list set out in clause 54 of the *Property and Stock Agents Regulation 2014 (NSW)* (**PSA Regulation**)), a vendor has no such obligation under section 52 of the *Property and Stock Agents Act 2002 (NSW)* (**PSA Act**). REINSW is of the view that the lack of disclosure obligations incumbent on the vendor creates the following issues:

1. The purpose for disclosing material facts is primarily to protect consumers and to ensure that they are adequately informed of relevant information which may impact their decision to enter into a contract for sale. This is important because a property transaction is likely to be one of the most significant financial decisions that a person makes throughout their lifetime. While purchasers should conduct their own due diligence, sometimes important enquiries can be omitted. Other information may be of a nature which is not readily available through a search or public register. It could be a latent or patent defect or safety issue unique to the property which is not apparent from an inspection, or it could involve information about a previous crime committed at the property. For example, REINSW is aware of one agent who exchanged a property in a strata complex and who was not informed by a vendor of an Emergency Annual General Meeting called to determine a special levy. The agent only found out about it because their agency managed another property in that complex and had received for that particular landlord a notice of the meeting. Imposing a mandatory obligation on the vendor to disclose information of this nature helps purchasers make better informed decisions about whether a property is right for them, when making this large financial investment decision.
2. There is no requirement for a vendor to inform an agent of a material fact, which impedes upon the agent's ability to fully comply with their obligations under section 52 of the PSA Act. In fact, there is actually an incentive for a vendor not to inform the agent of information of this nature as doing so will generally adversely impact the property's value. Not only does this undermine the consumer protection objectives mentioned above, but where a vendor fails to disclose a material fact to an agent, the agent might be at risk of liability under section 52(1)(b) of the PSA Act where they "ought reasonably to [have] know[n]" about it.
3. The current lack of disclosure obligations on the vendor creates a conflict-of-interest between agent's obligations to the vendor and purchaser. It requires the agent to act in their client's best interests while also disclosing to the purchaser material facts. This creates tension between the agent and their client which could be removed where both the vendor and agent were under the same obligation to disclose this information to the purchaser.

REINSW's view is that these issues could be resolved in the Regulation as a mandatory disclosure obligation requiring the vendor to inform purchasers of any material facts affecting the property.

For consumer protection purposes and similar reasons stated in paragraphs 1-3 above, REINSW also recommends that vendors disclose if their property is listed on the Asbestos Register. Although this would also fall within the scope of a "material fact" (should Government agree with REINSW's recommendations on this matter) and there is already a prescribed warning in Item 16 of Schedule 1 to the current Regulation recommending the purchaser search the Asbestos Register and contact their local government about any record of loose-fill asbestos in the property, given the significant health and safety impacts of this material, REINSW's view is that there should also be a specific duty for vendors to disclose this information in the contract for sale if they know the property is on the Asbestos Register.

REINSW recommends that these mandatory disclosures should be included as prescribed warranties in the contract for sale, akin to the warranties in the contract in Part 1 of Schedule 3 to the current Regulation.

For the reasons given in this submission, REINSW would be grateful if Government would consider amending the Regulation on the above basis as we believe it would assist all.

We thank you for your consideration of our submission, we are available to discuss our submission if you wish. Otherwise, we look forward to receipt of your response.

Yours faithfully

Tim McKibbin
Chief Executive Officer