

Department of Fair Trading
PO Box 972
PARRAMATTA 2124
e. policy@customerservice.nsw.gov.au
e. sc@customerservice.nsw.gov.au

Natasha Mann
Deputy Secretary
Better Regulation Division
Commissioner for Fair Trading

Anoulack Chanthivong
Minister for Fair Trading
<https://www.nsw.gov.au/nsw-government/ministers>

Jihad Dib
Minister for Customer Service
<https://www.nsw.gov.au/nsw-government/ministers>

John Minns
Property Services Commissioner
<https://www.nsw.gov.au/property-services-commissioner/contact-property-services-commissioner>

RE: Changes Required in the Real Estate Industry

Dear Sir or Madam,

I write suggesting changes to legislation governing the Real Estate Industry, so as to improve service outcomes in this sector across NSW.

Every year, defective practices in Real Estate causes considerable undue expense to landowners across NSW, affecting the residential housing stock across NSW.

- Many Real Estate Agents have over 200 properties under their administrative control but only a small handful of administrative staff. In addition, there remain a number of 'assistant agents' who have power to show properties for lease and for sale, sign leases, inspect properties and complete condition reports, arrange repairs and maintenance. They are always very junior and have no chance of informing the owner of anything serious, such as lack of safety switches, problems with plumbing, electrical, or matters that require initiative and interpretation. They are simply there to reduce costs for the licensee but have limited experience.
- There is technically no way these people can meet the minimum statutory obligations of leasing each of the properties. If there are no minimum statutory requirements, they are almost certain not to lift a finger to do anything significant.

This is an area needing increased regulation and compliance or else NSW is likely to experience widespread disaster, typified by depreciation of the quality of rental properties from defective administration in Real Estate. It is one of the reasons, we had so much

disaster throughout the last La Nina, and why the property industry in NSW is about to experience significant damages if such weather events happen again. Owner occupiers tend to maintain their buildings but those buildings managed by real estate agents are mostly neglected.

To fix this problem I suggest either:

- a) Limits be prescribed over how many properties each agent takes on; or
- b) The NSW Real Estate licencing system be updated to prescribe a minimum number of annual inspections required for property managers of residential buildings; or
- c) Other policy measures be taken to lift the standards of property management in NSW.

Owners give Agents their trust over the day-to-day administration of their most prized asset but most owners are so busy working long hours to earn the money required to pay mortgages, that they can't keep a close eye on agents, who constructively and negligently fail to administer their obligations under NSW law, leaving owners with significant damages. When things go wrong, landowners are left with limited options. Very few owners can access legal aid, due to the value of their assets and thus any legal action requires engaging private lawyers which makes litigation too expensive.

- In *Northern Sandblasting Pty Ltd v Harris*, the court held that a landlord owes a duty of care in negligence to the tenant and members of the tenant's family to ensure that reasonably discoverable defects in the premises are remedied at the commencement of the lease.¹ If an Agent is representing the landlord and doesn't highlight this, then the agent is at fault and liable. Yet there are a number of agents who are leasing properties these days, without even first visiting the property. There is no way they can discover defects at the commencement of the lease if they do not visit.
- Where a lease contains an express covenant 'to keep and deliver up premises in a satisfactory state of repair', and the premises are in a state of disrepair at the commencement of the lease, the tenant is immediately in breach. Where the landlord gets no notice of any need for repairs, there is no liability on the landlord.² Often the agent is at fault for neither inspecting the property, nor passing on tenant complaints.
- *Where the premises are not in repair when the tenant takes them, he must put them into repair in order to discharge his obligation under a contract to keep and deliver them up in repair.*³ <https://swarb.co.uk/obrien-v-robinson-hl-19-feb-1973/>.
- *Where the lessee and his wife were injured because a ceiling collapsed on them, the landlord was held not liable because he had no notice from the tenant that the premises were in disrepair". O'Brien v Robinson (HL 1973).* Again, often the agent is at fault for not even inspecting the property.

A large amount of the negligence from Real Estate Agents is constructive and intentional. They tend to lie and make up all sorts of stories which makes them difficult to be held accountable for anything. Perjury and contempt is something that can only be prosecuted when an agent is before a court of law. When agents don't even co-operate on a daily basis, it is difficult to get them before a court of law. However the industry provides incentives for agents who are best able to tell lies in a way that can't be detected.

The ABC wrote a recent article on how Real Estate agents lure buyers and sellers.⁴ Agents have a tendency of over promising and under delivering. This is largely due to greed and exploitation. It's also due to the wording of the statute and lack of proactive compliance from

¹ *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313. For a discussion of this case, see L Griggs, 'The Tragedy of *Northern Sandblasting v Harris* and the Landlord's Liability to Third Parties.' (1998) 6 APLJ 169.

² Samantha Hepburn, *Australian Property Law, Cases, Materials and Analysis*.

³ *Proudfoot v Hart* (1890) 25 QBD 42 at 50.

⁴ <https://www.abc.net.au/news/2023-03-27/real-estate-agents-reveal-secret-tactics-of-industry-/102133830>

Fair Trading, which allows agents to get away with poor behaviour unless persistent complaints are lodged, which most people can't afford to do. Agents tell an owner what they want to hear, with the premise that they are more likely to get the listing. This problem extends to leasing as well. Their *modus operandi* is to appraise properties high without accountability, then as the leasing campaign runs its course, they adjust the owners' expectations to where the market is.

I am the Attorney for a family portfolio [REDACTED]
[REDACTED] In addition, I have been closely aligned to the management of the properties for the last 30 years. I did a full audit of the holdings. My family (as landlords) have experienced tens of thousands of dollars' worth of damage due to agents failing to represent our best interests and failing to do their job properly. This has been financially crippling and personally devastating, especially when I previously had a successful career. Because of my success, I was called upon by the family to do whatever I could to remedy the situation. However, every dealing with agents and tenants, ruins my career more. They do very little, and then when held to account, they tell whatever lies are necessary to avoid responsibility. There are not enough days in the year for me to take every matter through judicial recourse.

I have tried several different agencies, from large agencies with lots of staff, to small agencies with only 2 or 3 staff. Very few agents ever try to meet (let alone exceed) statutory obligations. Over the last 12 months, I have had to sack 5 agents for defective administration and not adhering to the basic statutory obligations of the *Residential Tenancies Act 2010* (NSW) and failing to deliver on the instructions of the owner. NSW Fair Trading will be aware of numerous complaints I have made to advise of practices occurring in Real Estate. I have done this out of an attempt to keep the industry clean. I am not convinced things are improving.

Over the last 4 years, I have undertaken my own independent research to examine the negative impacts of the real estate industry on land owners. I have tried to focus on the internal processes and operation of a number of specific Real Estate Agencies to try to understand why the industry is so negligent and why officers make so many mistakes. Agents tend to get away with it, as they have a low level of training, thus a low level of responsibility and accountability. They know how to duck and weave as they are very experienced with making errors. Meanwhile, owners are left with no option other than to take matters through the legal process, of which is expensive and very few owners have resources or capacity.

On one day, I played the role as a mystery shopper, first posing as a prospective tenant, dressed in jeans and a t-shirt, then on another occasion, as a prospective buyer, with pin striped pants and a collared shirt, then on a separate occasion, as a person with a large portfolio, dressed with a suit, tie, pleated shirt and of course, a brief case.

- When I was a prospective tenant, agents said yes to everything I said.
- When I was a prospective buyer, every idea I had for the new place, was met with overwhelming support, even though many of my ideas were illegal.
- When I dressed as a person with a large portfolio, I was asked out to lunch by the proprietor who, upon first impression, appeared the sort of guy to have had many long lunches.

Each time, the relevant officer, pandered to my needs. There was no attempt to critically appraise, or bring into reality anything I said. Nor was there any disagreement with the things I said, even though many of them were beyond the scope of the law. They just agreed and vibed with everything I said, wanting me to open up my trust and hand over my wallet.

Leasing agents are required to meet the minimum statutory requirements under the *Residential Tenancies Act 2018* (NSW), the *Residential Tenancies Regulation 2019* (NSW), the *Property and Stock Agents Act 2002* (NSW) *Property and Stock Agents Regulations*

2022 (NSW) and *Australian Consumer Law*. s55 (2)(a) *Residential Tenancies Act 2010* (NSW) enables landlords to request to inspect the premises as much as 4 times every 12 months, then to list the property, the agent needs to inspect the property and to vacate the property and do a property condition report they need to do similar. Property managers are required to list a property, do property condition reports, open places up for inspection, undertake 3-monthly inspections, field maintenance requests. It would also be optimal for agents to attend the property before and after maintenance calls are made. In addition, there are other functions, including telephone calls and account administration.

It is common for Agents to gloat about taking on over 200 properties with only 3 or 4 staff but upon closer investigation, once all the clerical details are entered into a database and systems are set up to take rents and pay bills, they do very little. Agency agreements enable Agents to take from 5-7% of the rents for each property they lease out (plus \$110% of the first week).⁵ Assuming the average lease spans 12 months, and assuming 1 in every 2 leases are extended, if an Agent is representing the interests of the landowner in the best possible way by doing his/her job properly, he/she should be visiting a property at least 6 times per annum. 6 x 200 properties = 1200 site visits. When weekends, public holidays, annual leave and sick leave is excluded, each staff member has approximately 200 business days in a calendar year to do their job. There is no way they are going to achieve this. Let alone do other functions that owners may request, such as do a drive by and take photos of potential storm damage, or general upkeep, or maybe the odd letterbox check or light tidy up of the property.

If Real Estate Agents, continue to agree to take on more and more properties, there can be no way they are covering all their legal obligations or representing the owners' best interests. For example, s 55 (2)(a) *Residential Tenancies Act 2010* (NSW) enables landlords to request to inspect the premises as many as 4 times every 12 months, however there is no minimum and therefore, if owners don't request inspections, agents rarely undertake them.

Those in the Real Estate industry are typically charismatic, enthusiastic, bright, positive and energetic people, who are very good at selling and influencing others, but this extends to vacant mindedness when dealing with legal obligations. Every time I check their conduct, they make errors. Documents almost always have basic clerical errors which costs me time to review and reissue. It also undermines the legitimacy of the agreement.

- Repairs are rarely done strategically or logically, and miscommunication is rife, as there is a tenancy for Agents to lack critical thinking skills. They merely parrot instructions, without taking any initiative or critical thinking. This causes cumulative errors.
- If the owner doesn't compel the agent to do an inspection, and doesn't accompany the agent at the inspection, it is almost certain they won't schedule an inspection.
- Then when there is an end of lease or termination, the agent doesn't visit, rather just asks the owner if he/she wants to relist the place – and almost always the place is left in a worse state of repair even though property condition reports were done and if the owner visited, he/she would recognise it.
- But making agents accountable when they don't do their jobs is fraught with difficulty as they tell lies, and make all sorts of excuses and decoys to cover their defective administration.

Many officers enter the industry with only a TAFE certificate, which can be done in 6 months. Senior executives have mostly got where they are from networking and talking, not so much from extensive academic rigor or practical skills in property management (such as carpentry, building, or structural engineering).

⁵ This means they only need to 'manage' 20 properties to be earning the full amount rent from any one property. But they don't stop at 20 properties, many take on over 200 properties.

I have spent many years analysing the behaviour of Real Estate Agents. I this time, I have observed most agents promise the world of new owners to achieve an agency agreement, but once they have got the agreement, they slowly fail to undertake their obligations. This causes home owners a significant amount of costs, which are very difficult to recoup. Then it causes excessive inflation as everyone needs to cover the costs of the widespread leakage of defective administration. They have a tendency of agreeing with everything the new client asks of them but unless there is constant dialogue or pressure from the owners, it is rare that leasing agents will take any initiative. These officers need a high amount of direction and guidance over everything they do. People trained in other industries assume the opposite. For example, I wake up at 5am most days, to do my legal citations. I do this without payment or pressure.

Agents are neither legally trained or qualified. They act as the intermediaries between landlords and tenants but are unable to force the hand of tenants on matters that are unsavoury. Tenants know this, so they deny everything and fail to negotiate reasonably. Even the most junior officers, seem to learn very quickly how to pass the blame when anything goes wrong. As such when things turn nasty, the owner has to take the matter to a Tribunal to adjudicate an outcome. Where there are grey areas, such as when unsavoury matters occur on common land, or where there are not separately metred services and the property is agency managed, the landowner loses every time. As much as they ask the Agent to help them, the agent is neither legally trained or qualified or respected. For example, where a suspected tenant continues to cause damage on common land, with paint marks on their vehicle to show for it, but no camera footage, upon asking an agent to negotiate the remedy, the agent will default to saying there is no proof without video camera footage. Yet, if they were legally trained, they would understand the burden of proof in civil matters is on the balance of probabilities and they would have accepted photos as evidence and be tactful, persuasive and dogged in achieving an outcome.

Schedule 1 General Rules of conduct applying to all agents and assistant agents of the *Property and Stock Agents Regulations 2022* (NSW) requires an agent to have a knowledge and understanding of the following as necessary to enable the agent to exercise the agent's functions lawfully.

- (a) the Act and the regulations under the Act,
- (b) other laws relevant to the category of licence or certificate of registration held by the agent, including laws relating to the following—
 - (i) residential tenancy,
 - (ii) fair trading,
 - (iii) competition and consumer protection,
 - (iv) anti-discrimination,
 - (v) privacy.

This is a useful clause but it is rarely enforced or policed and when a client compels their agent to abide by it, many agents take great offence even to the thought that a client is holding them to account and then they cancel the agreement. There are also very few clauses that compel agents to do anything.

Like 1 in 4 people in NSW, I am a person with a disability. One of the features of my disability, is I tend to take what I am told, as fact, and act on it, in due diligence. In effect, I don't have a filter, like some people might. But I am legally trained and am very knowledgeable and experienced. So, I do tend to question (and reflect on) some things I hear. Many others, including the elderly, inexperienced, young, or uneducated are tricked and deluded by agency puffery.

However the moment the client asks for some practical help in return (normally people who we forge relationships with, tend to help us), agents will clam up and find a way to charge for any form of help. In my legal training, I have come across many cases, where Drs and

Surgeons, who may not be skilled in property, but very knowledgeable and diligent people, have experienced significant financial damages due to the defective administration and puffery of agents. However, only a Dr or a Surgeon has the financial resources to bring such a matter to the court of law. Most people don't. Most people have to write off the expenses.

Prospective agents jump at the opportunity to be appointed as leasing officers for our family buildings. This is because there are multiple units in the one building. They are very good at making a first impression. One day, I visited several agencies, asking if they would take on the property portfolio. They all dropped whatever they were doing to take the opportunity. Some even visited me at my residence, deferring other tasks they had on that day. However, in four (4) years, after five (5) different agencies, every single one has either constructively or negligently failed to administer basic requirements under the *Residential Tenancies Act 2010* (NSW). The first 2 months, involve a flurry of administrative emails requesting basic bank details, company names, filling out forms and exchanging pleasantries, there is very little dialogue. Once all the paperwork is uploaded into their systems, they do very little.

Agents fail to undertake all the statutory requirements of their obligations. This is not only negligence but they do it constructively, as a way to make more money. This enables them to continue to acquire more Agency agreements. Many Agencies operate as pyramid type schemes. They thrive on unjust enrichment and extortion. Then when they are cross examined about their conduct, first they deny it, then they try to lie, then when evidence is presented to illustrate their lies, they simply end the agreement, knowing recoupment of damages requires formal legal action which is expensive and takes considerable time.

There needs to be greater regulation on the agent to property ratio. In NSW Hospitals, there are strict nursing to patient ratios, in schools there are teacher to student ratios. The Real Estate industry needs to put a cap on the ratio of agents to properties. Agency agreements are generally registered with the lodgement of the bonds. It is not uncommon for some agents to have 500 properties. These need to be tracked.

On Federal highways, average speed cameras were set up to reduce speeding from truck drivers who are known to push the speed limits in areas where there are no cameras. On NSW Roads, speeding cameras are installed where fatalities occur to improve the black spots. In COVID, local councils employed more parking officers, as it became the only way they could earn money, with most people being stationed at home. Now that NSW is back to business, the state needs to employ more people to bring the dishonesty levels of agents down to a more manageable level. Limits need to be placed on how many properties a licenced agent can manage in the one agency. Otherwise, agents will keep taking on more properties and neglect the ones they have.

NSW needs tougher penalties on Real Estate Agents. Currently, incentives provide for Real Estate agents to act dishonestly. Many agents develop bad habits, in being opportunistically and deliberately untruthful. Legislative change will create better outcomes, improve service, create more jobs and reduce the proliferation of disasters in residential property, both amongst tenants and owners.

The World Health Organisation defines "*elder abuse as a single or repeated act or lack of appropriate action occurring within any relationship where there is an expectation of trust which causes harm or distress to an older person*". This sort of behaviour is embedded in the procedures of real estate agents. QLD have proposed Schedule 1 of the *Criminal Code Act 1899* (QLD) under s408C(1)(b) to the effect of a person who dishonestly compels an elderly person to certain things regarding property transactions to them without legal justification may be considered to have committed the offence of fraud. This extends to a real estate agent who places fees on things that have neither been discussed or administered.

I understand NSW Fair Trading has the capacity to issue on the spot fines, to a maximum of \$2,200 and in the last 12 months has issued over \$30,000 worth of fines. However, this is not enough. There are only 9 officers in the compliance section of NSW Fair Trading, despite there being over 40,000 registered Real Estate Agents – of which many of them have over 200 properties. The collateral damage across the state is extraordinary.

I request this letter be read jointly with my letter titled 'Misleading Position Titles in the Real Estate Industry', which I previously sent to NSW Fair Trading. In this letter, I suggest 'property managers' be named 'leasing agents', to more accurately illustrate the scope of their roles.

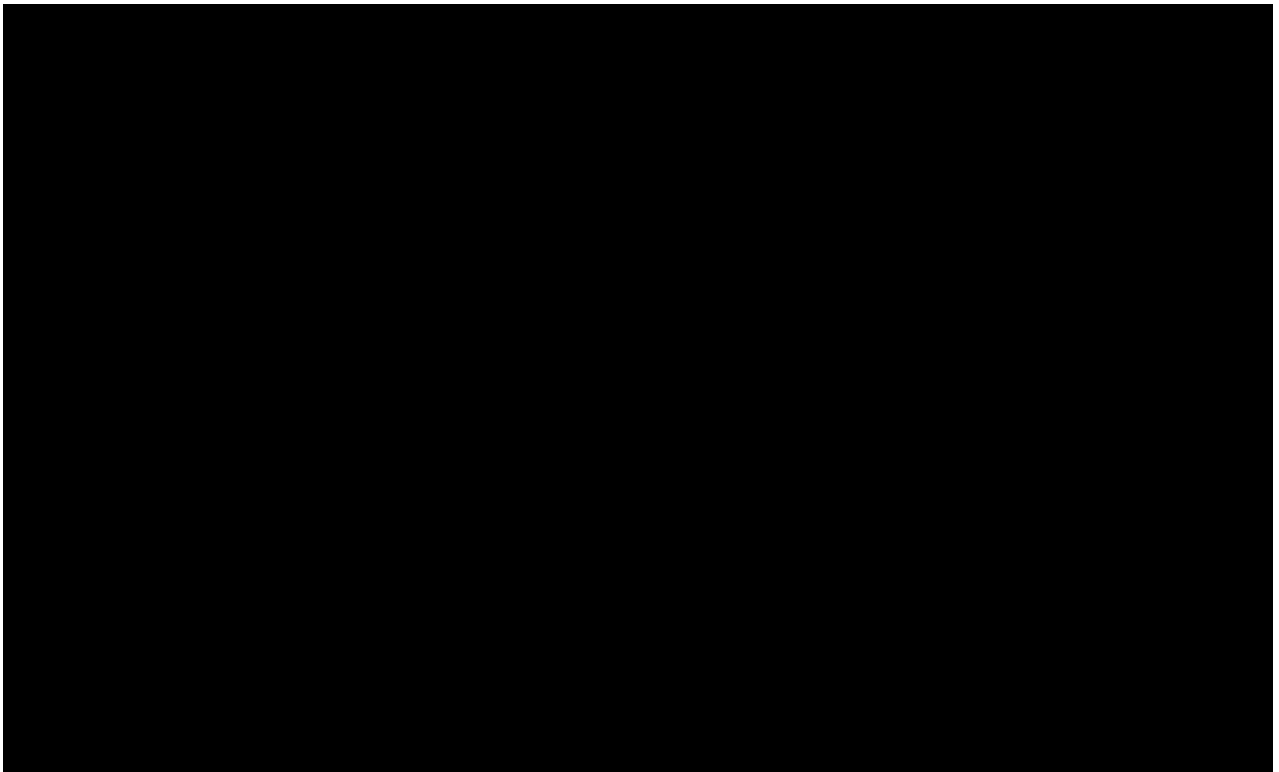
Please do not hesitate to contact me on [REDACTED] should you wish to discuss this further.

Yours Sincerely

[REDACTED]

[REDACTED]
17/05/2023

ATTACHMENT A – PHILOSOPHY OF RESISTANCE



There is a need for more regulation to protect property owners from defective real estate agents.

BEFORE – [REDACTED]) under Real Estate Administration

[REDACTED] Left to go to ruin under Real Estate Administration. NSW Legislation does not prescribe a minimum amount of inspections.

