SHOPPING CENTRE
COUNCIL OF AUSTRALIA

Review of NSW Property Stock

and Business Agents Regulation 2014

Submission by the

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Review of NSW Property Stock and Business Agents Regulation 2014

1.0 Summary: An opportunity to reduce business costs by $4 million a year

Our submission strongly supports the two possible exemptions from the *Property Stock and Business Agents Act* identified in this Review:

- *"A corporation performs commercial property agency work on an affiliate's behalf;*
- *A large commercial property exceeds a designated total floor area, or total estimated value, both of which would be determined through this consultation."*

Ten reasons to support these exemptions from licensing and regulation for 'related entities' and 'large commercial property owners'

First, this will free large commercial property owners from costly and irrelevant business regulation. We estimate the inclusion of these two exemptions in the new *Property Stock and Business Agents Regulations 2014* will reduce the cost of doing business in NSW by at least $4 million a year (4.3).

Second, both exemptions have been recommended by independent inquiries in NSW and in the regulatory impact statement processes of the National Occupational Licensing System (2.1 & 3.0).

Third, these exemptions have been legislated by the Queensland Government and are now being implemented by the Victorian Government (2.2 & 3.1).

Fourth, this is consistent with the Government's objective of reducing regulatory costs for business and the community by 20% by 30 June 2015, which is estimated to require reductions in the regulatory burden of $750 million a year (4.4).

Fifth, these will not affect small commercial property owners. The 'sophisticated consumers' of property management services are professional property owners who fully understand the risks involved in property transactions and have the ability to protect themselves, legally and commercially, against such risks (4.2 & 4.1).

Sixth, neither exemption will pose risks to commercial tenants or to the wider community in NSW (4.5).

Seventh, the real estate agent's license is not professionally relevant to staff managing on behalf of large property owners, since the licence is overwhelmingly orientated to residential property transactions and to real estate agency work (4.8).

Eighth, trust account regulation is not needed for large commercial property owners (4.6).

Ninth, this is a very minor piece of deregulation. We estimate these exemptions will affect only 629 commercial buildings in NSW - fewer than 1% of all commercial buildings in the State. Nevertheless its financial impact will be significant and will reduce the cost of doing business in NSW by around $4 million a year (4.2).

Tenth, this is a **'win, win' outcome**. The Government can rightly claim it has reduced the cost of doing business in NSW, while also making savings in its own administration, and without posing risks to tenants. Commercial property owners (whose investors are mainly people saving for, and living out, their retirement) will have been freed of unnecessary and costly business red tape.

We have **included** in this submission **suggested drafting** for both exemptions.

2.0 Related entity exemption

There is no justification for the regulation of the activities of real estate agents when the agency relationship is between a property owning entity and a manager which is organisationally related to the property owner. People or entities who directly sell, manage or lease commercial property do not need to be licensed since no agency relationship exists. However when, because of the organisational structuring of large businesses, the buying, management or leasing of property is not performed directly but through a related entity, such agents are required to be licensed, even though there is still no proper agency relationship between the owner and the manager.

It is obviously absurd, and was never the intention of the *Property Stock and Business Agents Act* ("the Act") that employees of, say, Westfield Shopping Centre Management are required to be licensed when managing or leasing shopping centres on behalf of the Westfield Group (with property assets of around $68 billion) or that employees of AMP Office and Industrial must be licensed when managing and leasing offices on behalf of AMP Capital Investors (with property assets of around $12 billion). This is the bizarre situation that exists today, however.

This means, for example, at Chatswood Chase Shopping Centre, relevant employees of the manager, an entity of CFS Retail Property Trust Group, must be licensed and observe the provisions of the Act, even though CFS Retail Property Trust Group (with property assets of nearly $9 billion) is the owner of the centre and management is conducted according to a legally enforceable management agreement. This is obviously nonsensical regulation.

2.1 Recommended by independent inquiries

A 'related entity' exemption has been recommended by three independent inquiries in NSW. The *NSW Statutory Review of the Property Stock and Business Agents Act* in 2008 recommended "*that commercial property owners who sell or manage property for a related corporate entity should be exempted from the Property Stock and Business Agents Act."* The NSW Independent Pricing and Regulatory Tribunal, following an investigation of the burden of regulation in NSW in 2006, recommended: "*exemptions from requirements for commercial property agents who are managing the property of a related company*." In IPART's draft report on reforming licensing in NSW in October 2013 (released in May 2014), it again recommended: "*NSW Government should exempt commercial property agents who sell or manage property for a related corporate entity from the requirements of the Property Stock and Business Agents Act*". Despite these recommendations, no action has been taken by the NSW Government.

The need for a 'related entity' exemption was also recognised at the national level in the deliberations in relation to the (then) proposed national license for real estate agents. The *Decision Regulation Impact Statement: Proposal for national licensing for property occupations* ("the Decision RIS"), in July 2013, noted "*an exemption from engaging a licensed real estate agent for non-residential property transactions between related entities has received full support from the industry".* The Decision RIS therefore proposed *"an exemption from the requirement to hold a real estate agent's licence or agent representative registration for non-residential property transactions between related entities"* (p.29).

2.2 Action by other States

The *Property Occupations Act,* which has just been passed by the Queensland Parliament (although it is still to begin operation), exempts entities which are buying, selling, leasing or managing on behalf of property owners which are 'related entities' (Section 7).

This principle has also been recognised in Victoria since 1997 and the *Estate Agents (Exemption) Regulations 2005* (the current version of this Regulation) exempts corporations which carry on the business of an estate agent in relation to the assets of another corporation which is directly or indirectly wholly owned by the former corporation. Unfortunately this Regulation has been drawn too narrowly to cover the most common ownership structure of commercial real estate in Australia, the real estate investment trust, as well as joint ventures between large property owners. The Victorian Government is now addressing this drafting deficiency as part of the regulation making process to exempt 'large commercial property owners' (see section 3.0 below).

2.3 Draft Regulation

We recommend the inclusion in the *Property Stock and Business Agents Regulation 2014* ("the Regulation") of a new regulation in the following terms:

> *An entity is an exempt entity for the purposes of section 230(2)(h) of the Property Stock and Business Agents Act 2002, if the entity:*
>
> *(a) carries on the business of a real estate agent in relation to assets, other than residential property or rural land of:*
>
> *i. another entity, the majority of which is directly or indirectly owned by the exempt entity; or*
>
> *ii. another entity, if the majority of both entities is directly or indirectly owned by the same persons; or*
>
> *iii. another entity that directly or indirectly owns the majority of the exempt entity; or*
>
> *iv. another entity which is a related body corporate or related entity (each within the meaning of Corporations Act 2001 (Cth)) of the exempt entity whether acting in a trustee capacity or otherwise; or*
>
> *v. another entity, where the property is held by that other entity as custodian, trustee, responsible entity or nominee for or otherwise on behalf of a related body corporate or related entity (each within the meaning of the Corporations Act 2001 (Cth)) of the exempt entity; and*
>
> *(b) is a real estate agent only because of the business carried on by it in relation to the assets (whether such assets are owned solely or jointly); and*
>
> *(c) when carrying on that business as a real estate agent discloses in writing in any advertising or contract relating to the assets its relationship to an owner of the assets.*

(NB. Definitions of 'residential property' and 'rural land' are already contained in section 3 of the Act).

3.0 Large property owner exemption

A 'related entity' exemption is not of itself sufficient to remove all burdensome regulation. Many large property entities, as well as managing on behalf of related entities, also manage on behalf of large 'third party' property owners.

CFS Retail Property Trust Group, referred to in section 2.0, as well as managing its own assets, also manages assets on behalf of other large property owners. Centre management staff and leasing executives often move between these assets and it would be an organisational nightmare for organisations to have to arrange licences simply because a staff member moves to a different asset. There are also other large professional property owners, such as the Perron Group and the industry superannuation funds which are members of ISPT, which choose to use an external agent for the management of their properties.

Sydney's Westfield Eastgardens, to take another example, is owned by the Terrace Tower Group but managed by Westfield Shopping Centre Management. Terrace Tower is a large private investment group whose core business is investment in commercial property. It makes no sense for Terrace Tower to be legislatively protected against the activities of Westfield when Terrace Tower has its own asset management, finance and legal staff and a legally-enforceable management agreement with Westfield. Terrace Tower notes on its website that the key to its success is its "hands-on approach" and that it is "actively involved in each of our assets".

Large shopping centre owners, and large owners of commercial and industrial property, are not ordinary consumers who need or want legislative protection. (Individual investors in these entities are protected by Commonwealth regulation of companies, trusts and managed investments.) Property ownership is their business and they employ large staffs to ensure their interests are protected. Their relationship with their property manager (agent) is a professional, business-to-business relationship, not a business-to-consumer relationship.

These owners have recourse to legal and commercial avenues if a property transaction goes wrong. The risks in the owner-agent relationship should therefore be a matter for commercial negotiation between the parties, not a matter for regulation by government.

Certain commercial property owners should therefore be acknowledged, for the purposes of the Act, as 'large commercial property owners', that is, persons who regularly engage in property management, leasing and sales and who therefore understand the risks and consequences that may be involved in such transactions.

The principle of such a 'large commercial property owner' exemption was also recommended in the *Decision Regulation Impact Statement: Proposal for national licensing for property occupations* for the National Occupational Licensing System*: "The risks in large non-residential property transactions appear to be adequately managed through the general sophistication of clients and trajectories, such as legal contracts and agreements. Licensing would be unnecessary for this sector as owners of multi-million dollar commercial properties would most likely be professional property investment companies. These companies would be conversant in the business of understanding the risks of owning and investing in non-residential property assets. An exemption would mean that there would be no requirement to go through a licensed real estate agent for very large non-residential property transactions." (p.28).*

3.1 Action in other States

The Queensland Government, in the *Property Occupations Act* recently passed by Parliament, has exempted 'large commercial property owners' (i.e. excluding owners of residential property and rural land) from regulation under the new Act (Section 8). As the Explanatory Memorandum explains: *"It is considered that this proposal benefits industry by significantly reducing red tape for transactions involving sophisticated property owners, who better understand the risks associated with property transactions and who do not need to be afforded the consumer protection elements of the legislation."*

The *Property Occupations Act* provides that the threshold for a 'large property owner' will be based on the collective 'total gross floor area' of the property owner. The actual amount of this threshold is now being determined by regulation. The Real Estate Institute of Queensland (REIQ), in its submission on this Bill to the relevant parliamentary committee dated 17 January 2014, stated it supported this exemption provided that the threshold is set at a total gross floor area of at least 10,000 square metres. We have no objection to 10,000 square metres being the relevant threshold and have recommended this in the draft regulation below.

The Victorian Government announced on 8 January 2014 that it would remove the requirement for staff working for large non-residential property entities from the requirement to hold a real estate agents license. This followed a review by the Red Tape Commissioner. The Government is now in the process of releasing for consultation a draft regulation to provide this exemption from the Victorian *Estate Agents Act.* We have recommended the threshold of 10,000 square metres to apply in Victoria as well.

To put this amount of floorspace in context, 10,000 square metres is around three times the size of a full-line Coles' or Woolworths' supermarket. In another context, this is roughly the size of Stockland Corrimal Shopping Centre in NSW. This shopping centre, owned by Stockland (a diversified property group with commercial property assets amounting to nearly $8 billion), contains a Woolworths supermarket and 42 speciality shops. At December 2013 this shopping centre had annual sales of $117.3 million and was valued at $62.2 million. A person or entity with the financial resources and commercial knowledge to purchase and own such a large neighbourhood shopping centre, and to arrange the management and leasing of the centre, is obviously a commercially sophisticated investor and does not need the protection of the Act.

If we look at office properties, the office building at 333 George Street in Sydney (currently undergoing redevelopment), owned by Charter Hall Core Plus Office Fund, had floor space of slightly less than 10,000 square metres, and contained 15 levels of offices. At 30 June 2013 this office building was valued at $67.5 million. Once again, a person or entity with the financial resources and commercial knowledge to purchase and own such a large commercial office building, and arrange the management and leasing of the building, is obviously a commercially sophisticated investor and does not need the protection of the Act.

3.2 Draft Regulation

We recommend the adoption in the Regulations of a new regulation in the following terms:

(1) a person acting as a real estate agent for the sale or exchange of real property, other than residential property or rural land, is exempt from the Property Stock and Business Agents Act 2002 for the transaction, if:

a) the real property for the transaction has:

i) a total gross floor area of at least 10,000 square metres; or

ii) a total estimated value of at least $10 million; or

b) each party to the transaction owns real property, other than the real property for the transaction, that has:

i) a total gross floor area of at least 10,000 square metres; or

ii) a total estimated value of at least $10 million.

(2) A person acting as a real estate agent for the letting of real property or collecting rents for real property, other than residential property or rural land, is exempt from the Property Stock and Business Agents Act if the person is acting on behalf of an entity that owns real property that has:

a) A total gross floor area of at least 10,000 square metres; or

b) A total estimated value of at least $10 million.

(3) To remove any doubt, it is declared that, without limiting subsection (2), the subsection applies if the person is acting as a real estate agent for 2 or more entities engaged in a joint venture arrangement and the entities, individually or collectively, own real property that has:

a) A total gross floor area of at least 10,000 square metres; or

b) A total estimated value of at least $10 million.

(4) In this section:

***estimated value**, or real property, means the estimate, made on reasonable grounds by the person acting as:*

a) a real estate agent for the sale of the property, of the price payable for the property; or

b) a real estate agent for the exchange of the property, of the value of the property; or

c) a real estate agent for the letting of the property or collecting rents for the property, of the value of the property.

(NB. Definitions of 'rural land' and 'residential property' are already contained in section 3 of the Act.)

4.0 Further justification for the proposed exemptions

4.1 Key characteristics of the 'consumers' who would no longer be protected by the Act if the exemptions were granted

The key characteristics of these 'sophisticated consumers' are:

- Property investment and ownership is their core business (which is acknowledged, for instance, through the characterisation of such companies listed on the Australian Stock Exchange as Australian Real Estate Investment Trusts, or 'A-REITs');
- They own and manage a portfolio of properties;
- They own and manage properties with a relatively high market value;
- They regularly engage in, and are conversant with, all property transactions;
- They employ large staffs (asset management, financial, legal etc.) to ensure their property assets are protected;
- The relationship with their managers/agents is a professional business-to-business relationship;
- They fully understand the risks that are involved in property transactions;
- They have comprehensive sales and management agreements with their managers/agents to reduce these risks;
- They have recourse to legal avenues if a transaction goes wrong;
- They also have recourse to commercial avenues to punish managers who do not look after their property interests (such as refusing to do further business) and to create incentives for managers to ensure they look after their interests (such as the prospect of repeat or long-term business);
- They have no need for recourse to the Compensation Fund;
- They understand that the real estate license and the associated regulation does not provide them with real protection from managers;
- They have no wish for regulation because of the unnecessary and costly red tape it imposes upon their managers, the cost of which is ultimately transferred to them.

4.2 No impact on small commercial property agencies

Using a variety of directories and sources, including the data base of rateable properties held by the Valuer General, and assuming the threshold to define a 'large commercial property owner' is set at 10,000 square metres, we have estimated that the proposed exemptions would affect only 629 commercial properties in NSW. This represents less than 1% (0.77%) of all commercial properties in NSW. The breakdown of the 629 commercial properties is 221 offices, 212 industrial buildings and 196 shopping centres. A number of these large commercial properties are in joint ownership so the actual number of entities that would benefit from the exemptions would be fewer than 629.

Transaction information from RP Data reveals that in the year to June 2012, there were only 259 commercial property sales in NSW which exceeded $10 million in value. This represented only 3.8% of commercial property sales. There were only 115 sales (1.7%) which exceeded $20 million and only 46 sales (0.7%) which exceeded $30 million. The vast majority of the sales above $30 million are transactions between two large property owners. We have suggested $10 million as the relevant threshold in the draft regulation in section 3.2. If this is adopted it can be seen from this data that the vast majority (more than 96%) of commercial sale transactions would be unaffected by these exemptions.

Given that more than 99% of commercial buildings will be unaffected by these exemptions, and that more than 96% of commercial sales transactions will be unaffected, it can be seen that this is a very minor piece of deregulation. This is obviously not, as described on the Fair Trading website, the "deregulation of commercial property agency work." Nevertheless, as noted in section 4.3 below, the exemptions will reduce the cost of doing business in NSW by around $4 million a year.

4.3 Cost of regulation in NSW

The Act's requirements impose significant costs on professional property owners and managers, for no benefit to the owners, or to tenants or to the public more generally. In 2012 we surveyed a sample of our members to establish the annual costs of the requirements of licensing and other obligations of the various real estate agents legislation around Australia. We asked these members to quantify the costs of annually renewing qualifications; continuing professional development; and the auditing of real estate trust accounts. This information, and the basis on which costs were apportioned (including employee time), was included as an Appendix to our submission on the *Consultation Regulation Impact Statement: Proposal for national licensing for property occupations* in October 2012.

We did not attempt in these calculations to assess the costs of a range of other unnecessary requirements including the plethora of rules on the signing of cheques, receipts and the collection and banking of rents; the establishment and maintenance of separate trust accounts in each state; and the organisational restructuring and organisational inefficiencies often necessary to meet state licensing requirements. Nor did we include in these costs the amount of interest 'foregone' by property owners as a result of interest from the trust accounts being directed into the statutory interest accounts, instead of being money earned by the property owner.

Nor did we seek to quantify the management time involved in implementing and overseeing systems to ensure compliance with the legislation. This includes the following: identifying who requires a licence/salesperson certificate (which can be difficult as both roles and people change); maintaining an up-to-date register of people and roles; organising a basic level of training for all affected employees; ensuring directors of the property management entity hold licences where required; and reporting to the board of the property management entity on all of these issues. These additional requirements and consequences of regulation add considerably to the costs we have directly measured.

On the basis of our sample of members we estimated, with reasonable accuracy, that the licensing, professional development and trust account regulation requirements alone are currently costing SCCA members around Australia around $3.62 million a year. Since SCCA members own around 60% of the total gross lettable area of Australian shopping centres, a reasonable estimate of the cost of this regulation for the Australian shopping centre industry is around $6 million a year.

This cost of $6 million a year is the cost only to the shopping centre sector of the Australian commercial property industry. Since retail property accounts for around 40% of the commercial property industry, and office property accounts for roughly a similar proportion, the total cost of licensing and regulation for the commercial property industry in Australia would exceed $12 million a year. The cost in NSW could therefore be reasonably assessed as $3.84 million a year (on the basis that NSW's proportion of the Australian population is 32%). We stress that this does not represent the full cost of regulation and this cost does not take into account a range of other regulatory costs outlined above, as well as the management time involved in overseeing and administering this regulation.

Where possible, of course, such costs are passed back to the owner of the property through the commissions and management fees they pay. This is particularly frustrating since the only reason these property owners are incurring these costs is to protect themselves against the agent or property manager they have personally chosen, often a related corporate entity to the owner, and with whom they have a detailed and legally enforceable commercial contract. Removal of licensing requirements will therefore achieve savings for commercial property owners who are mainly investors in superannuation funds, real estate investment trusts, managed investment trusts, life insurance funds and other investment vehicles. Such investors are mainly people who are saving for, or living out, their retirement.

4.4 NSW Government's regulation reform agenda

Both exemptions are fully consistent with the NSW Government's regulation reform agenda.The NSW Government is committed to reducing regulatory costs for business and the community by 20% by 30 June 2015, which is estimated to require reductions in the regulatory burden of $750 million per annum. We estimate the inclusion of these two exemptions in the new *Property Stock and Business Agents Regulations 2014* ("the Regulations") will reduce the cost of doing business in NSW by at least $4 million per annum. We also note that one of the aims of the NSW *Subordinate Legislation Act 1989,* under which the Regulations are being reviewed, is to "*reduce unnecessary regulation by government*".

The passage of these exemptions would also free up considerable staff resources in NSW Fair Trading currently occupied in licensing, compliance and enforcement. This is an important consideration at a time when NSW, like all governments, is struggling to control its budget. Most importantly this reform would come at no cost to the community.

4.5 Tenants unaffected by removal of regulation

It is occasionally claimed that the Act needs to continue to regulate agents managing on behalf of large property owners and even related entity property owners because the Act also protects tenants. According to this argument, an agent (acting on behalf of an owner) could be found guilty under the misconduct provisions if they engaged in misconduct. However, this argument does not explain how this action would provide relief to a tenant (as opposed to an owner). Nor does it explain what protection is offered to those tenants of a property whose owner handles property management directly (not through an agent) and who is therefore not regulated by the Act. Why would the Government be content with an Act which does not protect all tenants?

The extent to which the Act (and similar legislation around Australia) provides a protection to tenants was considered by government officials in the processes leading up to the *Consultation Regulation Impact Statement: Proposal for national licensing for property occupations* in October 2012. They found, after surveying the records of the relevant state/territory regulatory agencies: *"The assessment of the risks involved in non-residential property transactions identified that there are few complaints to consumer protection agencies in relation to these transactions as most parties are sophisticated consumers who are familiar with working in the industrial, commercial or primary production environment and able to seek redress through legal action in relation to the contractual issues involved."* (p.26) Indeed, so minimal are the risks, and so few are the complaints, that the Consultation RIS proposed the complete deregulation of commercial agency transactions.

Retail tenants are directly protected against the actions of landlords (and their agents) by the *Retail Leases Act,* not by the *Property Stock and Business Agents Act.* The *Retail Leases Act* provides minimum lease protections for a tenant in a wide range of areas beginning even before a lease is signed. If the lease does not meet these minimum protections, the Act overrides the provisions of the lease. The Act also provides for low-cost mediation of retail tenancy disputes. This is a very comprehensive Act which includes 159 separate sections, not counting the four Schedules to the Act. This Act is now being reviewed by the Office of the Small Business Commissioner. Parliament would have seen no need for a *Retail Leases Act* if the *Property Stock and Business Agents Act* was a protection for retail tenants.

It is true that the *Retail Leases Act* protects only retail tenants, not other commercial tenants. This is because successive governments in NSW have decided that tenants of these other commercial property buildings are not in the same position as retail tenants (considering such matters as balance of power in negotiations and the importance of location) and therefore do not need the protection of Parliament in their negotiations with their landlords. In other words, there are no special characteristics of the office leasing market or industrial leasing market, and no market failure, that justifies government regulation of these business-to-business transactions.

There is therefore no justification for the continued regulation of large commercial property owners under the *Property Stock and Business Agents Act* on the spurious grounds that it provides a protection for non-retail commercial tenants. After all, what protection does a real estate agent's licence - which teaches the holder nothing about commercial agency work - provide to an office tenant? The notion that the Act (which regulates the relationship between property owners and property agents) provides a protection for tenants is simply an invention by those opposed to this minor piece of deregulation.

4.6 Regulation of trust accounts

As well as requiring real estate licenses the Act also regulates the use of trust accounts and this has also been used as a justification for continued regulation of large property owners. The Act does not impose trust account and audit requirements for cash security deposits for retail premises since these are already regulated by Part 2A of the *Retail Leases Act*. These provisions (amounting to 29 separate sections of the *Retail Leases Act*) regulate the lodgement of cash security deposits and their release. Nor are trust accounts necessary for cash security deposits for other commercial tenants since, as noted in section 4.5, there is no identified market failure justifying government intervention in office leasing.

It should be noted that the use of cash security deposits is becoming increasingly rare. It is generally in the interests of both landlords and tenants that security of the lease is achieved by means of a bank guarantee or a guarantee from another financial institution.

Legislative protection of other moneys, in the case of large commercial property owners, is unnecessary since the handling of this money is already governed by the management agreements or sale agreements between the large property owner and the manager. It should not be the function of Parliament to dictate to large commercial property owners the banking arrangements for their own money. We note below (section 4.7) that while rent is obliged to be paid into a trust account this money is then moved out of the trust account into an operating account in order to meet the operating expenses of the shopping centre or the office building. This 'double handling' obviously adds to the costs of property owners.

It has also been suggested that without the Act's regulation tenants will have no evidence that they have paid their rent. This is presumably a reference to Regulation 25 of the *Property Stock and Business Agents Regulation 2003.* This is not correct. The issuance of a receipt is standard business practice and is often required for auditing purposes. There are many situations in NSW where the management of commercial buildings is undertaken by the owner of the building and therefore they are not regulated by the Act. There has never been any suggestion that the tenants of such owner/managers do not have evidence of having paid the rent. These days it is increasingly common for tenants to pay rent by direct bank deposit. Many residential agents no longer issue receipts in such situations because the bank record is evidence that the rent has been paid. Where cheques or cash are still used to pay rent, this is more likely to be for commercial owners who are unaffected by the proposed exemption because they do not qualify as 'large commercial property owners'.

The regulation of trust accounts therefore provides no justification for the continued regulation of large commercial property owners under the Act.

4.7 Financial impact on the NSW Government

The Shopping Centre Council once asked a former Commissioner for Fair Trading: why is Fair Trading so strongly opposed to removing regulation from property entities that neither want, nor need, the protection of Parliament? "Simple", he replied, "it's disguised taxation". In other words, the NSW Government derived revenue from this regulation and Fair Trading was reluctant to give this up.

We understand the NSW Government derives income from the regulation of large property owners from two sources. First, a proportion (60%) of the interest earned from monies held in trust by an agent for the property owner is effectively appropriated by the Government and directed into the Statutory Interest Account. Funds from the Statutory Interest Account are used for a variety of purposes, including the costs of administering the *Residential Tenancies Act*, the *Fair Trading Act* and the *Strata Schemes Management Act,* as well as partly funding the operation of the Consumer Trader and Tenancy Tribunal (now absorbed within NCAT) and the Tenants Advice and Advocacy Program.

In the case of residential property, this might be considered an appropriate 'fee for service' for government regulation of the industry. None of the services listed above, however, are relevant to commercial property. As well, most of the beneficiaries of these programs are residential tenants and agents, not property owners, so effectively property owners are subsidising the activities of the tenants and agents. That is particularly the case for commercial property owners.

Not surprisingly, therefore, large commercial property owners are reluctant to retain such monies in trust accounts which pay low rates of interest and where much of the interest received is appropriated by the Government. Nor can they afford to leave monies in these accounts since the rents received (from tenants in a shopping centre) are needed to pay the operating expenses of the shopping centre (cleaning, electricity, security etc.) These trust accounts are therefore 'swept' on a regular basis and the monies transferred to an operating account. The amount of money derived by the NSW Government from the interest paid in trust funds established on behalf of large commercial property owners would therefore be minimal.

Second, a Compensation Fund has been established in NSW to reimburse landlords, tenants, vendors or purchasers who have suffered financial loss as a result of defalcation by an agent. This is funded from revenue from licensing fees. Commercial property owners, however, do not need a statutory indemnity fund to compensate them if their arrangements with an agent fail. Commercial property managers operate in accordance with a comprehensive management agreement that has been negotiated between themselves and the property owners. These agreements are tailored to the property in question and set out in detail the obligations of the property manager, the accounting and audit requirements and any requirements for fidelity guarantee insurance and professional indemnity insurance.

It is our understanding that most, if not all, of the claims on the Compensation Fund relate to residential property. It would be inappropriate for large commercial property owners to make claims on a fund which is clearly intended for ordinary residential property owners, particularly when any such claims would have the potential to 'bankrupt' the fund and when these owners are fully capable of protecting their own interests against possible default by an agent. Yet the licence fees paid by property agents acting on behalf of large commercial property owners are being used to provide money for this fund. This is clearly inequitable and is presumably what the former Commissioner described as "disguised taxation". Nevertheless, given the proposal is only for the de-licensing of property agents managing on behalf of 'related entities' and 'large property owners', the loss of revenue to the Government from these licenses will be minor. (Presumably the Real Estate Institute of NSW is comfortable with the license fees of smaller commercial agencies to continue to be paid into this fund even though these licenses receive no benefits from the fund – see section 5.0).

Any loss of income to the Compensation Fund must be balanced against the fact that there will also be savings for the NSW Government given that Fair Trading would no longer be required to administer, and ensure compliance, with regulatory requirements for these large property owners. In any event it makes no economic sense for the NSW Government to increase the cost of doing business in NSW by around $4 million a year (relative to Queensland and Victoria) in order to obtain a much lesser amount of revenue from licensing fees for commercial agents.

4.8 Irrelevance of real estate agents qualifications

The real estate agent license required to be obtained by our members' staff is overwhelmingly orientated to residential property agency work and has no relevance to a person managing or leasing a shopping centre or a commercial office building. Consider the following units of competency which are required to be completed for the issue of a real estate agent's licence in NSW.

These requirements are set out in the *Property Stock and Business Agents (Qualifications) Order 2009*:

(a) Either of the following units of competency:
  i) CPPDSM4009A – Interpret legislation to complete agency work,
  ii) CPPDSM4009B – Interpret legislation to complete agency work, and

(b) either of the following units of competency:
  i) CPPDSM4015A – Minimise agency and consumer risk,
  ii) CPPDSM4015B – Minimise agency and consumer risk, and

(c) either of the following units of competency:
  i) CPPDSM4004A – Conduct auction,
  ii) CPPDSM4020A – Present at tribunals, and

(d) all of the following units of competency:
  i) CPPDSM4007A – Identify legal and ethical requirements of property management to complete agency work,
  ii) CPPDSM4008A – Identify legal and ethical requirements of property sales to complete agency work,
  iii) CPPDSM4080A – Work in the real estate industry,
  iv) CPPDSM4003A – Appraise property,
  v) CPPDSM4005A – Establish and build client-agency relationships,
  vi) CPPDSM4006A – Establish and manage agency trust accounts,
  vii) CPPDSM4010A – Lease property,
  viii) CPPDSM4011A – List property for lease,
  ix) CPPDSM4012A – List property for sale,
  x) CPPDSM4013A – Market property for lease,
  xi) CPPDSM4014A – Market property for sale,
  xii) CPPDSM4016A – Monitor and manage lease or tenancy agreement,
  xiii) CPPDSM4017A – Negotiate effectively in property transactions,
  xiv) CPPDSM4019A – Prepare for auction and complete sale,
  xv) CPPDSM4022A – Sell and finalise the sale of property by private treaty,
  xvi) CPPDSM4049A – Implement maintenance plan for managed properties,
  xvii) CPPDSM4056A – Manage conflict and disputes in the property industry,
  xviii) BSBRKG304B – Maintain business records,
  xix) BSBMB406A – Maintain small business finances,
  xx) BSBLED401A – Develop teams and individuals, and

(e) at least one elective unit of competency of the candidate's own choice from the property sales and management, specialist or common units CPP40307 Certificate IV in Property Services (Real Estate).

All of these educational units are geared to a person seeking to be involved in transacting residential real estate and involved in residential real estate agency work. Large commercial property owners are frustrated that they are made to carry the expense and staff absences of requiring their staff to obtain a qualification which has absolutely no professional relevance to the work they are required to undertake.

4.9 Precedents

There are legislative precedents, at the state and national level, for treating certain persons as 'sophisticated consumers' who do not require legislative protection. In the regulation of retail leases in NSW (and other States), for example, those retailers whose lettable floor area exceeds 1,000 square metres are considered to be sufficiently large as to not require the protection of the NSW *Retail Leases Act* in their negotiations with their landlords.

Nationally the *Corporations Act* recognises that some investors are 'sophisticated investors' who do not require certain disclosure protections that are required for ordinary retail investors. A sophisticated investor is deemed to have sufficient investing experience and knowledge to weigh the risks and merits of an investment opportunity without regulated protection. A 'sophisticated investor' must have net assets of at least $2.5 million, or have had a gross income of $250,000 or more in each of the previous two years.

There are also precedents in the area of real estate licensing for such exemptions in NSW. In 2012 the NSW Government gazetted a Regulation (2012 No 461) removing the need to hold real estate licenses for all employees "*authorised to act on behalf of any government department of the State of NSW or the Commonwealth, or any statutory body representing the Crown in right of the State or the Commonwealth".* These are sensible exemptions since the State Government and the Commonwealth Government do not need legislative protection against the actions of their property managers. Nor do other large professional property owners need this legislative protection.

Similarly, in 2013, the NSW Government gazetted a Regulation (2013 No 306) exempting real estate agents managing on behalf of large commercial property owners (i.e. defined as those dealing with any commercial property that exceeds $10 million in value), as well as those managing on behalf of 'related entity' property owners, from the requirement to hold professional indemnity insurance policies. This exemption recognised that such insurance policies were not required in these circumstances and the requirement would have added further to business costs in NSW for no identifiable public policy purpose.

4.10 Support of other organisations

Both of the exemptions we are seeking have the support of the Property Council of Australia (PCA), which is the peak body for commercial property owners (i.e. the consumers of commercial real estate agency services). These large commercial property owner) are members of the PCA and the SCCA and both organisations are acting on the wishes of these owners in pursuing these exemptions. The PCA also includes in its membership the large commercial real estate agencies, as well as many of the smaller commercial agencies. The Australian chief executives of five of the six largest commercial real estate agencies (JLL, Savills, Colliers, Knight Frank, Cushman and Wakefield) have separately written to the PCA indicating their support for these exemptions from relevant real estate licensing legislation. We are advised by the Chief Executive of the PCA that the sixth agency, CBRE, also does not oppose these exemptions.

The Royal Institute of Chartered Surveyors (RICS) has also indicated its support, in a letter to the PCA, for an exempted class of sophisticated entity from real estate licensing requirements.

5.0 Opposition by Real Estate Institute of NSW

We have been advised that these exemptions are being opposed by the Real Estate Institute of NSW (REINSW). We note, however, that the 'consumers' being protected by this regulation (i.e. large property owners) are not members of, and are not represented by, the REINSW. Nor, as noted in section 4.2, will these exemptions have any impact on the smaller commercial real estate agencies which are represented by the REINSW. We fail to understand, therefore, what relevance this issue has for the REINSW.

The attitude of the REINSW is in marked contrast to that of the Real Estate Institute of Queensland (REIQ) which supported the provisions in the *Property Occupations Act* in Queensland which exempts 'related entities' and 'large non-residential property owners'. The REIQ's support for the 'large non-residential property owner' exemption was qualified to the extent that the threshold to determine a large owner was a cumulative property holding of not less than 10,000 square metres. We have no objection to 10,000 square metres being the relevant threshold and have included this in our proposed drafting in section 3.2.

We have considered whether the exemptions would have a financial impact on the REINSW, not that this would be a justification for the NSW Government retaining unnecessary regulation. We understand, however, that few (if any) of the staff managing on behalf of large commercial property owners undertake compulsory professional development courses conducted by the REINSW. Given that the real estate agent's license is of no professional benefit to these employees, they are not inclined to waste more time and money on further irrelevant courses. Any further professional development, in addition to the training and experience provided by their employers, is undertaken through the Property Council and the Property Council Academy.

We understand that the opposition of the REI NSW is really based on the fact that smaller commercial real estate agencies see licensing as a 'barrier to entry' to their industry and they fear this minor exemption could be the 'thin end of the wedge' for the removal of licensing for all commercial agency work. It is not the role of governments, however, to erect or to protect barriers to entry to industries (and therefore maintain barriers to competition), particularly when that barrier (i.e. the real estate license) has no professional relevance to those forced to acquire the license. We note that the use of licensing as a barrier to competition within industries (in this case, competition within the property management industry) is specifically being examined by the Competition Policy Review.

As for this proposal being a precursor to removing licensing for all commercial property owners, that debate was conducted and resolved during the consultation over the proposed national license for real estate agents. The *Consultation Regulation Impact Statement: Proposal for national licensing for property occupations,* released in August 2012, proposed to remove licensing for all commercial agency work. Following opposition from the Real Estate Institute of NSW and others, however, this was reversed in the *Decision Regulation Impact Statement* released in July 2013. The Decision RIS recommended, instead, an exemption for large commercial property owners (as well as a 'related entity' exemption), which is consistent with the actions taken by the Queensland and Victorian Governments see section 3.1). Neither government has sought to extend the removal of regulation from smaller commercial property owners. Neither the SCCA nor the PCA are seeking the complete deregulation of commercial agency work and this is not being proposed by the NSW Government.

The possible creation of a 'two-tiered' commercial property agency market has also been raised as an objection to the exemption proposals. This, however, is an outcome chosen by the REINSW. The REINSW (along with the REIA) vigorously and successfully opposed the proposal to remove licensing for all commercial agency work contained in the *Consultation Regulation Impact Statement: Proposal for national licensing for property occupations.* This proposal, if it had gone ahead, would have created a level playing field in the commercial property industry.

A 'two-tiered' market exists in the retail leasing industry, as a result of Parliament's decision to treat large retailers as 'sophisticated tenants' who do not need legislative protection in their dealings with retail property landlords. This does not create problems in that industry. Nor would a 'two-tiered' market create problems in the commercial property agency industry.

The REINSW has also stated that its opposition is based on its principle that anyone involved in real estate should be licensed. This has never been the case in NSW, however. Anyone involved in managing or leasing a building which they own is not covered by the Act and therefore does not have to be licensed. Nor, as noted above (section 4.9), are property managers dealing in real estate on behalf of the NSW Government (or on behalf of the Commonwealth Government in NSW) required to be licensed. The REINSW did not oppose this exemption. Nor are all shopping centre employees or all office management employees required to be licensed. It would seem that the REINSW's 'principle' has a selective application.

6.0 Shopping Centre Council of Australia

The Shopping Centre Council of Australia represents Australia's major shopping centre owners and managers. Our owners own and manage more than 11 million square metres of retail space. Our members are AMP Capital Investors, Brookfield Office Properties, Charter Hall Retail REIT, CFS Retail Property Trust Group, DEXUS Property Group, Eureka Funds Management, Federation Centres, GPT Group, Ipoh Management Services, ISPT, Jen Retail Properties, JLL, Lend Lease Retail, McConaghy Group, McConaghy Properties, Mirvac, Perron Group, Precision Group, QIC, Savills, Stockland, Westfield Group and Westfield Retail Trust.

Contact

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