

**PROPERTY, STOCK &
BUSINESS AGENTS
ACT 1941**

**Proposed Reforms to
the Regulation of Property Agents**

**Released by the Minister for Fair Trading
September, 2001**

INTRODUCTION

The Property, Stock and Business Agents Act 1941 is the central piece of legislation that regulates the property agency industry in New South Wales. The Department of Fair Trading has responsibility for administering the Act, a role which includes licensing, inspection and compliance activities.

The Act provides for separate licences and certificates for different types of agent activities, and sets out experience and education requirements which must be met before a person may operate as a real estate agent, stock and station agent and strata managing agent, business agent, on-site residential property manager, salesperson or trainee managing agent.

The Act prescribes the way in which agents must conduct certain aspects of their business, for example, by specifying how trust accounts must be managed and the record keeping and accounting procedures to be followed. The Act also contains requirements with respect to agreements with consumers, receipt issuing and cheque signing procedures. In addition, the Act provides for a Compensation Fund to protect consumers in the event of trust account losses. The Act provides for penalties for non-compliance, including licence disqualification in serious cases.

A review of the Act has been completed which included the fulfillment of the Government's commitments under the National Competition Principles Agreement as well as a general review of the Act's effectiveness. The review was oversighted by a Steering Committee chaired by the Department of Fair Trading.

REVIEW FINDINGS

Overall, the review concluded that there is a continuing need for government regulation of the property services industry, in order to provide an appropriate level of consumer protection.

The review also recommended that the Act be simplified and brought up to date in order to increase its effectiveness. In this regard, the review proposed that the current licensing system be replaced by a system based on a single property agent's licence. Following a detailed assessment of the impact of the proposal, the Government has decided not to implement the single licence approach, in view of concerns that the proposed scheme could decrease the competency of agents and erode consumer protection. It was noted, however, that other Review recommendations, which would support the transition to a simplified scheme in the future, could be implemented while retaining the current licence categories.

SUMMARY OF PROPOSED REFORMS

The NSW Government has accordingly approved a number of reforms aimed at increasing the competency of agents, improving customer protection levels, reducing the regulatory burden and improving the way in which the legislation operates. The approved reforms include:

- ◆ streamlining the licensing requirements, with competency standards a component of the entry requirements;
- ◆ introducing mandatory professional indemnity insurance requirements;
- ◆ introducing mandatory continuing professional development requirements;
- ◆ annual licence renewal;
- ◆ replacement of the licensing requirements for on-site residential property managers with registration requirements, and requiring caretaker managers to be registered;
- ◆ continuing to base registration requirements for industry employees on good character and the demonstration of basic competencies;
- ◆ removal of the requirement to have a licensee-in-charge at each office in certain circumstances;
- ◆ removal of the requirement that at least fifty per cent of directors of a corporation be licensed in respect of the type of business carried out;
- ◆ clarifying responsibilities of licensees-in-charge and introducing measures to prevent licence lending;
- ◆ modifying the disciplinary system to include show cause proceedings, suspension provisions, the appointment of a manager of a licensee's business in certain circumstances and the keeping of a register of such disciplinary action;
- ◆ facilitating legal proceedings in relation to general trust account deficiencies;
- ◆ enhancement of inspectors' powers and the capacity to investigate persons suspected of unlicensed trading;
- ◆ introduction of a requirement to keep a register of bidders for auctions and limiting vendor bids to one bid;
- ◆ prohibiting misleading advertising in relation to the estimated commencement price at an auction;
- ◆ introducing a requirement that all benefits received by a licensee be disclosed in agency agreements;

- ◆ clarifying the circumstances in which a licensee should declare a beneficial interest in a property transaction;
- ◆ introducing disclosure requirements where agents provide general financial advice to purchasers;
- ◆ allowing for standard agency agreements to be prescribed, introduction of a cooling-off period for agency agreements and requiring that consumers be provided with an information booklet before entering into the agreement;
- ◆ introducing a court discretion in relation to a licensee's entitlement to commission where there has been a failure to serve an agency agreement;
- ◆ maintaining a Compensation Fund to provide consumers with compensation in the event of defalcation of a licensee, and extend the application of the Fund to persons whom the consumer reasonably believed to be licensed;
- ◆ improving debt recovery procedures in relation to money owed to the Compensation Fund;
- ◆ increased penalty levels for offences; and
- ◆ rewriting the Act with accompanying simplification of its provisions and reduction of the regulatory burden.

The remainder of this Consultation Paper provides more detail on the proposed reforms. For discussion purposes, the reforms are grouped under the broad categories of licensing reforms, disciplinary reforms and agency conduct.

LICENSING REFORMS

Categories of licences and certificates of registration

The legislation will continue to provide for the current licence categories, with the exception of the category of on-site residential property manager, which will be replaced with registration requirements. The category of on-site residential manager will be amended to include caretaker-managers, who will also be required to register. Both on-site residential property managers and caretaker-managers will be required, as a condition of their certificate, to reside in the building complex they manage and will also be required to contribute to the Compensation Fund. Managers will be restricted in the activities they may undertake. For example, they may act as an agent for others by letting lots in a building complex but will not be able to undertake other real estate activities without obtaining the appropriate licence. Salespersons and trainee managing agents will continue to be required to be registered under the Act.

Entry requirements

The provisions in the Act relating to the requirements and procedure for obtaining a licence will be revised and simplified. The grant of a licence will be based on entry-level competence, good character, continuing professional development and professional indemnity insurance. Similarly, registration of salespersons, trainee managing agents, on-site residential property managers and caretaker-managers will be based on good character and entry-level competency.

Competency standards will form an essential part of the licensing and registration criteria. Currently, the grant of a licence is based on undertaking an approved course of study, an experience test and holding a certificate of registration for two years. It is proposed to replace these with a set of entry-level competency requirements based on National Competency Standards. This type of system recognises that competency may be achieved through different pathways. The Minister will have the power to approve qualifications by reference to any one, or a combination of the following:

- a) the completion of a course of study; or
- b) the completion of a period of training; or
- c) the attainment of a standard of competency/s

Entry-level competencies will be selected to reflect areas of significant risk for consumers. More specialised competencies will form the basis for continuing professional development. Separate consultation will be undertaken about the selection of entry-level competency standards.

Applicants will continue to be required to meet the 'fit and proper person' test, which involves a check of Police records. A person will be disqualified if they are:

- an undischarged bankrupt;
- mentally incapacitated;
- disqualified or suspended from holding a licence or certificate of registration under the Act or a corresponding law; or
- if they have been convicted of an offence of dishonesty or fraud within the last five years.

Professional Indemnity Insurance

A pre-condition for the grant of a licence will be the requirement that a person holds an approved policy of professional indemnity insurance. As well, failure to hold professional indemnity insurance during the term of the licence will be grounds for suspension or cancellation of the licence. Employees will be exempted from the professional indemnity requirements if they are covered by an employer's insurance.

The Minister for Fair Trading will approve policies of insurance subject to appropriate terms or conditions. For example, insurers will be required to notify the Department if a licensee's insurance lapses or is withdrawn. It is considered that the introduction of professional indemnity insurance will enhance consumer redress in relation to quality of service issues. Premiums charged by insurers will be affected by an agent's claims history, thereby encouraging greater attention to quality issues by licensees.

Licence renewals and Continuing Professional Development

Annual licence renewals will be similarly subject to a requirement to hold professional indemnity insurance. In addition, it will be a condition of licence renewal that a licensee must undertake a minimum amount of continuing professional development each year, as determined by the Director-General. Continuing professional development recognises the changing nature of the marketplace and provides flexibility to educate agents in the special competencies needed in relation to the licence categories under the Act. This requirement will raise industry expertise and professionalism.

Licence applications and renewals will be determined by the Director-General, with appeals available through the Administrative Decisions Tribunal.

Licence conditions for auctions and buyers' agents

There will also be the capacity to impose conditions on a licence, for example, a condition prohibiting a licensee from carrying out certain types of work or requiring a person to undertake appropriate training. In particular, real estate agents who wish to conduct auctions will be required to undertake training in the practice and ethical issues involved in conducting an auction. Licensees-in-charge might also be required to meet certain competencies relating to the management of a real estate office.

With the recent emergence of persons acting as buyers' agents it has become clear that the current legislative framework does not always take into account the activities of a person acting solely as a buyer's agent. A conditional licence will be issued to those who wish to operate as a buyer's agent only.

Amendments will also be made to legislative framework to recognise the activities of buyers' agents. For example, unlike a selling agent, a buyer's agent will not be required to hold a copy of the contract before showing a property for sale to a purchaser. However, the legislation will require and facilitate a buyer's agent acquiring from the selling agent, a copy of the sale contract to give to their client purchaser. Buyers' agents will also be subject to the agency agreement and consumer information requirements as discussed later in this paper.

Responsibilities of Licensees-in-charge

The reforms to the Act will enable the Director-General to grant an exemption from the requirement that each separate agency office be under the charge of a licensee. Exemptions will be considered where a central trust account operates and proper supervision of employees exists. Applicants for exemption will be required to demonstrate the need for the exemption and to ensure that branch offices will be accountable on both an administrative and fiduciary level to a nominated licensee-in-charge. Exemption will not be available for a branch office operating a separate trust account.

The responsibilities of licensees-in-charge will be clarified by the amendments to the Act, for example, with respect to supervision and control of employees and licence lending. Licensees-in-charge will be responsible for the actions of their employees and will be prohibited from employing in any capacity any person:

- who is disqualified under the legislation from holding a licence,
- whose licence has been cancelled or suspended,
- whose application for a licence has been refused, or
- in relation to whom any claim has been paid from the Compensation Fund.

Breaches of these requirements will be subject to increased penalties, and will also be grounds for disciplinary action under the show cause provisions of the Act. Another measure proposed to limit the risk of agents lending their licences is the introduction of photo licences.

Corporation licences

With respect to Corporation licences, the reforms will remove the requirement that at least fifty per cent of directors be licensed. Instead, a corporate licence will be contingent on at least one director holding a relevant licence under the Act. Similarly, it is proposed that only one partner of a partnership be required to be licensed. Directors and partners not required to be licensed will continue to be vetted to ensure they are fit and proper persons and not disqualified for the purposes of the Act. Business operations will continue to be supervised by a nominated licensee-in-charge.

DISCIPLINARY REFORMS

Show cause proceedings

The disciplinary provisions of the Act will be reformed to allow the Department to initiate show cause proceedings, suspend licences, appoint a manager of a licensee's business in certain circumstances and to keep a register of disciplinary action taken.

At present, disciplinary action is taken by filing a complaint and summons in the Local Court, with appeals available through the District Court. This approach can be cumbersome and time consuming and enables unscrupulous agents to use delaying tactics, thereby hampering the Department's capacity to act promptly and effectively to protect consumers from further risk.

To address these problems, it is proposed that the disciplinary framework be overhauled and a more efficient model adopted. It is considered that a scheme similar to that, which applies to motor dealers and the one that has been recently introduced for builders under the Home Building Legislation Amendment Act 2001, would be an appropriate model for the real estate industry. This approach will enable the Department to initiate disciplinary action through the issue of a notice to a licensee to show cause as to why they should not be subject to disciplinary action under the Act. A licensee will be provided with a minimum of 14 days to provide evidence or make a submission.

There will be grounds for commencing show cause proceedings where a licensee:

- has failed to comply with a provision of the Act or regulations, including the Rules of Conduct;
- is no longer a fit and proper person to hold a licence or certificate of registration;
- has failed to comply with a condition of a licence or certificate of registration;
- does not have an approved policy of professional indemnity insurance in place;
- has become a disqualified person;
- in the case of a licensee-in-charge, has failed to properly supervise the conduct of employees;
- has failed to comply with a requirement to furnish records, documents or information; or
- has breached an undertaking given to the Director-General.

Disciplinary action taken by the Department may include one or more of the following:

- a caution or reprimand;
- compliance with an enforceable undertaking;
- compliance with specified requirements;
- cancellation or suspension of a licence, certificate of registration or involvement in the management of a business;
- imposition of conditions on a person's practise;
- imposition of a monetary penalty of up to \$11,000 for an individual or \$22,000 for a partnership or corporation.

Appeals from disciplinary decisions will be available through the Administrative Decisions Tribunal.

Immediate licence suspension powers

In addition to the introduction of show cause provisions, it is proposed to bring in a capacity to suspend a licence in circumstances where urgent action is needed to protect consumers from incompetent or unscrupulous operators. This provision will operate in a similar way to a recent amendment to the Fair Trading Act 1987 which enables the Department to immediately suspend a licence for up to 60 days where there is an on-going risk of significant loss or harm to consumers. Appeals against the suspension of a licence will lie to the Administrative Decisions Tribunal.

Appointment of managers

In conjunction with introducing immediate suspension powers, it will be necessary to include provisions in the Act relating to the management of a real estate business so that existing customers of the agency are not disadvantaged. The power to appoint a manager of an agency may also be necessary in cases where a receiver is appointed. A manager will be required to be licensed under the Act. The amended legislation will also include provisions relating to the powers of managers, reporting requirements and termination of management as well as a provision to enable the costs of the appointment to be borne by the licensee.

Register of licences

As part of the revision of the disciplinary framework, it is also proposed that the Act be amended to enable the inclusion on the Department's register of licences of details of disciplinary action taken. Currently, the Act requires that a register be kept containing details of licences, renewals, restorations, cancellations, refusals of applications and disqualifications. Consideration will be given to including details of:

- penalty notices issued;
- formal cautions issued regarding conduct;
- outcomes of show cause proceedings, including suspension of a licence or certificate of registration, and appointment of a manager;
- the results of any prosecutions;
- appointment of an investigating accountant or a receiver.

Further consultation will be undertaken with industry and consumers in the development of a Regulation to prescribe the additional matters to be included in the register.

Amendments to facilitate legal action by the Department

A number of other reforms are proposed which will improve the Department's ability to investigate breaches and take prosecution action. Amendments will be made to facilitate legal proceedings in relation to general trust account deficiencies. Action against unlicensed traders will be facilitated by the introduction of powers to inspect the books and records of persons suspected of unlicensed trading.

The Act will also allow a search warrant to be obtained where licensees fail to produce records as required under the Act.

Increased penalty levels

The Act provides a range of offences for breaches, such as:

- unlicensed trading;
- failure to deposit trust money into a trust account;
- failure to keep required records;
- licence lending; and
- advertising a property for sale without a copy of the contract for sale.

Except where penalties are specifically provided by the relevant provision, an offence against the Act attracts a maximum penalty in the case of a corporation of \$4,400 or, in the case of an individual, \$2,200. The penalty levels have not been revised since 1991 and it is considered that they do not appropriately reflect the nature of offences under the Act. Accordingly, the monetary penalty for offences will be doubled, with the exception of the penalty for failure to account for money entrusted to a licensee or associate of a licensee. This offence will attract a more significant penalty, given its seriousness. For an individual a maximum penalty of \$22,000 will apply, and in the case of a corporation the maximum penalty will be \$110,000.

AGENT CONDUCT

The amendments to the Act will introduce a number of new or changed requirements relating to the way in which agents conduct their business. The proposed reforms include the introduction of a requirement for an auction register of bidders and the limitation of vendor bids to one bid, prohibition of misleading information in relation to the estimated commencement price at an auction, introduction of disclosure requirements, introduction of a cooling-off period for agency agreements and provision of an information booklet to consumers before they enter into an agency agreement.

Auctions

The introduction of a requirement for a register of bidders is intended to assist in the prevention of collusive practices at auctions. This requirement will operate in a similar way to chattel and motor vehicle auctions. Under the proposal, all bidders will be required to register prior to the auction by providing their name, address and date of birth. The selling agent will be responsible for keeping the register and verifying the details of bidders. Bidders will be required to provide proof of identity, the details of which will be recorded by the licensee conducting the auction. Vendor bids will be limited to one bid, as a means of reducing the opportunity for 'invented' bids. One vendor bid will be allowed, to facilitate the commencement of the auction process.

The new Act will make it an offence to make misleading representations about the estimated commencement bidding price at auction. Although the Act currently contains a general prohibition on misleading advertising, it is considered that the level of consumer detriment warrants this behaviour being specifically prohibited.

Disclosure of benefits and interests

Another amendment will require agents to disclose in agency agreements all benefits they will receive from third parties, such as commissions, rebates and discounts. The agency agreement will be required to identify the source and estimate of any amount of benefit the agent may receive and seek the principal's agreement to the dispersal of benefits. Agents will also be required to disclose any personal interest they have in a property transaction, for example, where the purchase or sale of property is made for the licensee or employee or an associate of the licensee or employee. In contracting the services of a real estate agent, consumers should be able to expect that the agent will undertake his or her duties fairly and openly to achieve the best result for the client.

General financial advice

The Australian Securities and Investments Commission (ASIC) recently carried out a review of the regulatory arrangements for real estate agents who give financial advice in the course of selling real estate. The review noted that purchasers who obtain advice from real estate agents lack the safeguards available to persons who obtain advice from financial advisers licensed under Corporations Law.

It is accordingly proposed that, where real estate agents give general financial advice as an incidental part of selling real estate, they will be required to comply with requirements similar to those applying to the provision of general investment advice. This would include providing warnings that the advice is general advice which does not take into account the purchaser's individual circumstances, warnings that the person should consult an appropriately licensed financial adviser with respect to any proposed investments and disclosure of any conflicts of interest (such as whether the agency employee giving the advice is also acting for the vendor or developer).

Agency agreements and consumer information

A number of measures are proposed to address difficulties for consumers in understanding their rights and obligations under agency agreements. Firstly, it is proposed that a cooling-off period of one (1) business day apply to agreements. This will allow sufficient time for consumers to read and understand the terms of the agreement, seek independent advice and consider whether the services and fees are suitable for their circumstances.

Secondly, agents will be required to provide a consumer, before entering into an agency agreement, with a copy of an information booklet produced by the Department of Fair Trading. The booklet will cover the main types of agency agreements and provide an explanation of the various terms contained in such agreements. It will also provide information on agent selection and the right to negotiate fees and services. Such an approach has proven successful in relation to providing consumers with information in the areas of residential tenancy, caravan parks and retirement village living. It is envisaged that the availability of the booklet will remove the need for some of the more prescriptive requirements currently contained in the regulation, for example, the requirement to include in an agency agreement that a fee has been negotiated or the obligation to give notices of the right to review of an agent's commission.

A third measure to clarify issues around agency agreements will involve the development of standard agency agreement terms which will be prescribed in the legislation. This will allow agency agreements to be simplified and will make it easier for consumers to understand the terms of the contract. A time limit of 90 days will be placed on agency agreements, with the option to extend for further periods of 60 days. The agreement will state the consequences for the client if someone other than the agent sells the property during the term of the sole or exclusive agency period and will also contain full disclosure of benefits receivable by the agent.

Currently, the Act provides that an agent is not entitled to receive commission on a sale where the client did not receive a signed copy of the agency agreement within 48 hours of its execution. The amendments will enable service of agreements to be effected by facsimile or other electronic means where clients are geographically distant. The Act will also be amended to give courts the discretion to uphold a commission claim where no loss has been suffered by the principal as a result of a breach of the service requirements.

Compensation Fund

The new Act will continue to provide for a Compensation Fund to protect consumers who suffer loss because of an agent's failure to account for money or property received on the consumer's behalf. All licensees and on-site residential property managers and caretaker managers will be required to contribute to the Fund. At present, claims against the Fund can only be made if the person responsible for the loss is a licensee or an employee of a licensee. The amendments will extend the right to compensation to cases where a consumer suffers financial loss through dealing with a person who they reasonably believed to be licensed.

GENERAL

The Property, Stock and Business Agents Act was drafted in 1941 and has been amended many times to keep pace with changes. This review has provided an opportunity to rewrite the Act and Regulation to simplify and modernise their provisions and reduce the regulatory burden. Areas which will be reformed include the record keeping requirements, procedures for issuing receipts and accounting and computer system controls.

Other amendments will be included to:

- prohibit agents from soliciting a listing from a person where the agent is aware that another agent is engaged by that person under a sole or exclusive agency agreement, with a loss of entitlement to commission in the event of a breach of the provision;
- prohibit a licensee from acting as agent for more than one party in the same transaction; and
- remove the requirement that licensees include their address in advertisements and require instead that licensees provide their name or business name (as currently required) together with the licence number of the corporation or the licence number of the licensee-in-charge, in the case of a sole proprietor or partnership.

CONSULTATION

In developing these reforms the views of key interested parties have been sought. This has included:

- extensive industry and consumer consultation through the National Competition Policy review of the Act (over 50 submissions were received and meetings held with 24 representative organisations);
- a series of public forums around the State;
- Ministerial meetings with representatives of the industry, licensees and consumers; and
- consultation with the Property Services Advisory Council, established to provide advice to the Minister on consumer-related issues in the property services industry.

The matters outlined in this Consultation Paper are proposals for reform, as approved by the Government. The Government wishes to receive comment from interested parties – including consumers, industry organisations, licensees and others with an interest in the legislation. This Paper will be released for public consultation for a period of approximately four weeks ending in mid October 2001.

Legislation will be drafted to implement the reforms outlined above, taking into account the views of consumers and industry raised during the consultation period. It is anticipated that the legislation will proceed in late 2001, with commencement in early 2002.