

Property Council Submission to Consumer Affairs Victoria

Issues Paper No. 1: Conduct and institutional arrangements: estate agents, conveyancers and owners corporation managers

Introduction

The Property Council of Australia is the largest and most influential advocacy organisation in the property sector. We have 2,200 member companies that represent property assets worth over \$600 billion. Approximately 500 of these members are part of the Victorian Division.

Members of the Property Council represent the entire property investment cycle: finance, design, development, property maintenance and the services that underpin the sector.

While we welcome this review, the Property Council is of the view that the limited nature of the discussion paper will fail to address key underlying issues in the operation of the *Estate Agents Act* (the Act).

Principally, we are concerned that the Act's provisions are unduly restrictive when applied to the commercial property sector. Given the size and importance of the industry, the Property Council is disappointed that the consultation paper appears to focus almost solely on the regulation of residential property and does not recognise the very different nature of the commercial property sector.

Our submission contains direct responses to questions posed in the Consumer Property Acts Review Issues Paper No.1, as well as additional commentary we feel requires consideration.

Position Summary

The Property Council of Australia considers that while the Act should continue to regulate residential transactions in order to protect consumers, there is no similar rationale for its continued regulation of the non-residential property sector.

Relationships between non-residential property owners and their managers and agents are business to business relationships which do not need to be regulated through a licensing regime. The normal business risks in such relationships are adequately managed in commercial contracts, management agreements and normal commercial practice.

Additional regulation under the Act serves no useful purpose but simply results in unnecessary costs on commercial property companies. Moreover, as most companies in the non-residential

property sector operate nationally and internationally, the need to comply with different property licensing regulations in each jurisdiction imposes unnecessary costs.

We believe that non-residential property owners should be exempted, for the purpose of the Act, on the basis that they regularly engage in property management, leasing and sales and therefore understand the risks and consequences that are involved in such transactions. There is also a clear need to redraft the Victorian legislative exemption for dealing with related parties.

Such exemptions will provide further time and cost savings for those parties experienced in property transactions, who do not require the consumer protections of the Act. Not only will this benefit the property industry but also provide time and cost savings for the government departments responsible for administering the legislation, without the risk of reducing consumer protections.

The Property Council believes that continued regulation is inconsistent with the State Government's intention to remove unnecessary 'red tape' on Victorian businesses. By contrast, the exemptions would make Victoria more attractive to national and international property investors by significantly reducing costs.

PART A: ESTATE AGENTS AND CONVEYANCERS

1 LICENSING OF ESTATE AGENTS AND CONVEYANCERS

3 Are there any persons or organisations that are inadvertently captured by or excluded from the need to be licensed as an estate agent?

The Property Council considers the protection of consumers an important policy objective for the Act however it is not essential for the non-residential property sector.

As noted above, the relationship between property owner, manager and tenant is a commercial business to business relationship. Property owners operating in this sector are professionally advised, and able to take steps to mitigate against risks involved in property transactions. For instance, most commercial property managers operate in accordance with a comprehensive management agreement that has been negotiated between themselves and the property owner. Significant resources are applied by both parties to ensure these agreements are thorough and comprehensive.

Any legislative provision to protect large national and multi-national entities against their agents is not necessary and has no benefit in light of the onerous costs it imposes on owners. This is made worse by the fact that major owners, agents and managers in the non-residential property sector operate in more than one state and so have to comply with different pieces of real estate regulation and retail tenancy legislation. For instance, owners and managers of retail property must also comply with the Victorian *Retail Leases Act* which regulates almost every aspect of the landlord/tenant relationship. This unnecessary complexity and cost is therefore a major issue for commercial property owners and managers, including shopping centre owners and managers.

The Act currently imposes substantial costs on agents and managers, which can be broken down into the following categories:

- Organisational restructuring to meet licensing requirements;
- The cost of compulsory professional development courses and the working hours of staff lost to complete the course; and
- Administrative and auditing requirements, for instance to annually renew qualifications.

These costs are ultimately borne by property owners through the agency fees they pay, which in turn has a negative impact on the returns for investors in the trusts and institutions. Costs are also passed on to property buyers and tenants to the extent that these costs are reflected in the purchase price for rents that they pay.

We propose that as certain non-residential property owners do not need consumer protection under the Act, the Act should no longer apply to them. As such we strongly recommend two targeted exemptions be adopted by the Review, with regard to the current licensing arrangements in Victoria:

- A redrafted 'related party' exemption to ensure that a license is not required to notionally protect a commercial property owning entity from its own property management company, and
- A 'sophisticated owner' exemption to ensure that a license is not required to notionally protect large, professional commercial property companies which own tens of millions of dollars of property assets and are perfectly able to manage their own risks.

Related party exemption

In Victoria, people or entities who directly sell, manage or lease commercial property do not need to be licensed since there is no agency relationship. This exemption for related parties applies to a corporation which carries on the business of an estate agent in relation to the assets of another corporation which is directly or indirectly owned by the first corporation, or vice versa, or where both corporations are owned by the same person.

However, the term 'corporation' does not capture the most common owner/managers in today's commercial property industry, namely real estate investment trusts. As a result, most large shopping centre and commercial office owners in Victoria who manage their centres and offices through a related party are still not exempted in practice and must still go through the estate agents licencing process.

The Property Council believes it is a relatively simple exercise to redraft a workable definition for a related party exemption as there is clearly no reason for the Victorian state licensing regime to have the effect of regulating the relationship between the property ownership and property management entities of the same corporate family.

Sophisticated owner exemption

The Property Council believes there is no case for the non-residential property sector to be included in the licensing regime under the Act. Entities which invest in commercial property worth tens of millions of dollars and who are professionally and full informed do not require regulatory protection, as they are not unsophisticated consumers of real estate services suffering information asymmetries in their dealings with property agents and managers.

The Queensland Government was the first in Australia to grant exemptions from licensing and regulation for agents or managers which are managing property owned by an entity related to the manager or agent (a 'related entity' exemption) and for managers and agents managing property on behalf of large, professional property owners (a 'large property owner' exemption).

We urge the State Government to provide exemptions for 'related entities' and 'large property owners' in the Act, similar to that provided by the Queensland Government in Section 7 and 8 of

the *Property Occupations Act 2013*.

6 What is your view as to the present training for estate agents and/or conveyancers? Are there any additional training requirements that should be mandated? Are any of the current requirements unnecessary?

The Property Council considers the existing requirements for training estate agents and conveyancers unnecessary as they impose a substantial cost on the non-residential property industry for no benefit to consumers or the public generally.

Our members report that the current requirements are largely irrelevant to the work of commercial property managers and agents and add little or no value. Firstly, agencies and related management companies operating in the non-residential sector have their own recruitment procedures and generally require a much higher standard of qualification and training than required by the Act. Secondly, the qualifications and training required by the Act are irrelevant to the types of transactions performed as they were designed with residential leasing in mind. For example, a shopping centre manager is currently required to obtain an estate agent's license and undertake a course on residential real estate to comply with the Act, even though this has no relevance to the skills required for managing and leasing a shopping centre.

We do not believe there are additional training requirements that should be mandated.

7 What are the potential costs of mandating higher entry standards for estate agents and/or conveyancers?

As discussed in our response to Question 6, the cost of regulating commercial property transactions currently outweighs the benefits, due to the irrelevance to the non-residential sector where 'consumers' are large national and multinational institutions. Our members have indicated that not only are these requirements unnecessary, but also costly.

Leasing and property management agencies incur additional costs and lost staff time when staff have to attend external or in-house training on issues not covered by the mandatory professional development courses under the Act. Of course, there is also the time involved in implementing and overseeing systems to ensure compliance with the Act, as a result of:

- Identifying which staff requires a licence;
- 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 the above.

It is difficult to quantify the ongoing costs incurred by commercial property owners, agents and managers, though the Shopping Centre Council conservatively estimated these costs to be \$12 million per year. Considering that these professionals are also incurring significant costs to comply with other pieces of real estate regulation and retail tenancy legislation, it is clear there would be considerable savings to the industry if this unnecessary regulation were removed.

For this reason, the Property Council does not believe there is a case for Government to mandate even higher entry standards.

9 What is your view about the need for CPD for estate agents and/or conveyancers? If CPD was required, what type of development should be mandated?

The Property Council believes there is no need for the introduction of CPD for estate agents and conveyancers. Companies that sell, manage and/or lease non-residential properties already provide extensive in-house training on leasing and the requirements of Victorian tenancy legislation to ensure that their management and staff comply with the law. More importantly, such companies which sell their services based on the superiority of the leasing and management skills of their staff would not want to rely on the lowest common denominator mandatory courses to maintain their competitive advantage.

10 What are the costs of mandating CPD for all conveyancers and estate agents?

See responses to Question 7 and 9.

17 Is it really necessary to prescribe in legislation a management approach that requires an estate agent or conveyancer to physically manage the day to day operations at each place of business? If not, what, if any, office management requirements should be prescribed?

The Property Council considers any prescriptive regulation of management approaches under the Act to be unnecessary due to the sophisticated nature of operations in the non-residential property sector. Issues such as the obligations of the property manager are currently addressed by a detailed management agreement which also covers many other eventualities which are tailored to the property in question. Given the millions of dollars at stake in the successful management of a large office building or shopping centre, these issues should not be left to a standardised property management approach.

2 CONDUCT OF ESTATE AGENTS

22 What would be the merits or otherwise in having some established principles about the role of estate agents in the Estate Agents Act and/or setting out the duties for the conduct of an estate agent in relation to sellers, buyers, landlords and tenants (i.e. would it clarify expectations about the role of the agent and their conduct)?

The Property Council considers the relationships between non-residential property owners and their agents as business relationships which do not need to be defined through legislation or regulated via the imposition of a licensing regime, especially as there is no evidence of a public policy failure.

23 What additional information should be included in the Estate Agents Act about the role estate agents play in property management, including in respect of duties and obligations should they be under to landlords and tenants?

See response to Question 22.

24 What sanctions should be in place for estate agents who display poor behaviour in the property management space (for example specific offences, limited licence)?

Large owners of commercial property are not ordinary consumers who need or want legislative protection, as they are already professionally advised and employ large staffs to ensure their interests are protected. These owners have recourse to legal and commercial avenues if a property transaction goes wrong. Therefore, we believe that the risks in the owner-agent relationship should be a matter of commercial negotiation between the parties, and not for regulation by government.

25 What are your views on the merits of clarifying and directly expressing in the Estate Agents Act, the duties and obligations, if any, that an estate agent may hold towards buyers of property?

See response to Question 22.

26 What would be the costs and benefits of regulating the conduct of estate agents in negotiating sales authorities and the content of those authorities?

See response to Question 22.

PART B: CONDUCT OF OWNERS CORPORATION MANAGERS

71 What are the main concerns about unfair contract terms in management contracts?

The Property Council believes that it is not appropriate for the power to remove a manager to be vested in a committee. Given that managers act in the interests of all lot owners in an owner's corporation, it is our view that all lot owners should have a say in the matter of revoking a manager's appointment or that, at the least it be a special resolution with at least 75 per cent support. We believe that in order to remove a manager, an owners corporation should arrange a general meeting.

With regards to the assignment of management contracts, the Property Council believes that terms which limit an owners corporation's ability to prevent an unwanted assignment of the contract should be prohibited.

72 Are there other types of unfair terms that should be considered? If so, what are they and how common are they? Why might they be unfair?

With regards to the removal of of managers, the Property Council believes that contract terms that require a step not required by the *Owners Corporation Act* should be prohibited. This is because the removal of a manager before the expiration of their contract raises complex legal and contractual issues. In order to remove a manager correctly, an owner's corporation should arrange a general meeting.

We further believe that terms which require an excessive period of notice for the early termination of a management contract should be prohibited. Early termination should be based solely on performance; however, the provision of notice for early termination should not be required to exceed three months.

74 What is your view as to contractual terms for the renewal of management contracts? For example, should there be any rules about terms such as automatic renewals or renewals at the prerogative of the manager only?

The Property Council would not support automatic renewals as different projects have varying projects needs and requirements. This issue does not require additional regulation as the appropriate terms of a contract will vary from case to case depending on a variety of factors. Therefore, a 'one size fits all' approach will likely have adverse effects.

75 Are there other issues that require a regulatory response relating to long-term management contracts?

There are adequate consumer protections which currently relate to long term management contracts and that a Committee acting in accordance with the current *Owners Corporation Act*

should be able to determine an appropriate length of a contract. The Property Council is of the view that this issue does not require an additional regulatory response.

76 How can concerns about managers' influence on voting be addressed?

Existing provisions under Section 122 (1) of the *Owners Corporation Act* already address the behaviour of a manager. If they are acting in accordance with the Act, then they will not be undertaking the activities referenced by the questions.

If the Manager is in breach of these provisions, the dispute procedures, including an application to VCAT can be commenced. We believe the powers of VCAT together with the existing obligations under the Act, are sufficient to deal with any problem.