

22 March 2016

Consumer Property Acts Review
Policy and Legislation Branch
Consumer Affairs Victoria
GPO Box 123
Melbourne Victoria 3001

By email: consumerpropertylawreview@justice.vic.gov.au

Consumer Property Acts Review

I refer to the submission lodged by the Shopping Centre Council of Australia on 11 March 2016 (**attached**).

In that submission we stated: *"The NSW Government is also considering [an exemption from real estate licensing for large commercial property owners]. This follows a report by the Independent Pricing and Regulatory Tribunal (IPART), 'Reforming Licensing in NSW'. Among the licenses identified by IPART for reform is: "The NSW Government should exempt commercial property agents who sell or manage property for a related corporate entity, or a large commercial property owner, from the requirements of the Property Stock and Business Agents Act"*

The NSW Minister for Fair Trading, Mr Victor Dominello MP, has stated that the Government would review IPART's recommendations and "those [licenses] that cannot be demonstrated to have a strong public policy rationale will be removed". (Media release 11 August 2015)."

Mr Dominello MP has now announced that the NSW Government will remove the need for real estate licensing for those managing on behalf of owners of commercial property collectively worth more than \$40 million or exceeding 20,000 square metres, and for those managing on behalf of a related corporate entity. Further information about the NSW decision can be obtained from Mr Martin Gray, Policy Adviser to the NSW Minister for Innovation and Better Regulation or Mr Andrew Gavrielatos, Assistant Commissioner, NSW Fair Trading.

This means that NSW will join Queensland in removing licensing and associated regulation for large commercial property owners. As we pointed out in our submission such an exemption has operated in Queensland since 1 December 2014.

This provides further support for the recommendation we made in our earlier submission that those who sell, buy, lease, manage or collect rents on behalf of such entities are excluded from the definition of an 'estate agent' and therefore excluded from associated regulation under the *Estate Agents Act*. Without such an exemption the cost of doing business in Victoria will be higher than in NSW and Queensland.

Yours sincerely,



Milton Cockburn
Adviser

11 March 2016

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This submission by the Shopping Centre Council of Australia (SCCA) is confined to one aspect of the *'Consumer Property Acts Review Issues Paper No. 1'* – the definition of an 'estate agent'. We specifically address Question No. 3: *"Are there any persons or organisations that are inadvertently captured by or excluded from the need to be licensed as an estate agent?"*

Large commercial property owners are inadvertently captured by the definition of an 'estate agent'.

The *Estate Agents Act* inadvertently captures professional commercial property-owning entities for whom property ownership and management is their core business. The relationship these entities have 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. They each employ a large staff to manage and protect their property assets. Often the manager is a related corporate entity. 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. Governments generally should not regulate business-to-business transactions unless there are special characteristics of the particular market or evidence of a market failure. No such characteristics exist in the commercial property market. This was confirmed by the *Decision Regulation Impact Statement: Proposal for national licensing for property occupations, July 2013* (refer p.28).

The original purpose of legislation regulating the activities of estate agents, gleaned from the parliamentary debates at the time, was to protect ordinary home owners and rural property owners from the activities of real estate agents and stock and station agents. We accept that residential property and rural land will remain regulated by Parliaments as was originally intended. The regulation of other types of property (commercial and industrial), however, has occurred by historical accident with the subsequent development of a professional commercial property industry in Australia. The shopping centre industry, for example, did not begin in Australia until 1957, which postdates the introduction of estate agency legislation. These large commercial properties entities have therefore found themselves 'caught' by regulation which was never intended to apply to them.

The key characteristics of these professional commercial property-owning entities are:

- Property investment and ownership is their core business (which is acknowledged, for instance, through the characterisation of such companies on the Australian Stock Exchange as Australian Real Estate Investment Trusts, or 'A-REITs');
- They own and manage a large 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 a large staff (asset management, financial, legal etc.) to ensure their property assets are protected and well-managed;
- 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 properly 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 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.

The fact that the Act was never intended to protect commercial property owners is demonstrated by the fact that none of the units of competency required for the issue of a real estate agents licence in Victoria has any relevance to a person managing or leasing a shopping centre or a commercial building. (These units are set out in Schedule 1 of the *Estate Agents (Education) Regulations 2008* (S.R. no. 128/2008). This means commercial property owners are required to bear the expense, staff absences and staff rostering needed to require staff to obtain a qualification which is professionally irrelevant to the work they are required to perform. This is a 'poster-child' of unnecessary government regulation.

Recommendation

It is our strong recommendation, for these reasons, that those who sell, buy, lease, manage or collect rents on behalf of such entities are excluded from the definition of an 'estate agent' and therefore excluded from associated regulation under the *Estate Agents Act*.

Although we consider there is little justification for the regulation of commercial and industrial property agency work, because of the limited complaints made to the regulatory authorities, we accept the outcome of the debate on this issue during the proposals for national licensing of real estate agents under the National Occupational Licensing System (NOLS). At the same time, another outcome of that debate was widespread acceptance that the sophisticated segment of the commercial property industry would be exempt from government regulation.

We therefore recommend, as part of this review, that the *Estate Agents (Exemption) Regulation 2014*, which was due to come into operation on 1 July 2015, be reinstated. Alternatively, if the *Estate Agents Act* is to be amended arising out of this review, the exemptions could be legislated.

Consequences of such an exemption

The Queensland Government implemented these exemptions as part of the *Property Occupations Act*, which came into force on 1 December 2014 (see sections 7 and 8). The *Review of the Estate Agents (Exemption) Regulations 2014*, conducted by ACIL Allen Consulting on behalf of Consumer Affairs Victoria, found no adverse consequences as a result of these exemptions.

The Queensland Office of Regulatory Policy (QORP) advised ACIL Allen it "*has not had complaints related to unprofessional behaviour from people covered by the exemptions (and they are not aware of any complaints before the exemptions were implemented).*" The QORP also advised it "*has not seen any noticeable change in the market (and they do not expect to see any).*"

The NSW Government is also considering such an exemption. This follows a report by the Independent Pricing and Regulatory Tribunal (IPART), *'Reforming Licensing in NSW'*. Among the licenses identified by IPART for reform is: "*The NSW Government should exempt commercial property agents who sell or manage property for a related corporate entity, or a large commercial property owner, from the requirements of the Property Stock and Business Agents Act*"

The NSW Minister for Fair Trading, Mr Victor Dominello MP, has stated that the Government would review IPART's recommendations and "*those [licenses] that cannot be demonstrated to have a strong public policy rationale will be removed*". (Media release 11 August 2015).

An exemption for large commercial property owners (as envisaged by the *Estate Agents (Exemption) Regulations 2014*) would have minimal impact in Victoria. The ACIL Allen report, referred to above, found:

- only 0.7% of commercial properties in Victoria would be impacted;
- less than 1.4% of commercial property sales in Victoria would be affected;
- only around 2% of real estate licensees would be affected;
- only around 0.2% of real estate agencies are likely to be affected.

It should be stressed that ACIL Allen found no evidence that the exemption "would have driven down standards in the commercial property industry and put tenants at an unfair disadvantage", as was claimed when the Victorian Government repealed in May 2015 the *Estate Agents (Exemption) Regulations 2014*.

We estimate that this unnecessary business red tape is costing commercial property owners in excess of \$3 million a year. Where possible such costs are passed back to the owner of the property through the commissions and management fees they pay. Removal of this unnecessary licensing requirement and associated regulation will therefore achieve savings for commercial property owners, who are mainly investors in superannuation funds, real estate investment trusts, managed funds, life insurance funds and other investment vehicles. Such investors are mainly people who are saving for, or living out, their retirement.

Tenants have nothing to fear from such an exemption. Retail tenants will remain fully protected by the Retail Leases Act. This is why the exemption has been supported by the Australian Retailers Association and the National Retail Association.

Removal of these licensing requirements would also free up staff resources in Consumer Affairs Victoria currently occupied in licensing, compliance and enforcement of a law which has no public policy rationale.

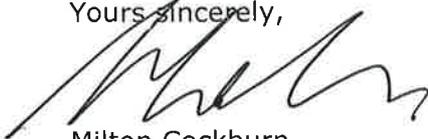
Most importantly the reforms will come at no cost to the community.

We would be happy to answer any queries in relation to our submission.

Shopping Centre Council of Australia

The Shopping Centre Council of Australia (SCCA) represents the major owners, managers and developers of shopping centres in Australia. Our members are: AMP Capital Investors, Blackstone Group, Brookfield, Charter Hall, DEXUS Property Group, Eureka Funds Management, GPT Group, Ipoh, ISPT, Jen Retail Properties, JLL, Lancini Group, Lendlease, McConaghy Group, McConaghy Properties, Mirvac, Perron Group, Precision Group, QIC, Savills, SCA Property Group, Scentre Group, Stockland and Vicinity Centres.

Yours sincerely,



Milton Cockburn
Adviser