

17 January 2014

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The Research Director
Legal Affairs and Community Safety Committee
Parliament House
George Street
Brisbane, Qld 4000

Dear Mr Hastie

Property Occupations Bill 2013

Thank you for the opportunity to provide feedback on the *Property Occupations Bill 2013* (Bill).

In early 2013, the Property Council lodged a comprehensive submission in response to the public release of the Queensland Government's draft Agent's Bills. The submission provided numerous suggestions for red tape reduction, along with an outline of issues that remained of concern to the property industry. It has been attached again for your reference.

We are pleased to note the majority of issues previously raised with the Department of Justice and Attorney-General (Department) have been addressed in the Bill.

The Bill is seen by the property industry as an improvement on the current *Property Agents and Motor Dealers Act 2000* (PAMDA), as it reduces red tape and regulation while continuing to provide comprehensive protections for consumers.

The Property Council provides the following comments, for your consideration:

Exemptions

Of particular benefit to the property industry in Queensland will be the Bill's introduction of exemptions for non-residential transactions between related entities and for 'sophisticated owners'.

The *Objects of the Act* focus on the balance between protection of consumers and 'the promotion of freedom in the market place', with particular emphasis on residential property.

As the majority of non-residential transactions are business-to-business rather than business-to-consumer, it is unclear why all property transactions have historically been subject to the requirements of legislation designed to protect consumers.

As noted in our previous submission, research undertaken by the Shopping Centre Council of Australia indicates that non-residential transactions between related entities or sophisticated owners currently incur costs in excess of \$2.4 million annually, in order to comply with the legislation.

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Providing exemptions for related entities and sophisticated owners will benefit not only 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.

Queensland is the first state in Australia to introduce these exemptions for related entities, and the Government is to be commended for taking this proactive step to reduce unnecessary red tape.

Additionally, the Property Council supports the exemption from Part 7 for residential sales contracts involving 'sophisticated parties'.

This exemption will provide further time and cost savings for those parties experienced in property transactions, who do not require the consumer protections of the Act.

In our submission of 11 March 2013, the Property Council drew the Department's attention to the current situation whereby a buyer is able to sign a contract calling on an option to buy, and then exercise their right to terminate the contract under the subsequent 5 day cooling off period.

The Property Council is pleased to see the Bill has been amended to include exemptions from the definition of 'relevant contract' where contracts have been formed through the exercise of an option granted under an earlier contract.

Licensing

The Property Council supports the removal of licensing requirements for property developers, bringing Queensland in line with other jurisdictions in Australia.

The rationalization and consolidation of categories of licenses under the new legislation will reduce administration time and costs both for government and the property industry.

Sales contracts

Through introducing penalties for the seller or the seller's agent for technical breaches to the legislation, rather than allowing buyers the option to terminate contracts on this basis, the level of litigation associated with technical breaches can be expected to reduce considerably.

The Bill's simplification of the definition of 'residential property', will be of particular benefit to the industry in situations where it is unclear whether or not a contract is a 'relevant contract'.

Additionally, the removal of strict requirements, such as a warning statement, body corporate information sheet and statement directing the buyer's attention to the warnings, will streamline and simplify residential sales contracts and limit avenues for litigation.

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For consumers, the removal of the requirement to involve a lawyer and specify the section of legislation under which they are terminating a contract during a cooling off period will save time and money, and limit the potential for litigation surrounding references to relevant sections of legislation.

Notice of vacant land requirements

In our submission of 11 March 2013, the Property Council drew particular attention to the requirement under the draft Bill for prospective purchasers to be given a written statement where vacant land is not lawfully useable for residential purposes.

The Property Council is pleased to note our submission has been considered by the Department, with the removal of the requirement for agents to provide a written statement of vacant land.

This will provide time and cost savings for both buyers and sellers, as well as returning the onus to the buyer to undertake their own due diligence.

Commission and Disclosure

The Property Council supports the removal of maximum caps on real estate commission, not only as a means to introduce further competition, but also to bring Queensland in line with other states.

Allowing agents to obtain commission where they have an interest, provided that interest has been disclosed to and acknowledged by the seller, will ensure agents are able to receive a commission for their services, rather than being penalized for having an interest.

A significant issue with disclosure continues to exist, however, as a result of Sections 157 and 158 of the Bill, as they relate to the sale of house and land packages.

The Explanatory Notes clarify these sections are intended to ensure that all marketing costs, regardless of whether they have been paid directly to another person, or passed on through the land or building contract, must be disclosed.

While the protection of consumers from undesirable practices is supported, as noted in our previous submission, this provision has the potential to impact on broader issues, including valuations and bank finance.

If a developer is required to disclose all marketing costs as part of a sales contract, a valuer undertaking a valuation on behalf of the purchaser's bank, will then discount the valuation by the disclosed cost of marketing the property.

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This will then leave the prospective purchaser with a contract price above the valuation of the house/land. In most situations, banks are unwilling to lend to prospective purchasers in situations where the property is valued at less than the contract price, particularly where the transaction involves a new residential property.

Prospective purchasers are then left with the option to terminate the contract, or in some instances, increase their deposit to cover the cost of the marketing, while still meeting the bank's lending requirements.

While the intentions of Sections 157 and 158 are supported, the Property Council is concerned the practical operation of these sections will have a negative impact on consumers, particularly where new residential products are being transacted.

Appointment

Part 4 of the Bill, relating to a standard approved appointment form, is seen by the Property Council as a positive move to streamline and simplify the appointment process.

The Property Council has previously raised concerns regarding the need for standardised written pre-appointment advice to be provided to prevent potential litigation surrounding technical breaches.

Conclusion

The Property Council supports the Government's commitment to the reduction of red tape, and sees the introduction of this Bill as a positive step towards reducing unnecessary regulation in Queensland.

If you have any further questions regarding the Property Council or this submission, please do not hesitate to contact me on 07 3225 3000 or kmacdermott@propertyoz.com.au.

Yours sincerely



Kathy Mac Dermott
Executive Director

Enc. Property Council of Australia submission, *Splitting of the Property Agents and Motor Dealers Act 2000*.

11 March 2013



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Red Tape Reduction Review of Agents Bills
Office of Regulatory Policy
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Dear Attorney-General

Splitting of the Property Agents and Motor Dealers Act 2000

Thank you for the opportunity to provide feedback on the splitting of the Property Agents and Motor Dealers Act (PAMDA) and the subsequent draft Agents Bills 2013.

The Property Council is supportive of the move to separate the legislation regulating property agents from motor dealers, and provides the following comments on the draft Property Occupations Bill 2013 (Bill).

Objects of the Act

The objects of the Act are primarily to provide a licensing system for property agents and 'provide a way of protecting consumers against particular undesirable practices associated with the promotion of residential property'.

The second object relates directly to residential property, and it is therefore questionable why commercial property agents are subject to the same provisions.

Many commercial property transactions are multi-million dollar deals involving sophisticated vendors and buyers. They are mostly business to business transactions, with few involving consumers inexperienced in real estate.

There is little need for consumer protection provisions where it can be demonstrated that parties to a transaction are sophisticated and experienced in real estate transactions.

Subjecting commercial transactions to the provisions of the Act based on consumer protection is ill-founded, as many 'consumers' are multi-million dollar corporations.

Exemptions

A precedent has been set in legislation, including the Queensland *Retail Shop Leases Act*, whereby 'sophisticated consumers' are exempt from complying with consumer protection provisions of an Act.



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Likewise, where transactions occur between related entities, there is little need for consumer protection. This has been recognized in other jurisdictions, and at a national level.

The Interim Occupational Licensing Advisory Committee set up to discuss the proposed national license for real estate agents, unanimously supported the exemption of related entities and sophisticated owners from the requirement for licensing.

As there is existing precedent within Queensland and nationally, it is logical that the draft Bill should exempt related entities and 'sophisticated consumers' who do not need, nor want, the protection of the legislation.

These exemptions will reduce the cost of compliance for companies and result in less regulation for the government to process.

The Shopping Centre Council of Australia estimates the cost of real estate regulation and licensing in Queensland to be around \$2.4 million per year.

Warning statement

The Property Council supports the intention of Section 167 (2) in streamlining regulations regarding the pre-signing direction and warning statement of residential contracts.

The current wording of the legislation however would see the warning statement required in multiple locations throughout the document and on supporting pages.

The legislation states the warning must be '...written immediately above, and on the same page as, each place in the contract where the buyer signs...'

Buyers often initial every page of a contract (or at least alterations), so the current wording would indicate a warning statement is required on every page. This may also apply to supporting documentation, for example site plans, which buyers are required to initial.

To ensure the section meets its objective of simplifying residential contracts, further clarification is required.

It would be the Property Council's preference that the warning statement is only required above where the buyer signs on the execution page of the contract.

Cooling off periods

Retention of cooling off provisions in standard residential contracts is supported by the Property Council. However, the current exemption to sale by auction should be extended to more sophisticated agreements, such as by tender or option, where cooling off periods should not apply.



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For example, a buyer could sign a contract by calling an option they have held for a significant period of time, and then exercise their right to terminate the contract during the subsequent 5 business day cooling off period.

Any party entering into a tender or option would be experienced in real estate transactions, and not need the 'consumer protection' provided by the cooling off period. This instead provides a legal technicality through which an agreement can be terminated.

The removal of cooling off periods for residential property purchased at auction has established a precedent through which cooling off periods should be removed for 'sophisticated' transactions.

This could also be extended to significant residential transactions, such as the sale of a large residential estate from one company to another.

There is a big difference between the purchaser of a single, vacant residential block of land, and the purchaser of a 100 lot residential sub-division. The legislation however, treats both consumers the same.

Definitions

Section 15 (2) of the draft Bill provides a definition for residential property.

The current wording is ambiguous enough to capture commercial and retail lots in predominantly residential buildings, which is clearly not the intention of the Act.

Removing the words '...or in a residential area -...' would resolve this issue by limiting the definition to those residential properties the Act aims to cover.

Throughout the Act, the expression 'enters into' is repeatedly used. While technically correct, it too is ambiguous. Greater clarity could be provided by exchanging it for terms such as 'signs the contract documents'.

Lands not lawfully useable for residential purposes

The draft Bill (section 96) provides that prospective purchasers must be given a written statement where vacant land is not lawfully useable for residential purposes.

While again aimed at protection of inexperienced consumers and residential purchasers, the current drafting of the legislation captures sophisticated property transactions.

Agents would be required to provide written notice to potential purchasers of industrial, commercial or retail land explaining they cannot build residential dwellings on it.

While intended to protect residential consumers, this adds extra regulation to property transaction for questionable gain. Particularly where agents are dealing with 'sophisticated consumers' this adds time and money to the transaction process.



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Additionally, agents are rarely qualified town planners, so in most situations they would not be in a position to provide advice on town planning matters to a purchaser.

Disclosure

Section 86 of the draft Bill outlines disclosure requirements for vendor's agents in the sale of residential properties.

While the intention of this section in protecting consumers from undesirable practices is supported, current reporting arrangements have the potential to impact on a range of broader issues, such as valuations.

For example, a residential developer may sell 10 new lots to a builder by way of an option, at a reduced rate for purchasing in bulk. That builder may then advertise house and land packages to potential purchasers. After identifying a purchaser, the builder may request the purchaser sign a contract on the land directly with the developer, and a building contract with them (the builder) for the house.

What this means, is the developer will be required to disclose the difference between the price the land was 'sold' to the builder and the final purchase price as a form of marketing cost. This has the potential to be a significant amount of money.

Often when providing a valuation on a property, valuers discount the amount of money spent on marketing from the final valuation. In the example above, this would mean the valuation would come in considerably below contract price, potentially meaning the purchaser will be unable to gain finance for the property.

Issues specific to commercial property

There is a fundamental issue with the draft Bill and the previous PAMDA legislation, as they are primarily designed for the residential property sector. Many of the requirements placed on commercial property agents are a consequence of this, and add unnecessary regulation to the industry.

The commercial property sector typically undertakes transactions of high monetary value, between experienced vendors and buyers.

These transactions often involve property management agreements and accounting and auditing requirements that are beyond the scope of this residential-focused legislation.

As noted earlier, there is a need to include exemptions within the legislation for 'sophisticated consumers' (both residential and commercial) and 'related entities'.

The current legislation does not provide the flexibility required by agents when drafting agreements. While having regulations and standard forms in place for smaller transactions or inexperienced owners is essential, it should be optional for larger, more sophisticated transactions.



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For example, many large commercial owners have drafted their own agreements which they use across jurisdictions. These multi-million dollar organisations do not need the protection of the legislation or the standard form agreements it dictates they must use.

Flexibility must be written into the draft Bill to allow such agreements to be accepted as common law, and to bring Queensland in line with other states.

Additionally, the current complex requirements for entering into a contract give rise to technical breaches being used to terminate commercial contracts. Permitting common law agreements would minimize the amount of litigation arising from technical breaches.

It is acknowledged that agents have a responsibility to inform their clients of the terms of their appointment, and disclose any interests they may have in a transaction.

Section 80 of the draft Bill provides that pre-appointment advice must be given prior to an appointment being signed.

As this section- and the previous section in PAMDA- does not require the advice to be provided in writing, this section has been used as a means of avoiding a contract based on a technical breach.

Where there is a requirement to provide specific information, the Property Council would like to see this as a standard form that must be initialed by the agent and the vendor, to minimize the potential for technical breach.

Conclusion

The Property Council supports the Government's commitment to the reduction of red tape in Queensland, and sees the development of the draft Agents Bills 2013 as a key way of achieving this.

While this submission has raised some issues requiring further consideration, we would appreciate the opportunity to meet with your department to discuss the technical details of the Bill in greater detail. Please contact Jen Williams on 07 3225 3000 or jwilliams@propertyoz.com.au to organize a convenient time to meet.

If you have any further questions about the Property Council or this submission, please do not hesitate to contact us.

Yours sincerely



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