

18 July 2011

The Chair, Ms Barbara Stone MP  
Legal Affairs, Police, Corrective Services and  
Emergency Services Committee  
Parliament House  
George Street  
BRISBANE QLD 4000

E: lapcsesc@parliament.qld.gov.au

Dear Ms Stone,

**Submission to the Committee – *Property Agents Bill 2010***

We congratulate the Government in effecting the migration of the *Property Agents and Motor Dealers Act 2000* into industry-specific legislation.

The PSAQ is deeply involved in the operations of the property sector and has had significant consultation with the Office of Fair Trading over the past twelve months regarding the *Property Agents Bill 2010*.

More particularly, we raised the issue of “sham employment arrangements” in the property sector at an initial consultation meeting with the Office of Fair Trading (OFT) on 23 June 2010, via email and at meetings with OFT officers, and subsequently in a written submission [see attached].

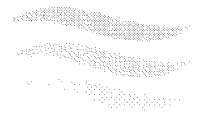
We are particularly pleased that the issue of “sham employment arrangements” are addressed in the Bill, through the definitions of “employ” and “property agent salesperson”. It is also heartening to note that the issue was specifically addressed in the Bill’s Explanatory Notes (pages 1-3) and in the Hansard record of Mr Peter Lawlor’s introductory address to Parliament on the intent of the Bill [extracts attached].

However the PSAQ does have remaining concerns that the Bill may still allow for challenges to the intent of those provisions that attempt to prevent “sham employment arrangements”.

Our concern arise from the industry’s ongoing attempted subversion of minimum employment standards, in particular from 1997 (when employment in the Queensland industry was first regulated) to the present. Within this period, various legislative mechanisms have been (ab)used, with great effect – firstly Queensland Workplace Agreements, then Australian Workplace Agreements, and now, on-hire labour, “independent contracting” and permanent in-house “conjunctional arrangements”. Each time one door is seemingly closed, the industry simply finds another route to achieve the same outcome. All of these diversions from the legislated employment conditions were and are attempts to avoid payment of fair remuneration, particularly to novice property salespeople.

We anticipate that legislators primarily interested in consumer outcomes may question why we are bringing (what appears to be) a “simple” workplace relations issue to this forum. There are two reasons:

Representing Real Estate  
Property Managers and  
Sales People in industrial  
relations & professional  
matters statewide.



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- Fair trading legislation, by defining terms such as “employ”, directly impacts the nature of the relationship in the workplace (workplace relations) and, hence, the means by which many novice salespeople are (not) remunerated
- Poorly paid (in most cases, unpaid) novice salespeople, many of whom are in dire financial straits, pose a considerable risk to the consumer.

Our concern as to whether the current Bill will achieve prevention of “sham employment arrangements” is heightened by the practice in Queensland of industry newcomers obtaining a Real Estate Agents Licence (which requires them being assessed as competent in some 20+ modules of the Property Services Training Package) after as little as five days instruction!!! We deem this to be a gross abuse of the assessment process by the training organization(s) concerned. The newly-awarded Real Estate Agents Licence then permits the receiver to be an agent in their own right and thus either represent property to the public as an inexperienced agent, or enter into in-house conjunctional arrangements or engage other similarly-inexperienced personnel as “independent contractors”. Such situations are highly undesirable as they place the consumer (commonly the seller of property) at high risk of bungled (or worse) dealings. From the position of PSAQ members, these outcomes are untenable, especially due to novice agents being able to engage novice salespeople with nil or ineffective training or supervision, thus compromising the likelihood of a positive result for the client!

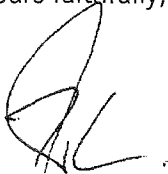
The developing practice of established real estate agents seeing the “five day full licence” avenue as a method of avoiding not only minimum employment standards, but taxation and payroll tax legislation, is alive and growing. The PSAQ is increasingly being approached for advice by prospective property salespeople who have been offered a position provided that they obtain a Real Estate Agents Licence and then become a “contractor” or permanent in-house “conjunctional agent”.

The PSAQ would welcome an audience with the Committee at the proposed public hearings on either 3 August or 24 August 2011, to provide examples of exploitation and consumer disadvantage resulting from the above practices.

We close by appealing to your Committee to revisit the provisions in the *Property Agents Bill 2010* and provide for greater certainty in addressing the above concerns.

This completes our submission.

Yours faithfully,



**TOM FRENCH.**

Vice President | Member Services

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Enc.

## PSAQ Email to OFT

**From:** Tom French  
**Sent:** Thursday, 24 June 2010 9:21 AM  
**To:** [REDACTED]  
**Subject:** PAMDAct Split Consultation

Good morning Chris!

Thank you for your inclusion of the Real Estate Employees Association in this consultation process.

As expressed yesterday at the first meeting of the group, some definition vagaries exist in the current PAMDAct that, in our opinion, place the consumer, employees and the general public interest at risk. We see this process as a brilliant opportunity to provide clarity in the new Act, particularly in relation to "sales employee" definition. We have had recent and ongoing discussions with your Mr Gary Gillard on this matter of definition and would see it as advantageous if Mr Gillard could be present at a meeting with you, if appropriate in your view.

We seek to meet with you "outside the forum" as invited to by yourself at the meeting yesterday. I would propose that mid to late next week say Wednesday 30th or Thursday 1st July would be most suitable for us. I would also seek to include Mr Barry Gannon, State and Federal Secretary of our Association in that meeting.

Please advise as to the most suitable date, time and venue should you be willing to meet with us.

Tom French  
State & Federal Vice President  
Manager, National Field Services  
Property Sales Association of Queensland  
0419787526

22 September 2010

Fair Trading Policy  
Department of Employment, Economic Development and Innovation  
GPO Box 3111  
BRISBANE QLD 4001

Dear Sir or Madam,

### Splitting of the Property Agents and Motor Dealers Act 2000 (PAMDA)

The PSAQ is the only association registered to exclusively represent the interests of real estate salespeople (which includes, in Queensland, property management personnel) in workplace relations matters. Since the late 1990s, the PSAQ has also been involved in matters to do with the registration and licensing of real estate salespeople; in particular having extensive input into:

- the development of PAMDA;
- the development of the PAMDA Codes of Conduct;
- the lobbying of OFT to adopt mandatory pre-vocational education standards for registered salespeople; and
- submissions and negotiations regarding commission arrangements.

### Independent Contracting

Whilst the issue of "independent contracting" is not currently contemplated in the proposed PAMDA split, it is increasingly alive and well at the "coal face" of the real estate industry. Such an increase in such activity has been brought about by two complementary issues – the *Fair Work Act 2009*, and the Real Estate Industry Award 2010.

For brevity, suffice to say that for **employees**, the loopholes in workplace relations legislation that previously allowed unproven "salespeople" to be engaged on "commission-only" have now been closed – and so business owners are now seeking alternative methods of achieving the same end, and are looking to "independent contracting" as the answer. This has resulted in previously-unidentified weaknesses in consumer protection legislation in three states now providing comfort to such business owners. It is notable that in both South Australia and Western Australia, consumer legislation effectively addresses this issue to the benefit of both consumer protection and workplace relations outcomes. For example, the South Australian legislation is quite elegant:

#### *Land Agents Act (SA)*

##### *6A—Sales representatives to be registered*

*(1) A person must not act as a sales representative for an agent unless the person—*

- (a) is registered as an agent under this Act; or*  
*(b) is registered as a sales representative under this Act and is acting as an employee engaged by the agent under a contract of service. (emphasis ours)*

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By contrast, in adopting a broader definition of employee than the normal common law usage (contract **OF** service) the Queensland legislation effectively opens the door to all comers:

***Property Agents Bill 2010 (QLD)***

*employ includes engage on a contract **FOR** services or commission and use the services of, whether or not for reward. (emphasis ours)*

The issue of "independent contracting" in the real estate industry is of major concern to the PSAQ. The concern in particular arises from people who are inexperienced in real estate sales being engaged in a manner that could result in them earning no income over an extended period. This is by contrast with independent contracting in almost every other industry, whereby an independent contractor can realistically expect to receive "a day's pay for a day's work". It has been observed that the engagement of salespeople as "independent contractors" in this industry is primarily intended to circumvent minimum employment standards – especially with respect to the payment of wages and the conditions under which commission-based and commission-only remuneration may apply.

The PSAQ has previously recognised, and made submissions on, the nexus between consumer protection and workplace relations in the real estate industry – i.e. a salesperson who is of unproven competence is more likely to both act in a manner that is detrimental to consumers **and** not earn a "living" income. This nexus was recognised by John Rau MP, current Attorney-General & Minister for Justice in South Australia, and former workplace relations lawyer, in his 2002 "Report into Practices in the Real Estate Industry" (South Australia).

The PSAQ and REA NSW (the PSAQ's New South Wales counterpart), as the key operational unions servicing the real estate industry, recognise the need to address this issue at both a state and national level.

We maintain that there is a clear distinction between "employees" – i.e. registered sales people/property managers – and Licensed Real Estate Agents working as salespeople who may elect to be "conjuncting agents" (rather than "independent contractors").

*The PSAQ submits, therefore, that the following definition should be used:*

***"employ means engage on a contract of service."***

*Further, we submit that the only people who should be permitted to be engaged as "contractors" (or "conjuncting agents") are those who:*

- *hold a Real Estate Agent's Licence; **and***
- *are operating a Trust Account; **and***
- *have **proven** competence (as opposed to **assessed** competence) in real estate sales.*

## Licensing of Real Estate Agents

The PSAQ remains additionally concerned that a full Real Estate Agent's Licence may still be issued to a person who completes the regulated academic requirements, **but has not gained sufficient or adequate relevant experience in the essential aspects of Real Estate Agency management or practice.**

Some RTOs are now actively promoting "fast track" courses to obtain a full Licence, using competency-based training modules, however we assert that any presumption of "competency" without practical experience is, for the purposes of consumer protection in the real estate industry, erroneous.

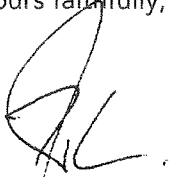
It is expected that this issue may be addressed by the NOLS reforms but we believe that Queensland should not rely upon this expectation.

Again, consumer protection is the fundament of our concern with a perceived high risk of infringement by inexperienced licensees in matters of ethics, legislation compliance and industrial relations/human resource management.

*We therefore submit that an experience-based component must be reinstated<sup>1</sup>, in addition to the required modules, for a person to qualify to be issued with a Real Estate Agent's Licence.*

This completes our submission.

Yours faithfully,



**TOM FRENCH.**  
State & Federal Secretary (acting)

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<sup>1</sup> Pre-PAMDA legislation required anyone who applied for a Licence to have worked for a specified minimum period in the real estate industry.

## **Extract from Hansard**

The Property Agents Bill will also correct minor, technical policy issues in PAMDA identified through operational and compliance processes. The bill will also prevent the real estate industry's use of independent contractors and on-hire labour who are not appropriately licensed or qualified, an emerging practice which has encouraged sham working arrangements and unfair working conditions. This is achieved by redefining what constitutes an employee. Codes of practice will be developed to regulate the behaviour of occupations licensed under the bill.

The Queensland Office of Fair Trading, in conjunction with industry, has worked hard to provide forward-looking legislation that gives both business and consumers legislative flexibility and responsiveness, in what is a constantly evolving and dynamic industry. I commend the bill to the House.

## **Definitions from the Property Agents Bill 2010**

*employ* includes—

- (a) engage on a contract for services or commission and use the services of, whether or not for reward; and
- (b) directly engage a person as an independent contractor; and
- (c) engage a person from a labour hire provider.

*employed licensee* means a licensee who performs the activities of a licensee as the employee of someone else.

*property agent salesperson* means—

- (a) a person who has obtained registration as a property agent salesperson under this Act; or
- (b) a person who has obtained a property agent licence and is employed, as an independent contractor, by a property agent as a property agent salesperson.

# Property Agents Bill 2010

## Explanatory Notes

### Short Title

Property Agents Bill 2010

### General Outline

The Property Agents Bill 2010 is part of a suite of Bills that repeals the *Property Agents and Motor Dealers Act 2000* (PAMD Act) and introduces a new legislative scheme governing the functions of real estate agents, pastoral houses, property developers, motor dealers, commercial agents, and auctioneers.

### Policy Objectives

The PAMD Act provides for the licensing and regulation of resident letting agents, real estate agents, pastoral houses, auctioneers, property developers, motor dealers, and commercial agents. In addition to licensing and regulating the conduct of such persons, another object of the PAMD Act is to strike an appropriate balance between the need to regulate for the protection of consumers and the need to promote freedom of enterprise in the market place.

This Bill implements the former Service Delivery and Performance Commission's (SDPC) recommendation to split the PAMD Act into occupation-specific Acts by establishing a Bill regulating the activities, licensing and conduct of property agents. Other SDPC recommendations and minor amendments to the relevant provisions of the PAMD Act continued in the Bill will also be implemented.

The main object of the Bill is to provide a system for regulating the activities, licensing and conduct of persons as property agents (including real estate agents, auctioneers of real property, and resident letting agents), and for registering and regulating persons as registered employees (property agent salespersons), that achieves an appropriate balance



between the need to regulate for the protection of consumers and the need to promote freedom of enterprise in the marketplace. The Bill forms part of a suite of Bills which give effect to the splitting of the PAMD Act, with the other Bills being the Motor Dealers and Chattel Auctioneers Bill 2010, the Commercial Agents Bill 2010 and the Agents Financial Administration Bill 2010 (collectively referred to as the Agents Bills).

### **Reasons for the Bill**

#### The Service Delivery and Performance Commission Review

In 2008, the Service Delivery and Performance Commission (SDPC) conducted a review of the PAMD Act with a view to reducing the regulatory burden on business while maintaining effective consumer protection. The SDPC made a number of recommendations, some of which were supported or partially supported by government.

The following SDPC recommendations are primarily relevant to the Property Agents Bill 2010:

- Split the PAMD Act into occupation-specific laws and transfer the trust account provisions to the *Fair Trading Act 1989*. It should also be noted that the Government supported the SDPC recommendations that pastoral houses transition to holding real estate agent licences and that property developers no longer be licensed.
- Remove the requirement for corporations to have a licensee as a director.
- Remove the requirement for principal licensees to display their licences at their registered offices; and
- Remove the requirement to provide photographs with licence applications, except for commercial agents.

#### The National Licensing System

The splitting of the PAMD Act will enable Queensland to more readily implement the National Occupational Licensing System (NOLS) agreed to by the Council of Australian Governments. The NOLS is intended to remove overlapping and inconsistent regulation between jurisdictions in particular occupational areas. It has been agreed that property agents will fall under the NOLS. The existing PAMD Act licences for real estate agents, auctioneers (of real estate only), resident letting agents and pastoral

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houses will fall under the property agent licence as a result of the PAMD Act split. The new property agent licence will then eventually be transitioned to the NOLS. The other categories of licence will be retained by Queensland, with the exception of property developers which will be removed altogether, in accordance with the SDPC recommendations.

Given that under the NOLS, property agents will be able auction real property as part of their licence, the Government has decided to create a new category of licence—under the Motor Dealers and Chattel Auctioneers Bill 2010—to regulate chattel auctioneers. This is consistent with the Government’s decision not to support the SDPC recommendations to remove the licensing of auctioneers.

#### Minor Amendments

While the Bill does not represent a full review of the provisions of the PAMD Act, minor amendments to the continued provisions of the PAMD Act in the Bill have been identified and will be implemented. In particular the use of independent contractors and on-hire labour in the real estate industry is becoming more prevalent given the potential tax and cost minimisation advantages for real estate agencies. There have been a number of business models that have been investigated by the Office of Fair Trading.

The use of independent contractors and on-hire labour presents a number of problems. For instance, the consumer would have difficulty identifying who they are dealing with. From a compliance perspective, problems may arise in respect to dual appointments, the keeping of trust monies and claims against the fund. In particular, problems arise in identifying the party or entity that should be held accountable.

Industry stakeholders are primarily concerned with the real estate industry being brought into disrepute as novice salespersons are primarily being used by on-hire agencies. There are also concerns about unfair working conditions and ‘sham’ contracting arrangements.

Legislative amendments have been made to clarify the position regarding the use of independent contractors and on-hire labour. While the definition of ‘employ’ is already wide, the definition has been amended to clarify that ‘employ’ also includes directly engaging someone as an independent contractor, and engaging on-hire labour. Additionally property agents are prohibited from directly employing, as an independent contractor, a person as a property agent or property agent salesperson unless that person holds a property agent licence.