



Property, Stock and Business Agents Regulation 2014

Regulatory Impact Statement

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Additional copies of this Regulatory Impact Statement and the draft Regulation can be obtained from:

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1. Introduction

1.1 Title of Regulatory Proposal

Property, Stock and Business Agents Regulation 2014

1.2 Name of the proponent and responsible Minister

The proposal has been developed by NSW Fair Trading. The responsible Minister is the Hon Stuart Ayres, Minister for Fair Trading, Minister for Sport and Recreation and Minister Assisting the Premier on Western Sydney.

1.3 The Subordinate Legislation Act 1989

1.3.1 The staged repeal process

The *Subordinate Legislation Act 1989*, provides for the staged repeal of certain regulations on 1 September each year. Most regulations must be reviewed every five years. The Property, Stock and Business Agents Regulation 2003 was scheduled to be reviewed in 2008, however, at the time an Intergovernmental Agreement was signed by the Council of Australian Governments (COAG) to develop a National Occupational Licensing System (NOLS) for a range of occupations, including property agents. As a result, the review of this regulation was deferred and no action was taken.

On 13 December 2013, COAG noted that, following the outcome of extensive State-based consultation, the majority of States decided not to pursue the proposed NOLS. Most jurisdictions identified a number of concerns with the proposed NOLS model and potential costs. States instead decided to investigate approaches that would increase labour mobility and deliver net benefits for businesses and governments.

In view of NOLS not going ahead, it is now appropriate to review the regulation.

1.3.2 The purpose of a Regulatory Impact Statement

A Regulatory Impact Statement ("RIS") is required under the NSW *Subordinate Legislation Act 1989*.

This Act aims to reduce unnecessary regulation by government and requires that a RIS be prepared and public consultation be undertaken, before a new regulation is made.

Following the public review of the proposed RIS, comments received will be considered and, if required, the proposed Regulation will be amended accordingly prior to coming into effect before 1 September 2014.

When a regulation is to be reviewed under the program, the responsible agency must consider its social and economic impacts, and whether the regulation is necessary. The purpose of this review is to determine whether the proposed Regulation provides a net benefit to the community, and that any regulatory burden on industry is justified.

The outcomes of the impact of a proposed regulation are generally expressed in terms of the results of:

- 'cost-benefit' analyses where the costs and benefits flowing from the regulation can be measured in monetary terms; or
- 'cost effectiveness' analyses where the benefits of the regulation do not lend themselves to monetary quantification.

1.3.3 Better Regulation Principles

The RIS should also address the NSW better regulation principles. Information on these is available from:

www.dpc.nsw.gov.au

This RIS sets out the analysis of the impact of the proposed Regulation. The preparation of the RIS involved identifying and assessing the relevant costs and benefits of the proposed Regulation other than those parts that deal with matters of a machinery nature.

2. Outline of the Regulatory Proposal

2.1 Legislative background

The property services industry is regulated by the *Property, Stock and Business Agents Act 2002*. There are approximately 24,000 property agents, 18,000 certificate holders and 6,000 corporations licensed in New South Wales.

Approximately 145,000 residential land and property sales were made in New South Wales last year¹. The vast majority of these sales would have been handled by agents. As at 30 June 2013, there were around 703,000 NSW residential tenancies being managed by agents². There are approximately 72,000 strata schemes registered in the State of these, around 60% are managed by licensed strata managing agents³. As can be seen from these figures, the property services sector plays a significant role in the New South Wales economy.

The Act aims to protect consumers from loss resulting from their dealings with agents. To this end, the Act provides that agents have appropriate education, experience and character to act in the position of trust that is required of them and that they carry out their responsibilities professionally.

The legislation sets out how agents may carry on their business and makes them accountable for their actions, for example when dealing with clients' funds or marketing properties, and provides for compensation and dispute resolution when things go wrong. NSW Fair Trading licenses agents, monitors their activities and takes disciplinary action for contraventions of the law.

The vast majority of agents act fairly and honestly and in accordance with the requirements of the legislation. However, given that the purchase being made by consumers is generally the biggest purchase they will ever make and the sums of money that are held in trust by the agent are so large, there is significant potential risk of consumer detriment. Accordingly, it is vital that the legislation regulating the industry operates in a balanced way, providing appropriate levels of consumer protection without burdening the industry with unnecessary red tape.

The Act sets out the regulatory framework for the property industry and regulates the conduct of agents. In addition, the Act makes provision for licensing, disciplinary procedures and consumer protection.

¹ State Market Report, New South Wales, Australian Capital Territory, Data for the Quarter Ending December 2013, Residex Pty Ltd.

² Rental Bond Board, Annual Report 2012-2013.

³ Strata & Community Title Law Reform Position Paper,

To protect consumers, the Act:

- regulates the conduct and ethical standards of agents, including provision of competency standards as part of pre-entry requirements, continuing professional development, professional indemnity insurance and comprehensive Rules of Conduct;
- prohibits misleading advertisements and statements about the estimated selling price of residential property;
- deters 'dummy bidding' by requiring that bidders at auctions of residential property and rural land register in a Bidders Record and by limiting vendor bids to one single bid;
- increases consumer awareness of their rights, by requiring agents to give NSW Fair Trading booklets and brochures to clients and to prospective bidders at auctions;
- provides for a cooling-off period for certain agency agreements; and
- requires that agents disclose in the agency agreement all financial benefits they will receive and potential conflicts of interest.

Copies of the Act and current Regulation can be viewed or downloaded from:

www.legislation.nsw.gov.au/maintop/scanact/inforce/NONE/0

Click on 'P' in either the Act or Regulations list, then scroll down the alphabetical listing and click on the title of the Act or Regulation.

2.2 Need for Government action

For a range of reasons, most people choose to use the services of an agent for property transactions. An agent is a person who acts for another - a client, or principal - in return for payment, usually a fee or commission. Property agents:

- negotiate or arrange a variety of transactions, including sale, purchase, exchange and leasing – of property which may be commercial or residential real estate, agricultural land, livestock or businesses and professional practices;
- perform the delegated functions of an owners corporation under the *Strata Schemes Management Act 1996* or a community association, precinct association or neighbourhood association under the *Community Land Management Act 1989*;
- collect bonds, deposits, rents or fees for the leasing of property;
- manage rental property or holiday accommodation.

Ideally, agents bring expertise, experience and up-to-date market knowledge to property negotiations to bring about the best outcome for their client. Because most people enter into property transactions infrequently and are relatively unfamiliar with the property market, those that chose an agent often do so because they consider that an expert agent will be able to achieve a better result than they could. This relative lack of knowledge can make it easier for unscrupulous agents to take advantage of their position and act in their own interest rather than their client's. Some agents may also deal unethically with their clients' customers, that is, buyers and tenants.

2.3 Objective of Government action

The objectives of the Property, Stock and Business Agents Regulation 2014 are:

- to ensure that agency business is carried on in a manner that is financially and ethically accountable in order to support the Act's objective of minimising the risk of loss to consumers resulting from their dealings with agents; and
- provide the administrative detail required to support the operation of the Act.

2.4 Status of the proposed Regulation

The proposed Regulation is only a draft at this stage. This RIS is being released along with the draft Regulation so that the property services industry, consumers and other interested people may consider the proposed requirements and submit comments and suggestions. The draft Regulation may then be amended to take into account suggestions made in submissions. The Regulation will commence on or before 1 September 2014.

2.7 The Proposed Regulation

The proposed Regulation provides the administrative detail to enable the provisions of the Act to be implemented. The scope of any regulation is limited by the regulation-making powers provided under the relevant Act. The proposed Regulation is to be made under a number of sections in the Act including section 230 (the general regulation-making power).

The only proposed changes to the 2003 Regulation are as per table 2.7.1:

Clause	Proposal	Reason
Clause 3 - Definitions	Delete the definition of 'bank' and change the references to 'bank' throughout the regulation to 'authorised deposit-taking institution'	Under section 21 of the Interpretation Act 1987, an authorised deposit-taking institution is one within the meaning of the Banking Act 1959 (C'th)
Clause 5 - Extended function of real estate agent and real estate salesperson	Remove the Note	The note is unnecessary as it is set out in the Act's definition
Clause 6(1)(h) and clause 6(2)(g) - Section 31 exemptions	Delete in both paragraphs the words appearing after the phrase 'at any time by the licensee'	References to the 1941 Act are redundant
Clause 6 (1) and (2) - Section 31 exemptions	Make the two subclauses into one subclause	Avoids repetition
Clause 6(3) - Section 31 exemptions	Delete this sub-clause	References to 1941 Act redundant
Clauses 6, 7, 8, 12, 46A, 47A and 47B	Group these provisions together into a separate Part titled 'Exemptions'	Reduce size of miscellaneous Part and improve ease of location

Clause	Proposal	Reason
Clause 7 (2) - Sharing Commission	Change reference to 'Agents Act 1968 of the Australian Capital Territory' to 'Agents Act 2003 of the Australian Capital Territory' and change reference to 'Auctioneers and Real Estate Agents Act 1991 of Tasmania' to 'Property Agents and Land Transactions Act 2005 of Tasmania'	These two acts have been repealed and replaced.
Clause 8(2) - Sub-agency agreements	Remove the clause	Section 34(4) (b) of the Act provides for the prescribing of exemptions not the giving of approval by the Director-General. In addition, the exemptions that can be made under sub clause (1) do not need to be limited by reference to specified factors
Clause 9(2) and (3) - Itemised account	Make these two sub clauses into one	Avoid repetition and to make it easier to read
Clause 9(2) and (3) - itemised account	Make provisions to enable a request for an itemised account (cl9(2)) and the actual itemised account (cl9(3)) to be provided electronically	Need to take into account the current widespread use of technology as a means of communication
Clause 10 - provision of financial investment advice	That a penalty be inserted, Maximum penalty: 40 penalty units in the case of a corporation or 20 penalty units in any other case	The existing provision lacks any penalty for enforcement. Suggested penalty amount consistent with other penalties in the Regulation
Clause 13(4)(a) and (b) - contents of agency agreements	Insert provisions to enable an agency agreement to be served electronically on a person (cl13(4) (a)) and a body corporate (cl13(4) (b)) respectively if an email address is provided for service	Need to take into account the current widespread use of technology as a means of communication
Clause 17 (1)(a)-(e) - Proof of identity for Bidder's Record	Re draft provisions to see if these subparagraphs can be set out in fewer paragraphs	Avoidance of repetition and ease of reading
Clause 17 (3) - Proof of identity for Bidders Record	Increase penalty to make it consistent with other penalties in Regulation	This penalty is the odd one out. All other penalties in the Regulation are set at 40 units for corporations and 20 units for individuals

Clause	Proposal	Reason
Clause 24 - Computer systems control	This clause be drafted in a way that enables records and back-ups to be stored using modern technology including cloud computer technology	Computer technology is quickly evolving and its use by businesses and individuals in Australia is continuing to grow
Clause 33 (5) (a) - Signing of cheques or effecting electronic funds transfers-trust accounts	Delete the words appearing after the phrase 'with due expedition'	It is unnecessary to set out the reasons the delegator is unable to sign the cheque or effect the transfer
Clause 38 - Copy of accounts of owners corporation to be kept as a record	Insert immediately after '1996' or section 51 of the Community	The provisions of this clause should apply in circumstances where either a strata managing agent, or a managing agent appointed under the <i>Community Land Management Act 1989</i> , are required to deliver 'property' or 'prescribed information' respectively to the executive committee
Clause 41(1)(d) - Complaints and discipline	Delete the reference to section 113 of the Act.	Section 113 of the Act has been repealed
Clause 47 - Exemption for travel agents	Delete this clause	The Travel Agents Repeal Bill 2013 has been introduced into Parliament. It is anticipated that travel agents will be deregulated from 1 July 2014
Clause 48 - Transitional arrangement for auctioneers	Delete this clause	Transitional arrangements for auctioneers are no longer required
Clause 49 - Transitional arrangements for reporting by financial institutions	Delete this clause	Transitional arrangements for reporting by financial institutions no longer apply
Clause 50 - Transitional arrangements for taking out professional indemnity insurance	Delete this clause	When this regulation is remade, the dates set out in the clause will have passed
New Clause - Provision of unique identifying number when opening or maintaining a trust account	A licensee who opens or maintains a trust account in accordance with section 86 (4) of the Act must provide the authorised deposit-taking institution with a unique identifying number	During 2009/10 and 2010/11, the Audit Office of New South Wales raised the difficulties in verifying the completeness and accuracy of Statutory Interest collected by NSW Fair Trading. The main areas of concern were:

Clause	Proposal	Reason
	obtained from the Department	<ul style="list-style-type: none"> • inability to ensure completeness of revenue received; • incorrect interest rates applied by authorised deposit-taking institutions; • inability to confirm the accuracy of the authorised deposit-taking institution's interest calculation; and • inadequate audit instructions. <p>A unique identifying number issued by Fair Trading to agents operating trust accounts will ensure that banks account for interest in respect to all trust accounts</p>
Schedule 1(1) - Knowledge of Act and regulations	Change reference to 'trade practices' to 'competition and consumers'	The Trade Practices Act 1974 (C'th) has been replaced by the Australian Consumer Law
Schedule 1(12) and (13) - Referral to service provider and Licensee not to recommend engagement of services of solicitor or licensed conveyancer acting for other party	Change 'principal or prospect' where ever it appears to 'person'	The provisions will be easier to understand
Schedule 4(2)(d) - Sales inspection report required for business	Change 'ABN' to Australian Business Number	The initials 'ABN' should be replaced with the words in full. The words in full are used in subparagraph 15(3) (b)
Schedule 15 - Penalty notice offences	<p>Remove penalty provision for section 98 (7)</p> <p>Remove penalty provision for section 113</p>	<p>Section 98 (7) has been repealed</p> <p>Section 113 has been repealed</p>

2.8 Machinery Clauses

The proposed Regulation will remake a number of provisions that are of a machinery nature. Generally speaking, machinery clauses are those which could broadly be described as relating to 'process' rather than substantive policy matters.

Machinery clauses in the proposed Regulation include:

- Clause 1 - the name of the Regulation;
- Clause 2 - the commencement date of the Regulation;
- Clause 3 - Definitions of certain terms used throughout the Regulation;
- Clause 4 - Notes; and

- Schedule 15 - Penalty notice offences.

Matters of a machinery nature do not require a RIS. This RIS therefore does not consider these provisions in detail, but comment on the above provisions may nevertheless be included in submissions and will be considered.

3. Options

3.1 Options to achieve the objectives of the Regulation

Three options have been considered in this RIS as a means of achieving the objectives of the Act and Regulation. Maintaining the status quo is the 'base case' against which the other two options will be examined and compared.

3.2 Option 1: Remake the 2003 Regulation without amendment (status quo)

Maintaining the status quo is the option against which the others are compared. In the case of a regulation subject to staged repeal, the continuation of the status quo can only be achieved by remaking the current regulation without amendment. It is appropriate in these circumstances for the 'remaking the current regulations without amendment' option to be considered as the base case.

Remaking the 2003 Regulation without amendment would largely meet the objectives of the Act. Although there are no new costs and benefits associated with this option it would be an opportunity lost to make some relatively minor administrative changes to bring the Regulation up to date.

Conclusion

Option 1-The making of the Regulation without change is not the preferred option.

3.3 Option 2: Allow the 2003 Regulation to lapse

Allowing the 2003 Regulation to lapse would result in the existing Property, Stock and Business Agents Regulation 2003 being repealed on 1 September 2014, with no replacement Regulation being made. While the Act would still exist, a number of provisions would be unworkable and the objectives of the Act could not be achieved. It would not be possible to give effect to the intention of the Act without some further action by the Government, such as amending the Act. Enshrining the proposed requirements of the regulation in the Act would reduce the capacity to amend the requirements quickly to respond to problems which may arise for consumers or to address changes in industry practices.

Impact on consumers

Without adequate accounting procedures for record keeping and the management of trust money, there would be an increased likelihood that consumers may suffer financial loss due to the misappropriation of their funds by agents. In these circumstances, consumers would also suffer an associated intangible trauma arising from the stress of the financial loss and possible legal action and legal fees in any attempt to retrieve some of the money owed.

Agreements between consumers and agents would not have to include the proposed terms which provide for fair arrangements and would not include warnings about cooling off rights or circumstances in which more than one commission might be payable. The potential benefits of the proposed regulation in reducing disputes about commission would not be achieved. There would be no requirements for consumers to be made aware of the conditions of auction sales, which would reduce the beneficial impact of the auction reforms contained in the Act.

Consumers would not be warned of the need to verify financial advice given by agents when making investment decisions, which may increase the likelihood of inappropriate investment choices. No information about agents would be recorded on the public register, so consumers would not be able to confirm that the agent with whom they are considering dealing is appropriately licensed. In the absence of a Regulation, no Compensation Fund contributions by agents would be prescribed and consumers would not have access to the benefits of the Fund.

Impact on agents

In the absence of regulations, agents would still incur the costs of establishing appropriate trust accounting and record keeping procedures to ensure their businesses are properly managed and to meet other requirements such as those of the Commonwealth Government Business Activity Statement reporting system. Agents would need to develop their own procedures for bidder registration at auctions. Without the proposed penalty notice scheme, disciplinary proceedings would need to be taken for all breaches, foregoing the cost and time savings associated with the use of penalty notices.

It is possible that there would not be any significant cost savings to agents if the 2003 Regulation were to lapse.

Impact on Government

The Government's monitoring would continue under the Act but this role would be made more difficult and time-consuming by the lack of appropriate and consistent guidelines.

Table 3.3.1 Overall Impact of Option 2 – Do Nothing and allow Regulation to lapse

Interested Parties	Compliance with Assessment Criteria				
	Benefit	Cost	Incentive for good business practice	Protection of consumer funds	Overall efficiency
1. Consumers			N/A	Low	Low
Protection from financial loss	Low	High			
Intangible impact	Low	High			
2. Agents			Low	Low	Low
Business administration costs	Medium	Medium			
Intangible impact	Low	High			
3. Government			Low	Low	Low
Administration and compliance	Low	High			
OVERALL	Low	High	Low	Low	Low

Conclusion

Option 2-allowing the 2003 Regulation to lapse would result in a regulatory structure which would not be properly administered. In many respects, the intent of the Act would not be achieved, possibly resulting in financial loss to consumers and government. The opportunity for the industry to maintain its professional reputation in the eyes of consumers may be lost.

Option 2 – Allow Regulation to lapse:

1. fails to meet the regulatory objectives; and

2. involves a high financial and intangible overall cost to consumers, industry and government.

For these reasons allowing the 2003 Regulation to lapse is not the preferred option.

3.4 Option 3: To make the proposed revised Regulation

The proposed Property, Stock and Business Agents Regulation 2014 has been developed to replace the current Property, Stock and Business Agents Regulation 2003, which will be automatically repealed on 1 September 2014 due to the operation of the *Subordinate Legislation Act 1989*.

The proposed Regulation continues to provide the administrative detail required to support the operation of the Act by prescribing requirements for:

- consideration of exemption requests;
- trust accounting;
- record keeping;
- Compensation Fund levy notices;
- the particulars to be recorded in the Register under the Act;
- licence and certificate application fees and Compensation Fund contributions;
- auditing and reporting requirements in relation to trust money;
- appropriate penalties for non-compliance and;
- the proposed Regulation makes some relatively minor administrative changes to bring the Regulation up to date.

Impact on consumers

The proposed Regulation continues to benefit consumers by:

- prescribing rules of conduct which require agents to treat their clients and customers professionally and ethically;
- requiring agency agreements to include fair terms and warnings for clients about cooling off rights and circumstances in which more than one commission might be payable;
- requiring agents to give clients warnings and information when giving investment related advice;
- ensuring itemised accounts are delivered to clients correctly;
- ensuring that all prospective bidders are able to register to bid at auctions of residential or rural property by providing for flexible registration and proof of identity requirements;
- requiring warnings about bidders' rights and obligations to be given at auctions;
- protecting consumers' funds held in trust by agents by prescribing trust accounting and record keeping requirements;
- ensuring that agents whose licences have been suspended remain accountable to former clients;
- providing access to information on the public Register about licences and certificates issued under the Act and the compliance history of agents; and
- providing for payment of contributions to the Compensation Fund, which is available to compensate consumers in the event of trust account.

In addition to protecting consumers from potential financial loss, a number of the measures listed also provide intangible benefits by increasing consumer confidence in dealing with agents.

Impact on agents

The proposed Regulation will continue to impose a medium level of business administration costs on agents which largely arise from the adoption of accountable

business practices in respect of trust accounting and record keeping. The prescriptive nature of a number of the proposed requirements limits the capacity for agents to develop their own administrative procedures and arrangements for ensuring they comply with the requirements of the Act. However, it reduces the need for agents to obtain professional advice and or develop their own procedures. Rather, they just need to follow the procedures set out in the regulations.

Balanced against this, however, are the benefits of having clear requirements that apply consistently to all agents and provide for a high level of consumer protection in known problem areas (such as failure to account for trust money and unfair agency agreement terms). The annual licence fees and Compensation Fund contributions are a moderate direct cost to agents, claimable as a tax deduction since they are a cost of doing business.

By protecting consumers' funds and requiring agents to provide services ethically and to a high professional standard, the proposed Regulation maintains consumer confidence in using the services of agents. This is a significant benefit to industry members whose reputation may otherwise be tarnished by the actions of some agents.

Impact on Government

The adoption of the proposed Regulation would not add to the costs incurred by the Government in administering the legislation, arising mostly from the licensing procedures, the processing of annual audits, compliance and disciplinary activities, information and mediation services and resolution of disputes by the NSW Civil and Administrative Tribunal. It is considered that the cost of Government supervision of the property agency industry is justified in terms of the protection that it affords for consumers' funds. Fees set by the proposed Regulation and payments to the Statutory Interest Account help to recoup the costs of administering the legislation.

Table 3.4.1 Overall impact of Option 3 – the proposed Regulation

Interested Parties	Compliance with Assessment Criteria				
	Benefit	Cost	Incentive for good business practice	Protection of consumer funds	Overall efficiency
1. Consumers⁴			N/A	High	High
Protection from financial loss	High	Low			
Intangible benefits	High	Low			
2. Licensees			High	High	High
Business admin. costs	Medium	Medium			
Intangible impact	High	Medium			
3. Government			High	High	High
Administration and compliance	High	Low			
OVERALL	Medium-High	Low-Medium	High	High	High

Conclusion

Option 3 – to make the proposed Regulation:

- meets the regulatory objectives for the Act under which the proposed Regulation is to be made; and

⁴ Based on the impact to an individual who has suffered a financial loss as a result of unsatisfactory service provided by an agent or misappropriation of funds lodged with an agent.

- provides financial and intangible benefits to consumers which are considered greater than the costs to the industry and government.

For these reasons option 3 is the preferred option.

4. Consultation

Invitations for individuals and organisations to comment on the proposed Regulation will be issued in the following ways:

1. Publication of notices in State-wide newspapers;
2. Publication of the consultation arrangements on the NSW Fair Trading website; and
3. Forwarded to a range of organisations including:
 - Australian Consumers Association;
 - Property Owners Association;
 - Real Estate Institute of NSW;
 - Strata Community Australia NSW;
 - Australian Livestock and Property Association;
 - Estate Agents Co-operative;
 - Shopping Centre Council of Australia;
 - Australian Institute of Business Brokers;
 - Royal Institute of Chartered Surveyors;
 - Property Council of Australia;
 - Tenants' Union of NSW;
 - Law Society of NSW; and
 - Property Services Advisory Council.

APPENDIX A: Proposed Draft Property, Stock and Business Agents Regulation 2014