

Quote in reply: Property and Development Law Section

16 September 2010

Mr Chris Irons  
Director  
Fair Trading Policy  
Department of Employment, Economic Development and Innovation  
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Dear Mr Irons

## **CONSULTATION - SPLITTING OF THE PROPERTY AGENTS AND MOTOR DEALERS ACT 2000**

The Queensland Law Society is pleased to be able to provide comments with respect to the consultation drafts of the occupation specific legislation which is proposed to replace the *Property Agents and Motor Dealers Act 2000* (PAMDA).

There are two elements of the proposed *Property Agents Bill 2010* (PAB) on which we would like to make comment, relating to the:

- definition of 'property developer' in the PAB; and
- Part 6 of the PAB relating to residential property sales.

### **Definition of Property Developer**

The PAB proposes that the licensing requirement for property developers will be abandoned but the conduct of persons defined as property developers will be restricted by various provisions, notably proposed section 162 relating to disclosure to prospective buyers of residential property and Part 6 Division 6 of the Bill relating to accounting requirements for relevant contracts.

The definition proposed in the PAB for property developers is:

***property developer*** means—

- (a) a person who completes more than 6 residential property sales in any 1 year period; or
- (b) markets residential property in which the person has an interest of at least 15%.

This definition echoes the permitted activities of a licensed property developer from section 262 of PAMDA, namely:

## **262 What a property developer's licence authorises**

- (1) A property developer's licence authorises the holder of the licence (*property developer*) to perform the following activities—
  - (a) to complete more than 6 residential property sales in any 12 month period;
  - (b) to market residential property in which the property developer has an interest of at least 15%.
- (2) A person who completes more than 6 residential property sales in any 12 month period is taken to conduct the business of a property developer.

The requirement under PAMDA to hold a licence is provided by section 275 of PAMDA which states:

## **275 Acting and marketing offences**

- (1) A person must not complete more than 6 residential property sales within any 12 month period unless the person holds a property developer's licence.  
Maximum penalty—200 penalty units or 2 years imprisonment.

The threshold test under PAMDA for characterisation as a 'property developer' is simply conducting the required number of sales and is not associated with the marketing of properties in which the developer has an interest of at least 15%.

However, these provisions must be read in PAMDA in light of section 261 which provides a definition of *completing a residential property sale*:

## **261 Meaning of complete a residential property sale**

- (1) A person **completes a residential property sale** if a residential property in which the person has an interest is sold.
- (2) However, the person is not to be taken to have completed a residential property sale if—
  - (a) the person appointed a real estate agent, pastoral house or auctioneer (the **agent**) to sell the interest in the residential property on the person's behalf and the agent is the effective cause of the sale; or
  - (b) the person held the interest in the residential property as—
    - (i) a personal representative; or
    - (ii) an administrator under the *Guardianship and Administration Act 2000*; or
    - (iii) a beneficiary in, or a trustee of, a deceased person's estate; or
    - (iv) a mortgagee; or
  - (c) the person is a corporation and the corporation sold the corporation's interest in the residential property to a related body corporate; or
  - (d) the interest in the residential property is sold under a court order.
- (3) In this section—  
**related body corporate** means a related body corporate under the Corporations Act.

In the PAB this definition has not been carried across and we therefore apprehend there are a number of unintended consequences from the current proposed definition of 'property developer' with respect to application of the disclosure and accounting requirements:

- a property agent licensee may be considered a property developer for the purposes of disclosure as there is no requirement within the definition that a property developer has an interest in the properties that they have sold within the 12 month period; and
- any person who markets their own home for sale would be within the marketing interest limb of the definition and therefore be characterised as a 'property developer'.

It is surely not the intention of the Department to apply the disclosure obligations conceivably to licensed property agents or to apply the disclosure and accounting requirements for deposits to individuals marketing their own home for sale.

In order to remedy this consequence we submit that the definition should be expanded to include the substance of section 261 of PAMDA with respect to when a person completes a residential property sale.

A person licensed as a property developer was then only authorised to market property in which they had a 15% interest and section 275(2) of PAMDA made it an offence for such a person to market a property where they had an interest of less than 15%.

Such a restriction on the mode of operation of a property developer can not be achieved through the definition of 'property developer' in the PAB and there is no corresponding offence in the PAB to section 275(2) of PAMDA. However, as the policy intent of the split is to remove the licensing restrictions on property developers it may be appropriate for the 15% interest requirement not to be included within the PAB. We submit therefore that the second limb of the proposed definition of 'property developer' is removed.

### **Part 6 Residential Property Sales**

The Society notes that the split of PAMDA will require Chapter 11 of PAMDA relating to residential property sales to be reproduced in the PAB.

We have written on many occasions to the Department seeking further clarification in the legislation of a number of matters beyond those made in the *Property Agents and Motor Dealers and Other Acts Amendment Act 2010*.

We submit that the introduction of the PAB would be an opportune legislative vehicle to address these outstanding issues and we would welcome the opportunity to discuss this with your appropriate officers.

Thank you for providing the Queensland Law Society the opportunity to provide these comments. If you would like to discuss any of the matters raised please contact our Principal Policy Solicitor, Mr Matt Dunn, on 3842 5889 or via email on [m.dunn@qls.com.au](mailto:m.dunn@qls.com.au).

Yours faithfully



Noela L'Estrange  
**Chief Executive Officer**