



# Legislative Council

## Property, Stock And Business Agents

### Bill Hansard - Extract

19/06/2002

#### Second Reading

**The Hon. IAN MACDONALD** (Parliamentary Secretary) [8.34 p.m.]: I move:

That this bill be now read a second time.

I seek leave to have the second reading speech incorporated in *Hansard*.

#### Leave granted.

This is the second occasion on which I have introduced a Bill proposing reforms to the property services industry in New South Wales.

In December last year I introduced the Property, Stock and Business Agents Bill 2001 to lie on the table for consultation until Parliament resumed in February.

The consultation phase enabled by the Parliamentary break provided an opportunity for further refinement of the reform proposals. A new Bill incorporating changes informed by responses to the first Bill is the result.

It is an honour to introduce this important piece of consumer protection legislation into the House today.

This Bill is the product of the first major overhaul of the property services industry in this State since 1941. Its threshold reforms will catapult regulation of the property services industry into the 21<sup>st</sup> century.

Consumers buying and selling their homes will benefit from its far-reaching and innovative proposals that raise consumer protection to a level that acknowledges the significance of property transactions in people's lives.

The Bill will make the buying and selling process more transparent by deterring dummy bidding at auctions and prohibiting misleading statements by agents about the estimated selling prices of properties.

Agents too will benefit—the Bill will simplify the licence application process, improve industry standards and lighten the regulatory burden for licensees.

These reforms will create a fairer property marketplace. Industry players who flout the standards of honesty and integrity expected by consumers and industry representatives will be swiftly brought into line by a ruthlessly efficient new disciplinary process.

This Bill is the culmination of several years of hard work to fundamentally review the Property, Stock and Business Agents Act. The reform proposals that I bring before the Assembly today in this Bill combine the findings of that review and matters that have subsequently been raised.

The Bill substantially rewrites the Act in plain English to better fit the players and transactions of the contemporary property marketplace. It will repeal and replace the current Act and repeal the regulations made under it.

Before I embark on a more detailed account of the Bill's reforms, I would like to acknowledge the constructive input received from industry representatives who have also had the opportunity to look at and comment on the draft Bill prior to its introduction today.

My thanks go out to all of those people and organisations that took the time and effort to make a contribution to the development of this important legislation.

Most submissions have supported the general thrust of the proposed reforms. Submissions received in response to the 2001 Bill express uniform support for the core proposals – the introduction of competency standards, mandatory continuing professional education and professional indemnity insurance.

However, there are aspects of this Bill that some agents will regard as too tough or difficult. I cannot stress enough the intention of Bill—to protect consumers and their investments in their homes.

The review of the Act found that, while the basic components of the regulatory framework, namely licensing, conduct rules, dispute resolution and discipline remain valid, the system clearly needs to operate more fairly and effectively for both consumers and practitioners.

The proposals in this Bill fall into three broad categories:

- Licensing and registration requirements,
- General conduct of licence and certificate holders, and
- Discipline and enforcement.

I will now take the opportunity to outline some of the main provisions in each of these categories.

### **Licensing and registration**

The current Act specifies who may practise as agents, salespersons and trainee managers through licensing requirements for agents and certificate requirements for agency employees. It provides for a range of separate licences for different agency activities with specific experience and education requirements.

The Bill continues to provide for these licences, which reflect the range of different competencies relevant to the various industry sectors. Salespersons and trainee managing agents will also continue to be required to be registered, and they will be required to be employed and supervised by a licensee.

The conduct of residential property auctions in this State has been a source of increasing concern to consumers, the industry and the Government for some years. In particular, there is concern about a lack of competency and breaches of ethical standards by persons conducting property auctions.

To address this the Bill introduces mandatory requirements for persons who wish to conduct residential or rural land auctions. They must hold a real estate agent's licence or a stock and station agent's licence and must attain additional qualifications relating to auction conduct and ethical practice before being entitled to conduct auctions.

This measure will address the decline in auctioneer competency by setting entry requirements that recognise the specialist skills and ethical standards needed to be held by persons wishing to perform this crucial role. The Bill allows for a real estate or stock and station agent's licence to be annotated to indicate to consumers that the holder is qualified to conduct auctions of land or livestock.

The Bill also recognises the activities of buyers' agents, who act exclusively for purchasers in finding a suitable property and negotiating a sale on the best possible terms for the purchaser. Buyers' agents will continue to be required to hold a real estate agent's licence. However, if they wish to act only as a buyers' agent, they can apply for a conditional real estate licence that restricts them to carrying out those functions.

The category of on-site residential property manager is expanded in the Bill to include caretaker-managers, who will also be required to be licensed. This amendment recognises the recent emergence of this category of property management, which includes managers of large residential complexes. While the role of caretaker-managers includes responsibility for general building maintenance and services, it often also includes leasing of properties on behalf of owners in the development and dealing with rent money. It is therefore appropriate that caretaker-managers be regulated in a similar manner to other on-site managers.

It will be a condition of an on-site residential property manager's licence that they may act only in respect of premises at which they reside and in which they have an interest. Should an on-site residential property manager wish to act in respect of other buildings, they will need to hold a real estate agent's licence.

The core proposals in this bill—the introduction of competency standards, mandatory continuing professional development and professional indemnity insurance—provide the framework for modernisation of the property industry.

The grant of a licence or certificate of registration will be based on entry-level competency and good character. In this regard, the Bill provides an opportunity to keep pace with developments in the competency based approach to education and training by allowing for competency standards to be adopted as a pre-entry requirement for the licensing of the real estate industry.

The introduction of competency standards as a requirement for licensing and registration recognises that competency may be achieved by different pathways. For example, an applicant may attain competence by undertaking a course of study or learning on the job and being assessed by a registered assessor.

By ensuring that those who are granted a licence or certificate of registration demonstrate certain levels of competency, consumers are protected, consumer confidence is boosted, vocational professionalism is increased and an economically efficient property sector ensues.

I understand that real estate agents and stock and station agents have already developed competency standards and that business agents and other sectors are working hard at developing standards for their industries.

The Department of Fair Trading will soon commence consultation about the selection of competency standards. This process will be completed in time for the new qualification requirements to commence with the proposed legislation. Transitional arrangements will be made for those currently undertaking educational courses and for those sectors that may not have finalised their competency standards.

The Bill also enables the renewal of a licence or certificate of registration on condition that licence-holders undertake continuing professional development each year. Licensees and

certificate-holders, like many others in business, need a wide range of skills to competently perform their functions. Equally, they need to keep abreast of changes and developments in their fields of competence. Continuing professional development recognises the changing nature of the marketplace and provides flexibility to educate property professionals in the special competencies needed in relation to the licence and certificate categories under the Act. Continuing professional development could cover topics such as law and technology changes, ethics, dispute resolution and business management.

During the consultation program leading up to the introduction of this Bill, a number of suggestions were made as to how the new continuing professional development requirements could operate more effectively. One industry body suggested that training and continuing professional development as a condition of auction practice be required of all agents and salespersons engaged in the marketing and sale of properties by auction. I am pleased that the industry has given its wholehearted support to this important aspect of the proposals.

Further consultation with industry and consumers will be carried out over the coming months to develop the requirements for continuing professional development. It is envisaged that there will be a variety of ways in which a person will be able to satisfy the requirements, for example, by attendance at courses and seminars or through multimedia channels such as video or the internet. The Government is conscious that people, especially those in remote areas, need to participate in continuing professional development without disrupting their business activities.

In addition to competency and continuing professional development requirements, the Bill enables the Director-General to require a licensee to hold a policy of professional indemnity insurance that meets certain minimum conditions.

As with the other major proposals in this Bill, there will be extensive consultation with industry and insurers to determine the conditions that professional indemnity insurance policies will need to satisfy under the scheme. The Government is committed to ensuring that the insurance requirements are not too onerous, bearing in mind current market conditions. At the same time, it is anticipated that the introduction of the insurance scheme will make the market more attractive to insurers.

The introduction of professional indemnity insurance requirements is viewed as a means of raising industry standards and enhancing consumer redress in relation to quality of service issues. It is anticipated that this attention to risk management will result in fewer claims by consumers and lower premiums for licensees.

I must emphasise that professional indemnity insurance is as important an element of the reform package as the recognition of competency standards and the introduction of continuing professional development. It is envisaged that they will work hand in hand to lift the expertise and raise the ethical standards of the industry.

Before moving on to the topic of agent conduct, I should point out that decisions of the Director-General with respect to the issue, renewal or restoration of licences or certificates or the imposition of conditions are reviewable by way of appeal to the Administrative Decisions Tribunal.

### **Agent conduct**

As I indicated earlier in this speech, the reforms include a number of new requirements relating to the way agents conduct their business.

The practice of licence lending has been an ongoing problem for the Department of Fair Trading. When a consumer deals with a person who appears to be a licensed property agent but in fact has no genuine connection to the place of business, the effect can be devastating. Consumers who deal with unlicensed persons forgo the expertise and experience of a licensee as well as the protection afforded by the legislation.

To address this, the Bill allows for the introduction of photo licences. Consumers will be encouraged to check the credentials of anyone in the property market with whom they intend to deal by comparing licence details with the information held by the Department of Fair Trading on the Register of Licences.

These measures will make the practice of licence lending readily identifiable and the maximum penalty for licence lending will be the ultimate deterrent. A fine of 100 penalty units—which equates to \$11,000—is just not worth the risk.

The consumer detriment caused by poor supervision of employees has also vexed the Department for some time. The Bill tightens the supervision and control of employees and clarifies the responsibilities of licensees-in-charge. Licensees-in-charge will be responsible for the actions of their employees and they will be prohibited from employing people who are disqualified from holding a licence or certificate of registration or are otherwise considered not 'fit and proper'.

Each place of business will need to be in the charge of a licensee. This requirement reflects the view that qualified supervision is paramount in the handling of large sums, such as those that are placed in trust during property transactions. The requirement also acknowledges the particular need in this industry for guidance in procedural matters and ethical conduct.

The Bill also enables the Director-General to grant an exemption from the requirement that each separate agency office be under the charge of a licensee. Exemptions will only be considered where a central trust

account operates and proper supervision of employees is in place.

The Bill adds further to the responsibilities of licensees by requiring that a licensee notify the Director-General as soon as a failure to account is identified—failure to notify of a failure to account carries a hefty penalty. Similarly, franchisers and industry associations will have to notify the Director-General in writing within 7 days of becoming aware of any failure to account by a licensee.

The Bill allows for Rules of Conduct to be prescribed to govern the conduct of agency business. The purpose of these rules is to provide the industry with a clear guide to the standards expected by the public in respect of business dealings and ethical behaviour. The Rules of Conduct will underpin the core elements of the reforms—competency standards, professional indemnity insurance and continuing professional development. Contravention of the rules can result in disciplinary action.

Consultation will be undertaken with the industry and consumers to ensure the development of appropriate rules of conduct.

The Bill contains measures designed to ensure that both purchasers and vendors are better able to make informed decisions. In particular, it introduces new rules to address difficulties that home owners encounter in understanding their rights and obligations under agency agreements.

The Department is aware that consumer confusion sometimes arises because of the range of different terms and forms of agency agreement in use in the industry. To dispel this confusion and make agreements fairer, the Bill allows the regulations to provide for standard forms of agreements or certain matters that have to be included in, or excluded from, agency agreements.

The Bill requires that agents provide vendors of residential property with a "guide" booklet, approved by the Director-General, before they sign the agency agreement. This booklet will assist consumers in understanding their rights and obligations under the agreement.

The Department will consult with industry and consumers to ensure the development of an appropriate consumer "guide".

A cooling-off period of one business day will apply to all agency agreements for the sale of residential property or rural land. Sensibly, the Bill recognises Saturday—a high volume business day in the property market—in this provision.

This measure operates in tandem with the requirement that agents provide a copy of the approved consumer guide before the agreement is signed. It will ensure that consumers have time to read and understand the terms of the agreement, seek independent advice if they choose to and consider whether the services and fees are appropriate for their needs.

Another aspect of the agency relationship that demands greater transparency is the receipt of rebates and discounts by agents in relation to expenses payable by the client, such as advertising and property maintenance. These benefits from third parties are received without the principal's knowledge and are often not passed on to the consumer, who is required to pay the full cost of the service. These 'commissions' provide the real estate agent with a financial advantage over and above their agreed fee. To ensure there is full disclosure to consumers, the Bill requires that licensees set out in agency agreements the source and estimated amount of all rebates, discounts or commissions that they will receive from third parties in connection with their expenses.

Calls for full disclosure of any conflict between an agent's duty to a client and any beneficial interest held by the agent have also been taken seriously in the development of the Bill. Clearly, consumers expect their agent to undertake his or her duties fairly and openly to achieve the best result for them. Generally, the Bill prohibits real estate agents and their sales employees from obtaining or being connected to the obtaining of a beneficial interest in the sale of a property.

The client's agreement will need to be obtained where the agent wishes to retain entitlement to these benefits.

Under the current Act, agents are not entitled to payment of commission or expenses for the sale of property unless a copy of the agency agreement has been served on the vendor within 48 hours of being signed. The Bill continues this provision and simplifies service of an agreement by allowing it to be by facsimile.

The Bill also allows for a court or tribunal to order payment of commission or expenses despite a licensee's failure to serve the agency agreement within the required 48 hours in certain circumstances.

This provision reflects a recent Supreme Court case that upheld the decision of the Local Court that a failure to serve the agreement within 48 hours was fatal to the agent's claim for commission.

Property auctions have been cause for consumer concern over the last few years. The recent explosion of auction as the selling method of choice in a hot property market has enlivened consumers' unease about the fairness of the auction system. A particularly sore point is the time worn practice of 'dummy bidding'.

Dummy bidding occurs where an unauthentic bidder is planted in an auction to trigger the bidding or drive it up towards and beyond the reserve price. The intention is to create the impression that there is more

interest in a property than actually exists. The Bill provides a range of measures to deter dummy bidding at residential property and rural land auctions.

For a start, the Bill limits the number of vendor bids able to be made at an auction to just one. The vendor bid cannot be used unless notice of this right is included in the conditions of sale.

People who wish to bid for property at an auction will need to be registered by the agent acting for the vendor. The agent must enter a bidder's name, address and details of their proof of identity in a Bidders Record. Acceptable proof of identity will be:

- a motor vehicle driver's licence issued in Australia that displays a photograph of the licensed driver;
- an Australian passport; or
- other proof of identity prescribed by regulation.

In addition to providing proof of identity, a person bidding on behalf of someone else must also produce a letter of authority to bid on that person's behalf.

On registering, the bidder will be given an identifying number which they will be required to display when bidding. An auctioneer will not be able to accept a bid from a person who has not registered. This measure will be a boon to consumers, making it illegal for an auctioneer to take bids from trees, and passing cats, dogs and birds or other imaginary bidders.

The Bidders Record provides traceable information about bidders at auctions. The Bill requires that it be kept by the agent for three years.

Understandably, consumers may be concerned about the collection, storage and use of their personal information. In recognition of these concerns and existing privacy legislation, access to and use of information from the Bidders Record is limited. It must not be divulged to any party other than the Department of Fair Trading for investigative purposes, or a maximum penalty of \$11,000 will apply.

So far, the response from consumers to this proposal has been positive. Any concerns consumers may have about registering will be addressed in a 'guide' pamphlet about the auction process which agents will be required to give to bidders before the auction. The 'guide' will be prepared by the Department in consultation with the industry and consumers.

I am pleased to say that, on the whole, the real estate industry has supported these measures, although I understand that some in the industry have reservations about the effectiveness of the approach. However, registration of bidders attacks the problem of 'dummy bidding' head-on. It inserts a level of transparency and accountability to the auction process, the absence of which has been the nub of consumer discontent.

If purchasers know that they have paid more due to a 'trick of the trade', their feelings of anger at having been duped will do nothing to help generally-held opinions about the professional ethics of real estate agents. These measures will serve to increase consumer confidence that auctions are conducted fairly, and in turn, will go a long way in dispelling the negative impression that consumers have of the real estate industry.

An area of great concern for consumers, both vendors and purchasers, has been the unsavoury practice of some agents to deliberately over or underquote the estimated selling price of residential property. In the past, vendors have often reported selling prices falling well short of the anticipated selling price as quoted by their agents. The Bill makes it an offence to quote to a property owner an estimate of the selling price that does not reflect the agent's true estimate.

On the other hand, prospective purchasers have complained about the understatement of the estimated selling price. These consumers have been misled into spending money on legal and building reports when in fact the property was never in their price range. When auction bids exceed their limit within the first couple of bids they are left angry and needlessly out of pocket. To address this issue, the Bill specifically prohibits agents from deliberately underestimating expected selling prices.

While the Act currently prohibits false and misleading advertising, the task of gathering sufficient evidence to prosecute has proven difficult, time consuming and costly. The Bill provides a solution to this dilemma whereby the Director-General will be able to require an agent to justify any estimate made of the selling price of residential property. A statement in the agency agreement of the agent's estimated selling price will be recognised as evidence of the agent's true estimate of the selling price.

These measures will provide a strong deterrent to agents tempted to misrepresent their true estimated selling prices.

Now I would like to move on to the provisions dealing with discipline and enforcement.

#### **Discipline and enforcement**

Currently, the Department of Fair Trading's capacity to take action for breaches of the legislation has been hampered by the need to take matters to court—a costly and often lengthy process. Proceedings may take many months to complete, tying up valuable court resources in the process and enabling unscrupulous agents to use delaying tactics. This disciplinary system has been criticised by consumers and industry alike, and rightly so.

The Government has responded to the community's concerns by including a new disciplinary framework in the Bill that will allow fast action to be taken to remove rogues and incompetents from the industry in order to protect consumers from further risk.

The Department will be able to initiate disciplinary action through the issue of a notice to a licensee or certificate holder to show cause as to why they should not be subject to disciplinary action. A person to whom a show cause notice has been issued will have at least 14 days to provide evidence or make a submission.

Grounds for commencing disciplinary proceedings will include a breach of the legislation or Rules of Conduct, for example, a failure to account for money held on trust, or failure to comply with a condition of a licence or certificate of registration or to properly supervise employees.

The Bill provides the Department with a range of options for disciplinary action, depending on the circumstances. They include:

- issue of a caution or reprimand;
- requirement to comply with an enforceable undertaking;
- cancellation or suspension of a licence or certificate or exclusion from involvement in the management of an agency business;
- imposition of conditions on a person's practice; and
- imposition of a monetary penalty of up to \$11,000 for an individual or \$22,000 for a partnership or corporation.

Where urgent action is needed to protect consumers from significant loss or harm, the Bill enables the Director-General to:

- issue, where public risk is immediate, a public warning alerting consumers to the risks of dealing with a particular person; and
- in situations of serious risk, immediately suspend a licence.

The Bill enables the Director-General to appoint a manager to carry on the business of an agent whose licence has been suspended or cancelled, so as to ensure that existing clients are not disadvantaged.

The disciplinary scheme is similar to that which applies to motor dealers and travel agents and the one that has recently been introduced for builders.

The model is based on administrative law principles which preserve consistency and certainty in decision making. The process will be less costly both for licensees and the Department. There will be access to the Administrative Decisions Tribunal for review of all disciplinary decisions.

To better protect consumers, it is also proposed to give them more information about licensees so that they can make an informed choice when deciding whether to engage them. Information will be provided by way of a public register maintained by the Department.

The current Act requires the Department to maintain a register containing details of licences, renewals, restorations, cancellations, refusals of applications and disqualifications. The Bill expands on these requirements by allowing for the making of regulations to prescribe details of disciplinary action to be included in the register. The regulations will enable the register to include details of:

- outcomes of show cause proceedings, including licence suspension, or the appointment of a manager, investigating accountant or receiver; and
- the results of any prosecutions.

The aim of the register is to provide as much information as possible to consumers to ensure that they use the services of appropriately licensed and competent persons.

Another important facet of consumer protection is the Compensation Fund established under the current Act. The Bill continues to provide for the Fund, which protects consumers who suffer loss because of an agent's failure to account for money or property received on a consumer's behalf. All licensees will continue to be required to contribute to the Compensation Fund.

The Bill introduces a very important change to the operation of the Compensation Fund to further improve consumer protection. At present, claims against the Fund can only be made if the person responsible for the loss is a licensee or an employee of the licensee. As a result, consumers can, through no fault of their own, find themselves without compensation. This has occurred in the past where a person continues to trade after their licence has lapsed.

The new provisions will extend the right to compensation to cases where a consumer has lost money when dealing with an unlicensed person whom they reasonably believed to be licensed at the time.

Some members of the industry have raised concerns that these amendments could lead to open slather on the Fund by consumers. I assure you that this will not be the case.

Claims will only be allowed where it can be clearly established that the consumer believed that he or she was dealing with a licensee, or an associate of a licensee, and that the money was entrusted in the course of the licensee's agency business.

The Department's power to investigate complaints and take legal action for serious offences will also be considerably strengthened in this Bill. Action against unlicensed traders will be aided by the introduction of powers to enable a Departmental investigator to enter premises to inspect the books and records of a person suspected of unlicensed trading. The Bill also allows an investigator to apply to an authorised justice for the issue of a search warrant. This will allow for crucial evidence to be obtained when a person refuses to comply with a notice to provide books and records.

In all, these reforms to the disciplinary and enforcement regime will provide greater protection to the public by enabling a quicker, more flexible and cost effective response to misconduct on the part of licensees.

To support the enhancements to the disciplinary regime and to crack down on those attempting to operate outside the regulatory system, the Bill increases the maximum monetary penalties for all offences.

For example, the maximum penalties for unlicensed trading or licence lending will rise from \$2,200 to \$11,000. Penalties for collusive practices at auctions will rise from \$4,400 to \$22,000 for a corporation and from \$2,200 to \$11,000 for an individual. Trust account fraud will be an indictable offence with a maximum prison term of 10 years. These increases will send a clear message about the seriousness of these breaches.

In closing, I would like to express my thanks to the Department and those officers who have worked tirelessly in the development of these reforms. I would also like to acknowledge the co-operation given and long hours put in by the Parliamentary Counsel's Office in what has been a difficult and complex drafting process in the preparation of the Bill.

### **Conclusion**

I believe that consumers of property agents' services have a right to expect professional, honest behaviour from agents and that is what I intend to bring about by introducing this Bill.

I commend the Bill to the House.