

**Submission
No 206**

**ADEQUACY OF THE REGULATION OF SHORT-TERM
HOLIDAY LETTING IN NEW SOUTH WALES**

Organisation: Atherton Legal
Name: Mr Trevor Atherton
Position: Partner
Date Received: 1/12/2015

The Director
Committee on Environment and Planning
Parliament House
Macquarie Street, Sydney NSW 2000

30 November 2015

By email to: environmentplanning@parliament.nsw.gov.au

Dear Sir

**Legislative Assembly Committee on Environment and Planning Inquiry:
Adequacy of the regulation of short-term holiday letting in New South Wales**

This Submission concerns one matter which is nevertheless very important and of relevance to each item in the Terms of Reference: **Real Estate Agent Licensing and Trust Account Requirements under the *Property Stock and Business Agents Act (PSBA) and Regulations***.

Limited confidentiality. We advise a number of clients in relation to this matter and have been instructed to lodge this Submission on the basis that their identity not be disclosed. This is to protect client confidentiality. However as the matter is of interest to the whole short term and holiday rental industry (STHR) and is important for state strategic and economic development we have no objection to the Inquiry publishing the substance of the submission ie this letter and the Supporting Documents.

Supporting Documents. Enclosed with this Submission are the following:

- Letter dated 9 July 2015 to the Office of Fair Trading, Property Agents and Managers Department explaining and seeking clarifications on the matter.
- Email reply dated 30 October 2015. Fair Trading have consented to its inclusion in this Submission.

Our letter of 9 July explains the matter and the relevant issues in some detail (and should be read first) and that information is not repeated here. Despite earlier indications, the reply did not really clarify very much. Rather it indicated the Department's intention to simply enforce the regulations where properties in NSW are concerned regardless of fitness for purpose but acknowledging jurisdictional limitations. It is submitted that, because of the various parties involved, s12 of the Interpretation Act does not clarify the matter.

The present regulations have simply been carried forward unchanged in substance from their original, pre digital age design. There has been no attempt to review them in the light of the dramatic technological and other advances made in STHR so far and likely to continue into the future. The Inquiry provides an important opportunity for this to be now done taking into consideration the wider issues involved beyond the remit of the Department which regulates real estate agents and is most concerned with the sale of property.

Our letter of 8 July describes how the 4 main types of intermediary in STHR operate and appear to be regulated: real estate agents, travel agents, booking agents and digital platforms. It also describes the uncertainties and complications which arise when, as usual, an STHR transaction involves more than one of these intermediaries.

There have been great advances in general consumer law and commercial practices since the regulatory requirements for real estate agent licensing and trust accounting were conceived. Accommodation booking transactions are now well protected by the general Consumer Law, travel insurance, credit card charge backs, social media reviews and the like. Consumers also benefit greatly from increased competition and efficiency.

As a result, travel agency has been deregulated and licensing and the compensation fund disbanded in every state and territory from 1 July 2014.

Other states including Victoria and Western Australia reviewed real estate agency in STHR some years ago and all intermediaries in STHR are now completely exempted from real estate agent licensing and trust accounting in those states.

There is no evidence that real estate agent licensing or trust accounting for STHR in NSW is still necessary or appropriate. All the evidence including the precedents above is to the contrary.

As the Harper Competition Policy Review¹ concluded, innovation, competition and development should not be hindered or constrained by unnecessary and inappropriate regulation or to endeavour to preserve historic monopolies or vested interests. On 25 November 2015 the Federal Government announced that it has adopted the main recommendations and Treasurer Scott Morrison said:

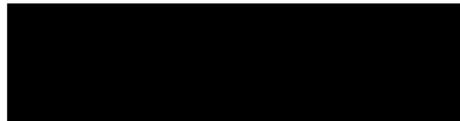
The government wants to unleash a spirit of competition, to put Australian consumers and choice front and centre, because it is the economy and all Australians that ultimately will be the winners.²

There are important state and regional economic consequences if NSW remains out of step with competitive states. New digital platforms and innovations are emerging at a rapid rate in STHR and other activities. On merit, New South Wales is the logical national and regional headquarters for these innovators. Unnecessary and inappropriate regulatory obstacles will drive them to other states or countries and NSW will lose the opportunity to host these exciting new business enterprises and the employment, commerce and economic benefits identified in the Harper Review. Other NSW based intermediaries will also be constrained from dealing with these digital platforms which in turn will hurt tourism and the wider economy in NSW.

Recommendation
Regulation 44 Property, Stock and Business Agents Regulations be amended so that STHR is exempted from the PSBA Act altogether.

I am available at your convenience to elaborate upon and discuss any aspect of this matter.

Yours faithfully,
Trevor Atherton
Partner



¹ <http://competitionpolicyreview.gov.au/final-report/>

² <http://www.theaustralian.com.au/national-affairs/harper-review-competition-reforms-to-end-decline-in-growth/story-fn59niix-1227621768678>

The Supervisor
Property Agents and Managers Department
NSW Fair Trading
PO Box 972
Parramatta 2124

9 July 2015

by attachment through the Office of Fair Trading on line Enquiry system

Dear Sir/Madam

**Real Estate Agent Licensing and
Trust Account Requirements
under the
*Property Stock and Business Agents Act (PSBA) and Regulations***

We have been asked to advise a number of clients in relation to this under the new PSBA Regulations.

Our clients are in the holiday and short term rental industry and include 4 main types of intermediary:

1. **Real estate agents** who operate from a local office and manage a number of houses and apartments for owners which they rent to tourists and visitors for short terms (usually not exceeding 3 months);
2. **Travel agents** both traditional who operate from a physical office and online travel agents;
3. **Booking agents** who deal in licences to rent accommodation for short terms (not exceeding 2 months); and
4. **Digital platforms** that connect owners/managers and consumers and mediate and facilitate short term accommodation rental transactions, often collecting rent and other moneys and often also involving other agents of type 1, 2. and 3.

We would like to clarify a number of ambiguities arising from the amendments to the PSBA Regulations which came into force on 1 September 2014.

1. Real Estate Agents: ambiguities and question

It is clear that in New South Wales type 1 agents continue to require a real estate agent's licence and to hold moneys received in a trust account.

As you are probably aware, this is not the case in other states such as Victoria and Western Australia. As you are also probably aware the Victorian deregulated model was to become the national model under the National Occupation Licensing Scheme (established by COAG in 2009) until efforts to achieve a uniform Australia wide system were abandoned in 2013.

In New South Wales the definition of real estate agent includes an agent dealing only in holiday and short term accommodation not because it is a "real estate transaction" (it is clearly not as it involves licensing, not "leasing" or "letting") but because it "carries on business" "as an agent"

(c) for the introduction, or arranging for the introduction, of a prospective purchaser, lessee or licensee of land to another licensed agent or to the owner, or the agent of the owner, of land (PSBA Act s3(c)).

Although there is no express limitation in the PSBA Act there clearly must be a jurisdictional limit to the ambit of the legislation ie there must be sufficient connection with New South Wales for this to apply to any particular person, property or transaction. For a traditional Type 1 Real Estate Agent operating from an office in New South Wales carrying business in New South Wales as an agent for owners in New South Wales of properties located in New South Wales for rental to guests in New South Wales this is clear.

The difficulties arise when considering these provisions in relation to type 4 Digital Platforms which may not have a branch or office in New South Wales and/or may not act "as an agent". The owners of the properties and their guests may also be located outside New South Wales.

Question 1.

Would a type 4 Digital Platform be a real estate agent within the meaning of s3 of the PSBA Act (thus requiring licensing, registered office and trust accounting in New South Wales) if it:

- did not have an office or branch in New South Wales (eg operated from a branch or office in Victoria or Western Australia or overseas where real estate agent licensing and trust accounting are not required); and/or
- did not "carry on business" in New South Wales though the owner, guest or the property may be located in New South Wales; and/or
- did not act "as an agent" but merely provided an on line mechanism to connect owners/managers and consumers and mediate and facilitate short term accommodation rental transactions.

2. Travel Agents: ambiguities and question

Travel agents are expressly exempted under PSBA Regulation 45.

As you are probably aware, travel agents have traditionally been exempted from real estate agent licensing and trust accounting throughout Australia, because they had their own nationally uniform licensing, financial controls

and travel compensation scheme. As you are also probably aware, that scheme has been disbanded and since 1 July 2014 travel agents have been deregulated except for the AFTA administered accreditation and self regulatory system.

Regulation 45 defines travel agent in a way similar in many respects to the definition in the former Travel Agents Act which is discussed in detail in our book.¹ Under that definition an agent dealing only in accommodation is generally not a travel agent. They must also deal in "rights of passage" or "other travel related arrangements". These terms have always been vague. The further difficulty is that this definition is now 25 years old and the practice of travel agency has changed dramatically in that time including the nature and mix of travel services sold and the emergence of online travel agents.

Question 2.

If an agent type 1 (travel agent with office or on line) or agent type 4 Digital Platform deals in holiday and short term rental accommodation plus one or more of the following services, would they qualify as a travel agent under the definition in Regulation 45 and thus be exempted from real estate agent licensing and trust accounting:

- arranging or offering to arrange hire cars by booking directly or by referral to hire car companies (hire cars are a contemporary type of passenger transport or "rights of passage").
- arranging or offering to arrange travel insurance by selling policies directly or by referral to travel insurance companies (travel insurance is a contemporary type "other travel related arrangements").

3. Booking Agents: ambiguities and question

Booking agents (and visitor information centres) are expressly exempted under PSBA Regulation 44 which provides (underlining added):

- (1) This clause applies to persons who:
 - (a) introduce, or arrange for the introduction of, a prospective licensee of land to the owner of land or to the agent of the owner of land, and
 - (b) deal only with licences of land for a period of not more than 2 months other than for residential purposes, and
 - (c) do not accept any money for doing so from any prospective licensee of land or licensee of land, and
 - (d) do not otherwise introduce, or arrange for the introduction of, a prospective purchaser, lessee or licensee of land to a licensed agent or to the owner, or the agent of the owner, of land.

However there are a number of difficulties in determining whether type 4 Digital Platforms come within the application of this exemption, especially if they collect and hold rental and other payments.

¹ Atherton T&T, Tourism, Travel and Hospitality Law 2ed Thomson Reuters Sydney 2011 at paras 11.395-11.400

Question 3.

Would a type 4 Digital Platform qualify for this exemption as a booking agent having regard for the following:

- "other than for residential purposes" (PSBA Regulation 44(1)(b)) is vague and undefined. The Residential Tenancies Act (s8) exempts occupancy for holiday purposes for 3 months. Occupancy of holiday and short term rental accommodation can be for any purpose including holidays, visiting friends and relatives, work, study, health care or other purposes as long term local residents who are renovating, changing houses or whatever.
- Type 4 Digital Platforms frequently do collect and accept deposit, rental and security bond moneys and hold them (not in trust) until the occupancy commences or is satisfactorily completed. Arguably this is not payment "for doing so" within the meaning of PSBA Regulation 44(1)(c) because it is not a fee or reward for the service it is providing in introducing the licensee/guest (PSBA Regulation 44(1)(a)) or for dealing with the licence in land (PSBA Regulation 44(1)(b)). Its fees for those services are charged separately to owner and guest but they may be deducted from the moneys collected.
- "otherwise introduce, or arrange for the introduction of..." (PSBA Regulation 44(1)(d)) is vague and difficult to interpret especially with regard for how type 4 Digital Platforms have emerged and operate. There appears to be no logical extension beyond what is already covered in PSBA Regulation 44(1)(a).

4. Interaction of all 4 types: ambiguities and question

In contemporary holiday and short term rental of accommodation, the transaction often involves more than one type of intermediary.

This creates further uncertainties about the compliance obligations of the respective parties. Particularly, although the type 2 travel Agent, type 3 Booking Agent or type 4 Digital Platform may be exempt or outside the jurisdiction of New South Wales real estate agent licensing and trust accounting requirements, where does that leave the type 1 local Real Estate Agent who is licensed and subject to trust accounting and other obligations in New South Wales?

Question 4.

Will a licensed real estate agent in New South Wales (type 1) remain in compliance with its trust accounting and other obligations when it deals (as it must to remain viable and in accordance with contemporary practice) with type 1, 2 and 3 intermediaries who are:

- not licensed real estate agents in New South Wales; and/or
- do not have or hold moneys in trust accounts in New South Wales or elsewhere; and/or
- located interstate or overseas; and/or
- are otherwise outside the jurisdiction of new South Wales; and
- it does not receive into its trust account the moneys collected and held by others until after the occupancy commences or is satisfactorily completed.

You will no doubt appreciate the importance of these issues and questions for New South Wales and its real estate, tourism and other industries and economy, especially in the globalised sharing economy.

I am available at your convenience to meet, elaborate upon and discuss any aspect of this matter.

Yours faithfully,

Trevor Atherton
Partner



Trevor Atherton

From: [REDACTED]
Sent: Friday, 30 October 2015 4:52 PM
To: [REDACTED]
Subject: [REDACTED]

Dear Mr Atherton,

Please note that Fair Trading does not provide legal advice. When investigating any matter, Fair Trading will consider individual circumstances and apply the relevant legislation to that matter.

Question 1 - Online businesses

With regard to online businesses and the need for a licence, Fair Trading would consider the location of the property as the determining factor (not the location of the business, property owner or lessee).

Section 28 of the Property, Stock & Business Agents Act 2002 (the Act) is also relevant as it deals with the requirements for a registered office in New South Wales where the licensee must display certain information.

Question 2 and 3 - Travel Agents & Booking Agents

Obviously, Fair Trading would consider each circumstance on merit. And, one of the main factors in this consideration would be what is the core business being offered. Services provided, which are auxiliary (e.g. car rental, travel insurance) to the core business, would not alter the need for a licensee to adhere with licencing provisions and comply with the Act.

Question 4 ? Interactions

In this case there are jurisdictional issues to consider in that Fair Trading may not, directly, be able to pursue businesses outside of NSW.

Agents, licensed in NSW, should not deal with, enter into an arrangement or act in conjunction with another party that they know to be unlicensed.

An important aspect of dealing with a licenced real estate agent is that all funds held by the agent in trust is protected by a compensation fund administered by Fair Trading. Consumers who pay money to a business, not licensed in this State, run a greater risk of losing that money when things go wrong.

Yours sincerely

[REDACTED]
Coordinator, Market Relations
NSW Fair Trading
