THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: Prop:EEgl1781907

2 October 2019

Real estate and property services industry reforms consultation
Regulatory Policy, Better Regulation Division
NSW Department of Customer Service
McKell Building
2-24 Rawson Place
Sydney NSW 2000

By email: rereforms@customerservice.nsw.gov.au

Dear Sir/Madam,

Property and Stock Agents Amendment Regulation 2019 ("Draft Regulation")

The Law Society of NSW appreciates the opportunity to comment on the Draft Regulation. The Law Society's Property Law Committee has contributed to this submission.

We are pleased to see that the reforms previously proposed for this industry are now progressing and we welcome the proposed commencement of the *Property, Stock and Business Agents Amendment (Property Industry Reform) Act 2018*. We also anticipate that the provision of further information as to what constitutes a material fact will be broadly welcomed by the real estate industry.

Below we set out our comments in relation to each of the proposed new material facts introduced by new clause 54 of the Draft Regulation, "Misrepresentation by licensee or registered person by failing to disclose material facts".

1. New clause 54(a)

New clause 54(a) prescribes as a material fact "that the property was subject to flooding from a natural weather event or bush fire within the last 5 years,". Comparing this to the parallel disclosure obligation in the draft Residential Tenancies Regulation 2019, we note that the words "from a natural weather event" have been added which is appropriate. We suggest that it might be better if this was expressed as "subject to a bush fire, or flooding from a natural weather event, within the last 5 years".

In consultation on the draft Residential Tenancies Regulation 2019, we suggested that limiting the obligation to disclose to a two-year time frame would be appropriate, but in the context of the sale of a property, five years is an appropriate timeframe in our view.

2. New clause 54(b)

New clause 54(b) prescribes as a material fact "that the property was the scene of a serious indictable offence within the last 5 years,". In contrast, the parallel obligation under the draft Residential Tenancies Regulation 2019 refers to "a serious indictable offence involving violent conduct". In our view, the additional criterion of "involving violent conduct" should be added to clause 54(b) to remove, for example, the need to disclose money laundering or tax fraud.

We note that the clause is drafted widely to refer to the property being the "scene of a serious indictable offence", rather than specifying that a serious indictable offence occurred "on the property". We expect that the clause has been drafted widely to cover the possibility that the stigmatizing factor occurred on, for example, the footpath or nature strip rather than on the property itself. While the broadening of the site may be appropriate for violent crimes, for serious white-collar crimes or drug offences limiting the occurrence to the property itself seems more appropriate in our view.

We note that framing the material fact by reference to the occurrence of a "serious indictable offence" will require in some instances an examination and understanding of the *Crimes Act 1900* and other relevant Acts. We note that an indictable offence is defined in section 3 of the *Criminal Procedure Act 1986*, and a serious indictable offence is defined in section 4 of the *Crimes Act 1900*.

3. New clause 54(c)

New clause 54(c) prescribes as a material fact "that the property was the scene of an offence under the *Drug Misuse and Trafficking Act 1985* within the last 2 years,". If the agent knows that such an offence has occurred, it would appear appropriate that a disclosure obligation is triggered. However, section 52 as amended by the *Property, Stock and Business Agents Amendment (Property Industry Reform) Act 2018* also includes the obligation to disclose a material fact that the agent "ought reasonably to know". We query whether this is a material fact that the agent ought to be aware of and whether this creates an obligation on the agent to make further enquiries. While the material fact is objectively ascertainable, we query how an agent is expected to have this knowledge.

New clause 54(c) would appear to include possession or use of small amounts of illegal substances. We expect that the purpose of this clause is primarily aimed at the need to disclose more significant offences under the *Drug Misuse and Trafficking Act 1985,* such as use of the property for drug manufacturing. If this is the case, we suggest that consideration should be given to reframe the clause to better reflect this objective and not capture all offences under the *Drug Misuse and Trafficking Act 1985.*

However, we also note that the indictable offences in Part 2 Division 2 of the *Drug Misuse and Trafficking Act 1985* all appear to be "serious indictable offences" and so would also be captured by new clause 54(b), which creates an inconsistency as to the applicable time frame (i.e., within the last five or two years).

In subclause 54(c), in our view it would be more appropriate to refer to the offence as occurring "on the property", rather than the property being the "scene of an offence".

4. New clause 54(e)

New clause 54(e) prescribes as a material fact "that that the property poses a significant health or safety risk,". In our view this term is very broad and should be further defined. We also note that difficulties may arise in that what may be a significant health risk for one prospective purchaser may not be the same for another, for example a person may have a specific allergy.

We also note that the draft Residential Tenancies Regulation 2019 includes the limitation that the risks "are not apparent to a reasonable person on inspection of the premises". Consideration could be given to adding that limitation to clause 54(e) of the Draft Regulation.

5. New clause 54(f)

New clause 54(f) prescribes as a material fact "that the property is listed on the loose-fill asbestos insulation register, as required to be maintained under section 119B of the *Home Building Act 1989*,". Noting that the obligation to disclose extends to a material fact that the agent "ought reasonably to know", we query whether the inclusion of this material fact will create an obligation on the agent to search the register.

We also note that if a residential property is on the loose-fill asbestos insulation register, the planning certificate attached to the contract will include a statement to that effect under item 20 of Schedule 4 of the *Environmental Planning and Assessment Regulation 2000*. In our view, this duplication should be further considered.

We further note that, following the introduction of the loose-fill asbestos insulation register, all contracts for the sale of residential land must include the statutory warning in relation to loose-fill asbestos insulation under item 6, Schedule 1 of *Conveyancing (Sale of Land) Regulation 2017*. The statutory warning alerts a purchaser to the existence of the loose-fill asbestos insulation register and strongly advises a purchaser to search it. The register is publicly accessible and in our view, this is a matter for purchaser due diligence, not a matter that should become the responsibility of the agent to disclose.

6. New clause 54(g)

New clause 54(g) prescribes as a material fact "that the property is, or is part of, a building that is on the register of buildings that have external combustible cladding established under clause 186U of the *Environmental Planning and Assessment Regulation 2000*.". We note that the external combustible cladding register is not publicly accessible so, from a prospective purchaser's point of view, this is important information. If the agent is aware that the property (or part of it) is on the external combustible cladding register it is appropriate in our view that this is disclosed. However, if the agent has no information on the subject, we again query whether the agent is obliged to make further enquiries and note the difficulties in making enquiries given the information is not publicly accessible.

We also note that under item 21 of Schedule 4 of the *Environmental Planning and Assessment Regulation 2000* a planning certificate must contain information known to the local council that is relevant to the question of whether the property is affected by external combustible cladding.

We would be pleased to meet with you to further discuss the matters raised in this submission. Any questions should be directed to Gabrielle Lea, Policy Lawyer on 9926 0375 or email: gabrielle.lea@lawsociety.com.au.

Yours faithfully,

Elizabeth Espinosa
President