

Submission

By



To The

Justice and Electoral, Committee

On The

Real Estate Agents Bill

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**REAL ESTATE AGENTS BILL
SUBMISSION BY BUSINESS NEW ZEALAND¹
29 FEBRUARY 2008**

1. INTRODUCTION

1.1 Business New Zealand welcomes the opportunity to make some brief comments on the Real Estate Agents Bill (referred to as 'the Bill'). Overall, we believe that if the Bill is to proceed, it requires significant amendment, particularly regarding the new regulatory authority, responsibility for establishing rules and codes, and levies and fees associated with the new authority.

2. SUMMARY OF RECOMMENDATIONS

2.1 Business New Zealand makes the following **recommendations** with regard to the *Real Estate Agents Bill*, namely that:

- (a) ***The Real Estate Agents Authority is established as an independent Crown Entity (p.3);***
- (b) ***The Minister is required to undertake meaningful consultation with the real estate industry concerning the appointment of members to the Real Estate Agents Authority (p.3);***
- (c) ***Membership of the Complaints Assessment Committee is separate from the Real Estate Agents Authority, and that the Minister is required to undertake meaningful consultation with the real estate industry concerning any proposed appointments (p.4);***
- (d) ***Representative groups and industry bodies within the real estate industry have more direct input into the establishment of the rules and codes of practice the Real Estate Agents Authority will create, preferably via the industry bodies providing a first draft for the Authority to discuss and give final approval to (p.4); and***
- (e) ***Any proposed monetary costs directly imposed on the real estate industry, such as fees, levies and fines are imposed after full consultation with the industry. Also, the Regulations Review Select Committee should be included as part of the consultation process regarding any monetary costs incurred by the industry (p.5).***

¹ Background information on Business New Zealand is attached in the appendix.

3. BACKGROUND

- 3.1 Business New Zealand has always taken a strong interest in issues of regulation. While a certain level of regulation is required for any country that wishes to provide a stable economic environment in which to do business, excessive or poor quality regulation can discourage investment and productivity.
- 3.2 We believe the Bill as it currently stands simply goes too far in terms of excessive regulatory control. While there may be a need to revisit the existing legislation that is now over 30 years old, with any changes aimed towards a greater need to protect consumers, we believe the pendulum has swung too far in terms of an overly prescriptive approach, especially in respect to the establishment of the new regulatory body for the real estate industry.

4. NEW REGULATORY AUTHORITY

- 4.1 The Bill seeks to create a new, stand alone regulatory body, independent of the industry, called the Real Estate Agents Authority (referred to as ‘the Authority’). The Authority will have wide ranging powers and responsibilities including:
- Licensing and registration of real estate agents and salespeople;
 - Setting entry criteria for agents and salespersons;
 - Maintaining a public register of agents and salespeople;
 - Setting industry standards (codes);
 - Provision of consumer information; and
 - First-tier complaints and discipline procedures.
- 4.2 As opposed to the previous regime where industry regulation was shared between the Real Estate Institute of New Zealand (REINZ) and the Real Estate Agents Licensing Board (REALB), dealing with substantive matters will now effectively fall under the powers of the Government.
- 4.3 Business New Zealand believes that any path toward regulatory control should only occur when there are significant – not minor - cases of market failure. There is a wide range of types of market failure, as outlined in Business New Zealand’s *Regulation Perspectives*² publication. Some cases of market failure are major, some minor, but it is wrong to assume that regulation is called for in every case, as market failure can often self correct in a relatively short space of time. Also, market failure should not mean government should intervene, as the result of government failure in attempting to address market failure might be even worse. The following are some specific concerns we have about the proposed authority as outlined in the Bill.

² <http://www.businessnz.org.nz/file/1053/Regulation%20Perspectives.pdf>, page 4.

Authority as a Crown Entity

- 4.4 As the Bill currently stands, the Authority will be established as a Crown Entity, and therefore must give effect to government policy. This is also clearly implied in clause 16(k) of the Bill, which states one of the Authority's 12 functions as being to "carry out any other function that the Minister may direct the Authority to perform in accordance with section 112 of the Crown Entities Act 2004". Business New Zealand is concerned about these wide-ranging powers, which could easily see 'policy on the hoof' if issues arise that the incumbent government believes require some form of immediate change. This would mean no proper consultation with affected parties, and run counter to work currently underway by the Government in regards to improving the regulatory processes via the Regulatory Responsibility Bill, as well as Government investigations into other regulatory processes.
- 4.5 Instead, Business New Zealand believes the Authority should be established as an independent Crown Entity, whereby its authority and responsibilities stem from the legislation, rather than from the views and direction of the Minister. While the Minister responsible can still give direction, the process by which this would occur would be more transparent (usually via the Parliamentary process).

Recommendation: That the Real Estate Agents Authority is established as an independent Crown Entity.

Membership of the Authority

- 4.6 The Bill states that the Authority should consist of no more than seven members, appointed by the Minister without any required consultation or reference to any criteria that the proposed members would need to meet to be picked for the board (apart from a loose mention of the chairperson having to be a barrister or solicitor).
- 4.7 Under the current structure, there is every possibility for 'political' appointments to be made, as there are no checks or balances to ensure the best people are appointed to the Authority.
- 4.8 Business New Zealand would want to ensure that membership of the Authority is balanced in terms of having experienced and respected industry participants, in addition to a selection of independent members who may provide input from a different point of view. At the very least, the Minister should be required to have meaningful consultation with the main bodies and organisations in the real estate industry before any appointments to the Authority are made.

Recommendation: That the Minister is required to undertake meaningful consultation with the real estate industry concerning the appointment of members to the Real Estate Agents Authority.

Complaints Assessment Committee

- 4.9 As stipulated in clauses 74-96 of the Bill, the Authority must appoint three members of the board to be members of the Complaints Assessment Committee (CAC). The functions of the CAC are, among other things, to consider complaints, as well as impose penalties and remedies in cases involving unsatisfactory conduct by an agent.
- 4.10 Business New Zealand is concerned that there is not sufficient separation between the Authority and the CAC, as membership of the CAC at the very least makes up over 40% of the existing Authority. This can potentially seriously undermine the need for separation of duties and independence. In addition, the flow-on effects of selecting low quality members will be exacerbated if they are part of both the Authority and CAC.
- 4.11 Business New Zealand recommends that membership of the CAC be separate from the Authority, and subject to the same rigorous selection as outlined in the recommendation regarding the Authority above.

Recommendation: That membership of the Complaints Assessment Committee is separate from the Real Estate Agents Authority, and that the Minister is required to undertake meaningful consultation with the real estate industry concerning the appointments proposed.

Practice Rules and Professional Standards

- 4.12 As stated in 4.1 above, the Authority will also have responsibility for setting rules and codes of practice for the industry. Given our concerns about the make-up of the Authority (especially given the possibility of inexperienced members within the industry being appointed), there is a possibility of a disconnect between the rules and codes established by the Authority and what would have been developed as a workable outline by the industry itself.
- 4.13 While clause 20 of the Bill mentions consultation in relation to practice rules via agents, branch managers and salespersons (along with any other persons or groups that the Minister may direct), Business New Zealand believes it would be more advantageous for the industry and representative bodies to have more direct input into developing the rules and codes, perhaps as a first draft that is then approved by the Authority. This would ensure that the weight of knowledge and experience of the industry is instantly harnessed, with the Authority still having the power to accept the final version of rules and standards.

Recommendation: That representative groups and industry bodies within the real estate industry have more direct input into the establishment of the rules and codes of practice the Real Estate Agents Authority will create, preferably via the industry bodies providing a first draft for the Authority to discuss and give final approval to.

Costs – Levies and Fees

- 4.14 Both the Authority and the Real Estate Agents Disciplinary Tribunal (referred to as the Tribunal) have powers under the proposed Bill to charge a variety of fees and levies, with what seems to be little in the way of self-imposed limitation. For example, Clause 24(2) states that *“Different fees may be prescribed under this section for different kinds of action and for different classes of person, depending on the kind of licence that they have, or wish to obtain or renew”*. In other words, there is essentially free licence to charge fees anyway that is seen fit by the Authority.
- 4.15 Business New Zealand believes there is a strong possibility that these fees and levies could become sizeable in not only the number prescribed, but also the amount collected without the right checks and balances. As these fees/levies will come directly from the real estate industry via agents and salespeople, invariably such costs are simply filtered down to the end consumer (in this case the buyer of a property) as the vendor will have to pay a higher commission charge for a real estate business selling their home to compensate for the extra fees/levies. This in turn means the vendor will ask a higher price for their house, raising house prices, and in turn costing the buyer more. Even if it is typically the case that actual fees and levies paid to the Authority and/or Tribunal are relatively small, because of the potentially large fines that could now be imposed, agents are likely to build into their commission rates that potential for fines/increased fees.
- 4.16 In addition, the explanatory notes to the Bill state that the cost of running the Authority will be \$4.4 million per year, along with \$1.5 million for the Tribunal. While the notes also stipulate that the overall costs of the regulatory regime will fall as the cost will be offset by the fact that there will no longer be compulsory membership of REINZ, given there is no incentive to ensure the Authority/Tribunal keeps at a minimum size, and that there will most likely be an inbuilt insurance element in commission rates in case if fines are imposed, it must seriously be questioned whether there will be any true reduction in regulatory costs. Certainly not when the flow on effects to vendors and buyers are taken into account.
- 4.17 Therefore, Business New Zealand believes ‘checks and balances’ regarding fees/levies and fines need to be established. Any and all regular or potential monetary costs that have to be paid by agents/salespeople need to involve proper and transparent consultation with the industry itself. Also, we would support moves towards some type of ‘gate-keeper’ role for, say, the Regulations Review Select Committee to ensure prices set are in accordance with statutory provisions.

Recommendation: That any proposed monetary costs imposed on the real estate industry, such as fees, levies and fines are imposed only after in full consultation with the industry. Also, the Regulations Review Select Committee should be included as part of the consultation process regarding any monetary costs incurred by the industry.

APPENDIX

5. About Business New Zealand

- 5.1 Encompassing four regional business organisations (Employers' & Manufacturers' Association (Northern), Employers' & Manufacturers' Association (Central), Canterbury Employers' Chamber of Commerce, and the Otago-Southland Employers' Association), Business New Zealand is New Zealand's largest business advocacy body. Together with its 70-member Affiliated Industries Group (AIG), which comprises most of New Zealand's national industry associations, Business New Zealand is able to tap into the views of over 76,000 employers and businesses, ranging from the smallest to the largest and reflecting the make-up of the New Zealand economy.
- 5.2 In addition to advocacy on behalf of enterprise, Business New Zealand contributes to Governmental and tripartite working parties and international bodies including the ILO, the International Organisation of Employers and the Business and Industry Advisory Council to the OECD.
- 5.3 Business New Zealand's key goal is the implementation of policies that would see New Zealand retain a first world national income and regain a place in the top ten of the OECD (a high comparative OECD growth ranking is the most robust indicator of a country's ability to deliver quality health, education, superannuation and other social services). It is widely acknowledged that consistent, sustainable growth well in excess of 4% per capita per year would be required to achieve this goal in the medium term.