

Property Occupations Bill 2013

Report No. 51

Legal Affairs and Community Safety Committee

February 2014

Legal Affairs and Community Safety Committee

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Contents

Abbreviations	iv
Chair's foreword	v
Recommendations	vi
1. Introduction	1
1.1 Role of the Committee	1
1.2 Inquiry process	1
1.3 Policy objectives of the Property Occupations Bill 2013	1
1.4 Consultation	2
1.5 Should the Bill be passed?	2
2. Examination of the Property Occupations Bill 2013	3
2.1 Background	3
2.2 Reduction of red tape and regulation	5
2.3 Improvement of the legislation	22
2.4 Clarification of the legislation	23
3. Fundamental legislative principles	26
3.1 Administrative power / Natural justice	26
3.2 Other issues	27
3.3 Explanatory Notes	28
Appendix A – List of Submissions	29
Appendix B – Schedule of Witnesses at the Public Hearing	30
Statement of Reservation	31

Abbreviations

Attorney-General	The Honourable Jarrod Bleijie MP, Attorney-General and Minister for Justice
Bill	Property Occupations Bill 2013
Committee	Legal Affairs and Community Safety Committee
Department	Department of Justice and Attorney-General
PAMD Act	<i>Property Agents and Motor Dealers Act 2000</i>
SDPC	Service Delivery and Performance Commission
UOAQ	Unit Owners Association of Queensland

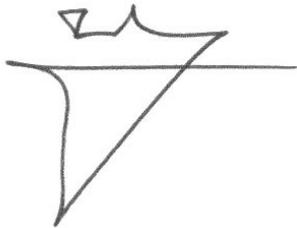
Chair's foreword

This Report presents a summary of the Legal Affairs and Community Safety Committee's examination of the Property Occupations Bill 2013.

The Committee's task was to consider the policy outcomes to be achieved by the legislation, as well as the application of fundamental legislative principles – that is, to consider whether the Bill had sufficient regard to the rights and liberties of individuals, and to the institution of Parliament.

On behalf of the Committee, I thank those individuals and organisations who lodged written submissions on this Bill. I also thank the Committee's Secretariat and the Department of Justice and Attorney-General.

I commend this Report to the House.



Ian Berry MP

Chair

Recommendations

Recommendation 1

2

The Committee recommends the Property Occupations Bill 2013 be passed.

Recommendation 2

17

The Committee recommends the Attorney-General and Minister for Justice clarify whether it is intended for an auctioneer, in the course of conducting an auction, to be in breach of the provisions if they announce a property is 'on the market' or similar - after the reserve price has been reached.

1. Introduction

1.1 Role of the Committee

The Legal Affairs and Community Safety Committee (Committee) is a portfolio committee of the Legislative Assembly which commenced on 18 May 2012 under the *Parliament of Queensland Act 2001* and the Standing Rules and Orders of the Legislative Assembly.¹

The Committee's primary areas of responsibility include:

- Department of Justice and Attorney-General;
- Queensland Police Service; and
- Department of Community Safety.

Section 93(1) of the *Parliament of Queensland Act 2001* provides that a portfolio committee is responsible for examining each bill and item of subordinate legislation in its portfolio areas to consider:

- the policy to be given effect by the legislation;
- the application of fundamental legislative principles; and
- for subordinate legislation – its lawfulness.

The Property Occupations Bill 2013 (Bill) was introduced into the House and referred to the Committee on 20 November 2013. In accordance with the Standing Orders, the Committee of the Legislative Assembly required the Committee to report to the Legislative Assembly by 24 February 2013.

1.2 Inquiry process

On 28 November 2013, the Committee wrote to the Department of Justice and Attorney-General (Department) seeking advice on the Bill, and invited stakeholders and subscribers to lodge written submissions.

The Committee received written advice from the Department and received 24 submissions (see **Appendix A**).

A public briefing was held on 12 December 2013, where the Committee received evidence from representatives from the Department on the initiatives being pursued in the Bill. A copy of the transcript of the briefing can be accessed on the Committee's website.

On 6 February 2014, a further public hearing was held where the Committee received further oral submissions from a number of invited witnesses (see **Appendix B**).

1.3 Policy objectives of the Property Occupations Bill 2013

The policy objectives of the Bill are to:

1. Provide for the repeal and split of the *Property Agents and Motor Dealers Act 2000* (PAMD Act). The Bill is one of four Bills resulting from the split the PAMD Act;

¹ *Parliament of Queensland Act 2001*, section 88 and Standing Order 194.

2. Simplify and reduce the level of red tape and regulation the PAMD Act currently imposes on the property industry; and
3. Improve the operation of the legislation and clarify particular provisions.²

1.4 Consultation

As set out in the Explanatory Notes, extensive Government consultation was conducted during the development of the Bill, with 17 peak bodies contacted.³

A comprehensive red tape reduction review of the draft Bills to split the PAMD Act was conducted in 2013 arising out of a six week public consultation process in February that year. Targeted consultation was also undertaken in October 2013 with positive feedback from stakeholders.

Throughout the development of the 'spilt' of the PAMD Act into separate industry specific Bills, key industry bodies have been consulted – with strong support for the process of repealing and splitting the current PAMD Act.

Positive feedback on the consultation undertaken for the PAMD Act split was also provided to the Committee at the public hearing on 6 February 2014.

1.5 Should the Bill be passed?

Standing Order 132(1) requires the Committee to determine whether or not to recommend the Bill be passed.

The Committee has examined the Bill and its policy objectives and has given thorough consideration to the information provided by both the department and submitters, including the written submissions from stakeholders.

The Committee makes the following recommendation.

Recommendation 1

The Committee recommends the Property Occupations Bill 2013 be passed.

² *Explanatory Notes, Property Occupations Bill 2013, page 1.*

³ *Explanatory Notes, Property Occupations Bill 2013, page 38.*

2. Examination of the Property Occupations Bill 2013

2.1 Background

In his introductory speech on 20 November 2013, the Attorney-General stated:

*Industry has long been calling for a reduction in red tape and for the cumbersome and complex Property Agents and Motor Dealers Act 2000 to be split into separate, industry-specific pieces of legislation.*⁴

In response to industry concerns, a suite of four inter-related bills (including the Bill) was introduced on 20 November 2013 to replace the PAMD Act:

- Property Occupations Bill 2013;
- Motor Dealers and Chattel Auctioneers Bill 2013;
- Debt Collectors (Field Agents and Collection Agents) Bill 2013; and
- Agents Financial Administration Bill 2013;

(referred to as the '2013 Bills').

The suite includes three industry-specific acts 'supported by a financial administration act containing common trust account obligations and claim fund provisions applying across the industry-specific acts'.⁵

Property Agents and Motor Dealers Act 2000

The PAMD Act was introduced into Parliament on 7 September 2000 and came into effect on 1 July 2001. It provided for:

- an occupational licensing and conduct framework for businesses and individuals operating in the real property sector (for example real estate agents and salespeople), as well as auctioneers, used motor dealers, debt collectors and process servers
- consumer protection provisions regarding residential property sales (particularly in relation to pre-contractual disclosure) and
- a claim fund designed to compensate consumers who suffer loss as the result of particular actions of licensees.⁶

The first amendment to the PAMD Act commenced on 21 September 2001,⁷ indicating that refinements to the legislation were required even in its infancy. The PAMD Act has been extensively modified over many years, including via four substantial pieces of amending legislation, resulting in legislation which is renowned as being 'a large and cumbersome piece of legislation'⁸:

While the PAMD Act serves a number of important policy purposes, over time it has become increasingly voluminous and difficult to navigate. It has also been characterised by increasing levels of complex and technical regulations, which in some cases, may be a disproportionate or ineffective response to the policy problems they seek to resolve. The

⁴ Record of Proceedings (Hansard), 20 November 2013, page 4057.

⁵ Record of Proceedings (Hansard), 20 November 2013, page 4057.

⁶ Letter from the Department of Justice and Attorney-General, 10 December 2013, page 1.

⁷ Reprint 1A, Act 61 of 2001.

⁸ Rowley v Abacus Associates Pty Ltd [2013] QCATA 206, per Stilgoe OAM, at 18.

PAMD Act has also resulted in a 'one size fits all' legislative framework, which is limited in its capacity to deal with industry-specific issues in a tailored, responsive way.

For instance, industries such as debt collection are currently regulated in legislation that is largely designed to deal with issues arising in the real property sector.⁹

History of review of PAMD Act¹⁰

In 2008, the former Service Delivery and Performance Commission (SDPC) conducted a Review of Regulatory Reform. In its 'Report on the Review of Regulatory Reform (Phase 2) – *Property Agents and Motor Dealers Act 2000*', the SDPC concluded:

... a significant reduction in the level of regulation could be achieved without adversely affecting consumers. The reductions were anticipated to be of significant benefit to the businesses affected by the Act and a number of the SDPC recommendations were considered likely to have positive benefits for consumers.

In 2010, the former Government introduced draft Bills (the 2010 draft Bills) to implement a number of recommendations of the SDPC. The four Bills were referred to the former Legal Affairs, Police, Corrective Services and Emergency Services Committee on 17 June 2011. That committee reported back to the Parliament on 3 October 2011 making a number of recommendations, including that the 2010 draft Bills be passed. However, the 2010 draft Bills lapsed upon the dissolution of the 53rd Parliament in February 2012.

Following the lapse of the 2010 draft Bills, a comprehensive red tape reduction review of the draft Bills was conducted in 2013. The objective of the review was to identify opportunities to reduce red tape and regulation while maintaining effective consumer benefits. The red tape reduction review was informed by a 6 week public consultation process that commenced in February 2013. Many of the suggestions that align with the Government's objective of reducing regulation and red tape have been adopted and incorporated into the 2013 Bills.

Feedback on the amendments was positive and further amendments to improve the operation of the provisions and the Bill were subsequently made before this Bill was ready to be introduced into the Legislative Assembly.¹¹

New legislative framework

The 2013 Bills are intended to:

... deliver a contemporary legislative framework that is responsive to the needs of the industries regulated under the Property Agents and Motor Dealers Act 2000 and that promotes growth, innovation, creativity and productivity.¹²

The 2013 Bills seek to establish this framework in two ways:

- (i) by repealing and splitting the PAMD Act into three industry-specific Acts¹³ supported by a financial administration Act¹⁴ which contains common trust account requirements and claim fund arrangements that will apply across the industry specific Acts; and

⁹ Letter from the Department of Justice and Attorney-General, 10 December 2013, page 1.

¹⁰ Letter from the Department of Justice and Attorney-General, 10 December 2013, page 4.

¹¹ *Explanatory Notes, Agents Financial Administration Bill 2013*, pages 8-9.

¹² *Record of Proceedings (Hansard)*, 20 November 2013, page 4056.

¹³ Refer to the Property Occupations Bill, Motor Dealers and Chattel Auctioneers Bill and Debt Collectors (Field Agents and Collection Agents Bill).

¹⁴ Refer to the Agents Financial Administration Bill.

- (ii) by significantly simplifying and reducing the regulatory requirements currently contained in the PAMD Act for the licensed industries (including in relation to residential property sales), and streamline the investigation and decision making processes for consumer claims made against the claim fund.¹⁵

Legislative reform objectives

The overarching objectives of this legislative reform are to reduce red tape and improve the regulatory framework for the licensed industries while maintaining effective consumer protections.¹⁶

Industry-specific legislation is expected to deliver:

- more responsive legislative reform into the future;
- enhanced awareness of regulatory requirements;
- increased industry standards;
- simplified compliance; and
- increased consumer confidence.¹⁷

As highlighted by the Department, it is anticipated:

*Industry groups will benefit from having legislation and obligations that are specific to their line of business. In addition, industry-specific Acts will mean future legislative reforms will be more responsive to marketplace changes in each industry. This is anticipated to lead to increased industry standards, simplified compliance and increased consumer confidence in the regulated industries.*¹⁸

2.2 Reduction of red tape and regulation

The Bill contains a number of red tape reduction initiatives which will simplify a range of processes and procedures usually undertaken in the property industry. While all the initiatives contained in the Bill are not covered in this report, the Committee highlights the following matters which were examined in detail by the Committee during its inquiry.

Home contracts and statements

The Bill will streamline home sale contracts by repealing the existing warning statement provisions.¹⁹

As is illustrated by an extensive body of case law, the warning statement provisions and in particular the requirement that the statement be 'attached' to a contract of sale, have long been problematic.²⁰ The preferred approach, which appears to be generally applicable to the Chapter 11 Part 1 requirements of the PAMD Act, was articulated by the Chief Justice²¹ in *MNM Developments P/L v Gerrard* as one of simply adopting the ordinary concept of "attach", which the Chief Justice was satisfied was 'plainly the legislature's intent'. Notwithstanding this guidance, the warning statement provisions continued to generate much litigation.

¹⁵ Letter from the Department of Justice and Attorney-General, 10 December 2013, pages 1-2.

¹⁶ Letter from the Department of Justice and Attorney-General, 10 December 2013, page 2.

¹⁷ *Explanatory Notes*, Agents Financial Administration Bill 2013, page 2.

¹⁸ Letter from the Department of Justice and Attorney-General, 10 December 2013, page 2.

¹⁹ Chapter 11, Part 3, *Property Agents and Motor Dealers Act 2000*.

²⁰ See, for example, *MNM Developments P/L v Gerrard* [2005] QCA 230; *MP Management (Aust) Pty Ltd v Churven* [2002] QSC 320.

²¹ *MNM Developments P/L v Gerrard* [2005] QCA 230 at [18]

Clause 165 of the Bill replaces these highly technical provisions with a simple requirement for a prescribed statement to be included in particular home sale contracts. Should a seller fail to comply with these new provisions, they will be subject to a maximum penalty of 200 penalty units,²² and the buyer will no longer have a right to terminate.

This proposal was largely welcomed by stakeholders. In its submission to the Committee, the Property Council of Australia endorsed this approach, suggesting that *‘through introducing penalties for the seller or the seller’s agent for technical breaches to the legislation, rather than allowing buyers the option to terminate contracts on this basis, the level of litigation associated with technical breaches can be expected to reduce considerably.’*²³

Similarly, in its submission to the Committee, the Urban Development Institute of Australia also strongly endorsed removal of the existing warning statement provisions, stating:

*The removal of this requirement will reduce transaction costs and lower risks associated with contract enforceability. It was unacceptable that under PAMDA contract validity could be determined by reference to the concept of physical attachment to a contract of the statutory warning statement. The order in which pages appear or how they are bound adds nothing in terms on consumer protection.*²⁴

Likewise, Corrs Chambers Westgarth Lawyers stated *‘Industry will embrace this relief, as a buyer will no longer be able to terminate a contract based on the slightest technical infringement of PAMDA or BCCM.’*²⁵

The Queensland Law Society held an opposing view, suggesting that retention of the right to terminate is the preferred approach:

...the [QLS Property Development and Law] Committee does not agree with the removal of the existing termination right for a buyer where a seller fails to comply.

...as s167 currently stands, a deceived buyer has no remedy and is bound by the contract. The omission of the particular matters is a regulatory offence, which may or may not be prosecuted by the relevant regulatory authority depending on the evidence available to them. This is little comfort to a deceived buyer.

*For these reasons the [QLS Property Development and Law] Committee was of the view that in order to ensure that the consumer protection elements of the Bill are still effective, while also reducing red tape and better facilitating residential property sales, a time-limited termination right to the buyer should apply if the particular matters are not included within the contract. The [QLS Property Development and Law] Committee was of the view that the current 90 day time limitation of termination rights may be appropriate so as not to frustrate long-term agreements where a buyer has not sought advice or has not taken any action on the sale contract within a three month period.*²⁶

At the public briefing, Mr David Ford, Deputy Director-General, Liquor Gaming and Fair Trading, made the following observations regarding the utility of the current warning statement approach under the PAMD Act:

There have been some red-tape reduction measures initiated. For instance, the classic illustration is...the requirement for a separate warning statement to be on the front of a

²² Equivalent to \$22,000 as at 29 January 2014.

²³ Property Council of Australia, Submission No. 12, page 2.

²⁴ Urban Development Institute of Australia, Submission No. 3, page 1.

²⁵ *Relief at Last from PAMDA Red Tape*, Corrs Chambers Westgarth (online brief), 3 December 2013.

²⁶ Queensland Law Society, Submission No. 17, page 3.

*contract... Which nobody reads and which has resulted in a lot of litigation which has been probably pretty unhelpful to the sector as a whole. That warning statement will still exist but it will be incorporated in the body of the contract and it will be incorporated in a place immediately above where the person who signs the contract signs the contract. So I do not believe that that is actually going to lessen the consumer protection around it.*²⁷

With respect to the proposal to replace a buyer's right of termination with an offence provision attracting a penalty of 200 penalty units, the rationale was explained by Ms Shayna Smith, Director, Office of Regulatory Policy:

The termination rights were associated with the warning statement that was attached to the contract and that warning statement has now been removed...

*Because of the nature of what the statement has become, to attach a termination right for wording that strongly urges the buyer to seek independent legal advice seemed disproportionate to what the statement was trying to achieve. We also know that there has been a lot of litigation around the current procedures where technical noncompliance has seen a lot of contracts terminated for not substantial reasons but for technical noncompliance. So we were trying to avoid a similar situation....and we felt that an offence was a more appropriate response.*²⁸

Committee Comment

Whilst mindful of the concerns raised by the Queensland Law Society, the Committee is of the firm view that it is time the problematic warning statement provisions were replaced and simplified.

Clause 165 achieves this by replacing them with a simple requirement for a prescribed statement to be included in particular home sale contracts.

The Committee is not convinced that the associated removal of buyers' termination rights will result in any degree of substantial detriment to the consumer, however notes that this should have the positive effect of significantly reduce the levels of litigation typically associated with the Chapter 11 Part 1 requirements.

The Committee is satisfied with the proposed amendments.

Existing licence categories

The PAMD Act currently provides for nine categories of licence and four categories of registered employees. The Bill will significantly consolidate this, by providing for three licence categories (real estate agents, auctioneers and resident letting agents) and one category of registered employee.

The Explanatory Notes indicate that it is anticipated there will be '*minimal impacts on existing licensees*'²⁹ as a consequence of these changes. In terms of the impact upon licensees that may require more than one type of licence to conduct activities that were previously authorised to perform under one licence, they '*will be provided with a licensing fee concession to mitigate any negative impacts associated with transition for those licensees (i.e. auctioneers and pastoral house licensees)*'³⁰.

²⁷ *Transcript of Proceedings (Hansard)*, Public Briefing, Legal Affairs and Community Safety Committee, 12 December 2013, page 7.

²⁸ *Transcript of Proceedings (Hansard)*, Public Briefing, Legal Affairs and Community Safety Committee, 12 December 2013, page 9.

²⁹ *Explanatory Notes*, Property Occupations Bill 2013, page 5.

³⁰ *Explanatory Notes*, Property Occupations Bill 2013, page 5.

Committee Comment

The Committee regards this amendment as sensible and is of the view that it will greatly cut unnecessary red tape. No issues were raised in submissions relating to this aspect of the Bill and the Committee is satisfied with the proposed changes.

De-licencing of property developers

The Bill removes the requirement for property developers and their employees to be licensed.

It is considered that this measure *'may generate employment growth, reduce barriers to entry in the property developer market, encourage market entrants and in turn, increase competition'*.³¹

In its submission to the Committee, the Property Council of Australia supported the removal of licencing requirements, stating that this will *'bring Queensland in line with other jurisdictions in Australia [and]... reduce administration time and costs both for government and the property industry.'*³²

Committee Comment

No concerns about this proposed amendment were raised in the submissions. It is a straightforward change, designed to rejuvenate the property industry by reducing excessive administration. Accordingly, the amendments are supported.

Regulation of commissions

Deregulation of real estate commission cap

The Bill repeals the provisions in PAMD Act which set maximum levels of commissions for specified real estate transactions, on the basis that: *'While maximum commissions were initially intended to protect consumers, it has been found that, due to a lack of price competition and discounting between agents, the maximum commission rates set by government have effectively become the rates that agents charge. This restricts the choice of service providers for consumers and results in limited price competition between real estate agents.'*³³

At the departmental briefing, the Member for Burleigh, Mr Hart MP queried how the removal of the cap on commissions would be likely to work in practice. The Department provided the following clarification:

One of the critical things about the new legislation is that in agreeing to pay a commission the vendor or the person purchasing the services needs to have a very clear agreement with the agent as to what the terms and conditions of that contract are. That needs to be well set out. It needs to be understood by both parties and signed as a contract by both parties and enforceable by both parties. So I think there should be a level of transparency about the arrangements that could perhaps be better than it has been in the past.

The other comment I would make is that in making that change the government was mindful of the fact that we are the only jurisdiction that has any caps on commissions at the moment. I must say that the circumstances in other jurisdictions which do not have caps and have not for some time are on the whole no better and no worse than they are in

³¹ Explanatory Notes, Property Occupations Bill 2013, page 5.

³² Property Council of Australia, Submission No. 12, page 2.

³³ Explanatory Notes, Property Occupations Bill 2013, page 6.

*Queensland. So the existence of the cap does not seem to have assisted in either competition or in enforcement by purchasers of their rights.*³⁴

In its written submission to the Committee, the Unit Owners Association of Queensland (UOAQ) described this aspect of the Bill as ‘*a recipe for disaster for rental unit owners*’, stating:

*The majority of rental unit owners are absentee owners both overseas and interstate. They have little or no knowledge of market value commissions and the letting agent has a vested interest in achieving the highest possible commission rate and this is without the pyramid commissions currently being applied by travel agents and letting agents where 12% legislated commission rates are being jacked to 25% by dishonest letting agents.*³⁵

The Tenants’ Union of Queensland expressed similar concerns:

*The rationale for this removal is that it will put downward pressure on commission prices. This has not been the experience of the TUQ. With the introduction of section 171(c) of the Residential Tenancies and Rooming Accommodation Act 2008, the TUQ saw the concerning introduction of administration and other charges by body corporates and caravan parks where the utilities were provided through an embedded network.*³⁶

By contrast, Urban Development Institute of Australia endorsed the deregulation of the cap:

*The Institute welcomes the deregulation of commissions in the PO Bill and the removal of the requirement for developers engaging an agent to sell new residential property to disclose these commissions on the Form 27C. In a submission on the draft PO Bill in early 2013 the Institute highlighted the damaging effects on property valuations and sales of the Form 27C disclosure requirements.*³⁷

Committee Comment

The Committee is satisfied that the deregulation of real estate commissions will have positive outcomes for consumers by reducing red tape and regulation for industry and increasing competition between real estate agents. In this regard, Queensland will be aligned with other jurisdictions. The Committee expects to see benefits flowing through to sellers who will be empowered to negotiate agent’s commissions and exercise more choice in engaging the services of agents.

Allowing agents to receive commission when a beneficial interest exists

The Bill continues to ensure agents are required to disclose any beneficial interest to the seller but introduces amendments to allow an agent to obtain a commission when the seller has acknowledged the agent’s beneficial interest and subsequently agrees to the sale.

New section 155 of the Bill removes the prohibition on recovery of commission where an agent acquires a beneficial interest in property where the client’s written acknowledgement is obtained prior to a contract being entered into.

³⁴ *Transcript of Proceedings (Hansard)*, Public Briefing, Legal Affairs and Community Safety Committee, 12 December 2013, page 7.

³⁵ Unit Owners Association of Queensland Inc., Submission No. 1, page 2.

³⁶ Tenants Union of Queensland, Submission No. 19, page 1.

³⁷ Urban Development Institute of Australia, Submission No. 3, page 3.

On this matter, the Queensland Law Society observed:

The [QLS Property Development and Law] Committee's view was that commission would generally not be recoverable in such circumstances under general equitable principles relating to agent's dealings with its principal. The Committee therefore does not support this aspect of the proposed Bill.

The [QLS Property Development and Law] Committee also noted that equitable principles require that for consent to be effective, it must be fully informed consent. The Committee was concerned that the wording of the section may reduce the general law duties and considered that this be provided for in the section and that the existing form (PAMD Form 28) be amended to enable all relevant facts and circumstances to be disclosed in light of the agent's general law obligations and obligations in sub-section (4)(a)(ii). An example of required disclosure would be where the agent has knowledge (not publicly available) of a planning scheme change which would increase the market value of the property.³⁸

Committee Comment

The Committee does not share the concerns of the Queensland Law Society in this regard. As noted by the Department in its response to submissions, the amendment is considered to meet the policy objectives of the Bill by requiring agents to disclose any beneficial interest associated with a sale. Such disclosure ensures sellers are in substantially as good a position as they would otherwise have been if the property was sold to someone else, without limiting an agent's capacity to obtain the agreed commission for the sale.

The Committee supports these amendments.

Exemptions

Exemption for administrators, liquidators, controllers and receivers

Under the PAMD Act, externally appointed administrators and receivers that have been appointed to deal with the insolvency of a corporate licensee are provided with an exemption from the licensing requirements of the legislation.

Proposed section 6 of the Bill maintains this exemption for administrators appointed for corporate licensees and further provides that external administrators of licensees who are individuals are also exempt. In addition, the Bill extends the exemption for administrators, controllers, liquidators and receivers when they are appointed for formerly licensed corporations and natural persons.

The Queensland Law Society sought to extend this exemption to persons who are appointed as receivers for an individual licensee provided they are entitled to be appointed as the liquidator of a corporation under the Corporations Act.³⁹

The Committee is not satisfied such an extension of the exemption is warranted.

Exemption for related entities

Clause 7 of the Bill provides entities that are acting on behalf of a related entity in relation to non-residential property transactions, with an exemption from the Act, when the entity is carrying on that business only in relation to the assets of the related entity.

³⁸ Urban Development Institute of Australia, Submission No. 3, page 3.

³⁹ Queensland Law Society, Submission No. 17, page 5.

Specifically, the exemption applies to an entity carrying on the business of a property agent or resident letting agent as regards non-residential property assets of:

- another entity the majority of which is directly or indirectly owned by the exempt entity; or
- another entity, if the majority of both entities is directly or indirectly owned by the same persons; or
- another entity that directly or indirectly owns the majority of the exempt entity.

The Shopping Centre Council of Australia expressed strong support for the proposed exemption in its submission to the Committee, stating:

People or entities which directly sell, manage or lease their own commercial property do not need to be licensed since there is no agency relationship. However when, because of the organisational structuring of large businesses, the buying, management or leasing of such property is not performed directly, but through a related entity, such agents are required to be licensed, even though there is still no proper agency relationship between the owner and the manager.

It is obviously absurd, and was never the intention of the PAMDA, that employees of, say, Westfield Shopping Centre Management are required to be licensed when managing or leasing shopping centres on behalf of the Westfield Group or that employees of AMP Office and Industrial must be licensed when managing and leasing offices on behalf of AMP Capital Investors. This is the bizarre situation that exists today, however.

...Queensland is the first state to take action to correct this costly anomaly.⁴⁰

The REIQ also supported the exemption under Clause 7 in its submission.⁴¹

Exemption for 'sophisticated parties'

Clause 8 of the Bill provides agents acting on behalf of 'sophisticated owners', where transactions in relation to non-residential and non-rural property are involved and are over a certain threshold, with an exemption from the Act.

In its submission to the Committee, the Shopping Centre Council of Australia endorsed the proposal to exempt sophisticated parties, stating:

The fact that there are risks in commercial real estate transactions - as there are in all business-to-business transactions - does not mean that such transactions should be regulated by governments (in this case by means of licensing and compliance with PAMDA and its replacement). This is most certainly true for financially sophisticated property owners who fully understand the risks involved in property transactions.⁴²

The Property Council of Australia were similarly supportive, stating:

Providing exemptions for related entities and sophisticated owners will benefit not only the property industry, but also provide time and cost savings for the government departments responsible for administering the legislation, without the risk of reducing consumer protections.⁴³

⁴⁰ Shopping Centre Council of Australia, Submission No. 2, page 2.

⁴¹ Real Estate Institute Queensland, Submission No. 16, page 5.

⁴² Shopping Centre Council of Australia, Submission No. 2, page 3.

⁴³ Property Council of Australia, Submission No. 12, page 2.

The REIQ conditionally supported the exemptions proposed under clauses 8(1)(b) and 8(2), provided:

- *the threshold amount is set at a total gross floor area of at least 10,000sqm (s.8(1)(b));*
- *a person acting under the exemption is required to undertake educational training that is at least equivalent to the training they would otherwise be required to undertake (to qualify for registration) to perform the subject activities if the exemption under section 8 did not exist (s.8(2)); and*
- *the minimum threshold mentioned above applies (s.8(2)).⁴⁴*

On the other hand, the Queensland Law Society outlined concerns regarding the practical implications of the exemption:

The [QLS Property Development and Law] Committee noted that it was common for managers of large shopping centres and office buildings to hold substantial security deposits provided by tenants. The [QLS Property Development and Law] Committee expressed concern that, as a result of the exemption from the Act, there would not be any requirement for these security deposits to be held in an audited trust account. This would create a significant risk of loss to the tenants, most of whom would be small business owners, in the event of fraud or insolvency of the property management company.⁴⁵

Committee Comment

The Committee acknowledges the concerns raised by the Queensland Law Society however does not consider that the risk of fraud is significant. Overall, the Committee considers the benefit to industry would outweigh any risk and that the exemption will produce real time and cost savings across the board.

Exemption from residential property sales provisions

Exemption from Part 7 for residential sales contracts involving 'sophisticated parties'

Clause 160 provides that the residential property sales provisions of the Bill do not apply to a contract if the buyer is:

- a publicly listed corporation or a subsidiary of a publicly listed corporation; or
- the State or a statutory body; or
- purchasing at least 3 lots at the same time, whether or not in the 1 contract.

Committee Comment

No concerns about Clause 160 were raised in the submissions. The amendment appears to be uncontroversial in nature and not otherwise consequential as regards the operation of the Act. The Committee has no concerns about the proposed exemptions.

⁴⁴ Real Estate Institute Queensland, Submission No. 16, page 5.

⁴⁵ Queensland Law Society, Submission No. 17, page 6.

Private treaty contracts entered into 2 days after an auction with a registered bidder

Clause 166 of the Bill maintains the existing 5 day statutory cooling-off period and continues to provide that it does not apply to contracts formed on a sale by auction.

Clause 160(1)(b) of the Bill also operates to remove application of the cooling-off period from private treaty contracts entered into within 2 clear business days after an auction, when the buyer was also a registered bidder at the auction.

The Queensland Law Society agreed in principle with the changes contemplated by clause 160(1)(b), but advised that:

While this approach may reduce red-tape for selling agents, it will add red-tape (and possibly costs) to the conveyancing process as:

- (a) buyers risk losing their deposits if they wrongfully terminate contracts in the mistaken belief they have the benefit of a cooling off period;*
- (b) it will not be apparent to a buyer's lawyer on the face of the contract whether there is a cooling off period. This will create an additional step in the conveyancing process as it will necessitate a buyer's lawyer giving detailed advice in each case about when a cooling off period applies. Further enquiry and investigation will often be required;*
- (c) where buyers are purchasing following an auction using corporate or trustee entities, it may be impossible for the buyer's solicitor to ascertain whether the entity named on the contract was exactly the same entity as that registered to bid at the auction;*
- (d) in some instances it may not be possible to ascertain whether there is a cooling off period before the period expires.⁴⁶*

Caxton Legal Centre expressed concern that clauses 166-7 may result in vulnerable people feeling 'pressured into agreeing to waiving or shortening cooling-off periods. From our perspective, it is very important for clients to be able to rely on a cooling-off period if they have made hasty, ill-considered decisions about purchasing property they cannot actually afford.'⁴⁷

Committee Comment

The Committee notes the above concerns, however considers that lawyers acting on behalf of a buyer would be able to quickly determine whether a buyer was a registered bidder at auction and provide appropriate advice with little difficulty. The conveyancing process has evolved over many years and it is not considered that this provision would add an 'additional step' to the conveyancing process. In practice, the Committee accepts it would be another aspect of the contract which must be addressed in any advice from a solicitor, however it is not anticipated that this matter would add additional red-tape to the conveyancing process or cause confusion.

The Committee is satisfied it will be clear at the time of signing a contract in this instance, that the cooling off period does not apply for the buyer who was a registered bidder at auction.

Buyer's notification of termination during cooling-off

The Bill removes the requirement for a buyer to state in a termination notice the section of the legislation they are using to exercise their statutory cooling-off rights, together with the requirement that the termination notice be dated. Proposed section 168 merely requires that the buyer provide 'signed notice of termination' to the seller.

⁴⁶ Queensland Law Society, Submission No. 17, page 2.

⁴⁷ Caxton Legal Centre, Submission No. 23, page 12.

In relation to this change, the Queensland Law Society made the following observations:

While the new requirement is less onerous, the [QLS Property Development and Law] Committee has concern that there may now be uncertainty about which right of termination a buyer is exercising where the buyer could have multiple grounds for termination ... This may in turn lead to disputes as it will be unclear whether the buyer is entitled to retain the termination penalty. Whilst the [QLS Property Development and Law] Committee agrees the existing provision is overly prescriptive, a buyer who is relying on the cooling off period to terminate should be required to indicate that it is doing so.⁴⁸

Committee Comment

The Committee notes the concerns of the QLS however considers that the removal of the requirement for the notice of termination to state that the contract is terminated under the relevant section [termination during cooling-off period] is appropriate. The Committee considers that in practice, notices of termination would refer to the grounds which are being relied upon and that this would not be a widespread problem. This new provision will however reduce the instances of buyers failing to terminate properly due to not meeting technical, legislative requirements.

Disclosure requirements

Ban on auction price guides

Clauses 213 to 216 contain various requirements for auctioneers and real estate agents in relation to representations about price. Clause 214 of the Bill allows an auctioneer to disclose the fact that a reserve price has been set for residential property proposed for auction, but not the reserve price.

Considerable debate has arisen in the real estate sector regarding the proposed ban on auction price guides, with some agents supporting it and others vehemently disagreeing with the changes. Opposing views range from the price guide concept being '*major[ly] flaw[ed] and rarely reflective of the sale price that is achieved⁴⁹*'; to, conversely, that the new laws will potentially leave buyers and sellers in the dark⁵⁰.

In his submission to the Committee, John McGrath expressed these views about the proposal:

I have grave concerns regarding the proposal to ban price guides on all auction marketing.

I support the introduction of any legislation that protects consumers against undesirable practices associated with the acquisition of residential property. I also encourage legislation that achieves an appropriate balance between the need to regulate for the protection of consumers and the need to promote freedom of enterprise in the property market.

I believe banning price guides is the antithesis to what the bill aims to achieve and, in my opinion, is a draconian and regressive step which will, in the long term, harm consumers.

I oppose the banning of price guides based on the following reasons:

1. *If the legislative proposal is adopted Queensland is the only jurisdiction on the planet that prohibits vendors advertising the price expectation would be for their property.*
2. *The banning of price guides is inconsistent with freedom of speech.*

⁴⁸ Queensland Law Society, Submission No. 17, page 4.

⁴⁹ CEO, Ray White Surfers Paradise Group, Andrew Bell, as quoted in "*In the Dark on Pricing*", Sunday Mail, 15 December 2013.

⁵⁰ John McGrath, as quoted in "*In the Dark on Pricing*", Sunday Mail, 15 December 2013.

3. *The banning of price guides eliminates consumers' access to information.*
4. *The banning of price guides would render marketing of properties online virtually useless.*
5. *There is currently confusion over the use of price guides and the practice of misquoting.*⁵¹

The Real Estate Excellence Academy echoed John McGrath's comments, as follows:

*It is believed that total banning of price guides goes against the grain of consumer protection; in fact it appears to have the expected result of the complete opposite. Transparency in real estate is paramount as is consumer protection. It is not understood what the actual intent of such as proposed change of legislation such of this is and who is fact is being protected?*⁵²

News Corp was also highly critical of the prohibition, recommending:

*...that a price guide for a property to be sold at auction should be able to be disclosed, including in advertising and editorial. ...Information, including price guidance, is highly valued by consumers and is an important aspect of an efficiently operating market. Such information should not be unnecessarily restricted. To do so would...likely result in unintended consequences including an uneven playing field and market inefficiencies, and risks infringing freedom of speech.*⁵³

By contrast, the REIQ supported the prohibition, however sought 'the inclusion of a provision in the Bill to clarify that an auctioneer will not contravene section 214(2) if the auctioneer makes a statement in the course of an auction that 'the property is on the market' or words to that effect provided that the reserve price has been reached or exceeded'⁵⁴ to ensure the continuation of the smooth running of auctions.

The REA Group (which operates the property advertising website realestate.com.au), specifically queried whether the price guide prohibition would apply to the scenario where a real estate agent wished to supply a confidential notional price to their site for the purpose of enabling web searches:

We consider the best interpretation of the current words of section 216(2) is that an agent's provision of confidential notional prices to the back-end of a portal is not within the intended scope of the prohibition.

That notional price is highly unlikely to be the 'reserve price' under section 216(2)(a). Neither is it likely to be the amount the property agent considers is a price likely to result in a successful or acceptable bid for the offered property under section 216(2)(b). The agent sets the notional price to bracket the property within the searches of website users who have budgets in that range.

However, it is unclear whether the notional price is a 'price guide' for the property under section 216(2)(c).

'Price guide' is not defined and the ...brief guidance in the explanatory notes to the Bill is unhelpful.

We request that section 216(2) be clarified to confirm that a real estate agent who only discloses a notional price to a property portal for search purposes would not be in breach of

⁵¹ McGrath Estate Agents, Submission No. 6, pages 1-2.

⁵² Real Estate Excellence Academy, Submission No. 10, page 2.

⁵³ NewsCorp Australia, Submission No. 21, page 1.

⁵⁴ Real Estate Institute Queensland, Submission No. 16, page 2.

section 216(2), provided that the notional price is not published on the portal. Alternatively we request confirmation that the current terms of section 216(2) are not intended to restrict this activity, as appears to be the best interpretation of the section. The final alternative we ask be considered is to make explicit that an agent may provide a price guide if they consider that to be in their vendor's best interests, or at least be able to provide a price guide if their vendor instructs them to do so.⁵⁵

RP Data made these observations about the price guide prohibition:

Based on our research of other relevant applicable State legislation, it appears no other State legislation imposes a similar prohibition on the provision of price guides to that proposed in the Bill, making Queensland's proposed legislation unique.

We believe that there is a solution that is more appropriate for potential buyers – an independent report called a Property Profile Report. This is a report compiled by RP Data (therefore it is independent to what real estate agents compile) and is generated based on data that we have collected. It ... does not give a specific estimated market value. Rather, it provides an estimated market value range, together with an estimate and how confident we are in the estimate. The report makes a clear note that this is only a starting point, and for buyers to do their own research as well to supplement the estimate. It contains 6 examples of the following; sold properties, properties for sale and properties for rent.⁵⁶

The proposal to ban price guides was discussed in detail by both John McGrath and the REIQ at the public hearing.⁵⁷ Compelling evidence was provided by both parties on the 'for' and 'against' arguments for the use of price guides.

Committee Comment

After considering the evidence provided, the Committee took the view that it is essential for the process in a sale of a property by auction for there to be a true market price – and that there should be no distortion of the market value by an agent or auctioneer providing potential buyers with an indication on price.

The Committee does not consider there to be widespread problems in relation to misinformation being provided to buyers or 'baiting' occurring; however the use of price guides etc. is simply not needed for an effective auction market to occur in Queensland.

The Committee's view can be summed up by the statement at the public hearing by Ms Antonia Mercorella from the REIQ:

We are not trying to prevent consumers from having conversations with real estate agents; that is the exact opposite to the objective in mind. We see this as an opportunity for the consumer to actually have some direct engagement with the real estate practitioner rather than simply relying on a price guide in the newspaper and going past the property. In particular with auctions, I guess we are going back to the pure form of auction if you like. In relation to chattel auctions, you will never see a price guide. Over time, for whatever reason, the use of price guides in connection with property auctions has emerged in other states and has emerged to some extent here in Queensland. The pure form of auction is that a vendor chooses that method so that the public can determine what the value of that property is rather than imposing a figure on it at the outset, which may be too high or too

⁵⁵ REA Group, Submission No. 13, pages 2-3.

⁵⁶ RP Data, Submission No. 14, page 5.

⁵⁷ *Transcript of Proceedings (Hansard)*, Public Hearing, Legal Affairs and Community Safety Committee, 6 February 2014.

low. So really it is about returning to the point of an auction, which is to let the market decide what the value of that property actually is.⁵⁸

The Committee considers a comparative market analysis is the appropriate information to be presented to a potential buyer to assist them in the process and that there should not be any other indication to a buyer relating to the price of a property up for auction.

The Committee does however share the concern raised by the REIQ in its written submission and discussed at the public hearing that there should be no ambiguity in the law in relation to auctioneers potentially breaching the provision in the conduct of the auction itself. That is, if the auctioneer makes a statement in the course of an auction that 'the property is on the market' or words to that effect provided that the reserve price has been reached. The Committee does not consider that this should be in breach of the provisions and that further clarity around this issue is required.

Recommendation 2

The Committee recommends the Attorney-General and Minister for Justice clarify whether it is intended for an auctioneer, in the course of conducting an auction, to be in breach of the provisions if they announce a property is 'on the market' or similar - after the reserve price has been reached.

Appointment of agents

Appointment forms

Consistent with the PAMD Act, the Bill provides that a property agent must not act for a client unless first appointed in that capacity, in accordance with the requirements of the legislation.

Clause 104 of the Bill simplifies the existing 'approved forms' for appointments by providing for one approved form that can be used by any agent for any type of appointment. The approved form must:

- contain a prominent statement that the client should seek independent legal advice before signing the appointment;
- state whether the appointment is a single appointment or a continuing appointment;
- state the service to be performed by the agent;
- state the fees, charges and any commission payable for the service;
- state when the fees, charges and any commission for the service become payable;
- state the expenses, including advertising and marketing expenses, the agent is authorised to incur in connection with the performance of each service or category of service;
- state the source and the estimated amount or value of any rebate, discount, commission or benefit that the agent may receive for any expenses that the agent may incur in connection with the performance of the service; and
- state any condition, limitation or restriction on the performance of the service.

⁵⁸ *Transcript of Proceedings (Hansard)*, Public Hearing, Legal Affairs and Community Safety Committee, 6 February 2014, page 11.

In its submission to the Committee, Legal Forms You Can Trust extensively outlined problems encountered when using the approved forms of appointment, and suggested that the forms could be more user friendly. It recommended:

...the components of an agency appointment, currently required by legislation to be in the 'approved form', be able to be incorporated into a document format published by industry form providers, such that such form is approved as long as the current 'approved form' components are included.

The proposed legislation section 104 need not be reworded, but section 234 could be amended to read as follows:

"The chief executive may approve forms or components of forms for use under this Act."

This approach has been adopted in other States with a great deal of success.⁵⁹

Committee Comment

The Committee does not consider the Bill requires amendment in this regard, however encourages the Department in the development of approved forms to consult with industry stakeholders to ensure that forms developed are simple and user friendly, while meeting the requirements in the Bill.

Other requirements for appointments—sole or exclusive agency

Clause 108 of the Bill provides that an appointment must state in writing—

- (a) whether the appointment is for a sole or exclusive agency; and
- (b) the day the appointment ends.

In addition, the appointment may provide that at the end of the term of the sole or exclusive agency, it continues under the terms of an open listing. In relation to clause 108, Legal Forms You Can Trust queried:

Given that section 103 states that the client may negotiate a term up to 90 days, does this mean the term must also be stated to prove that a term was negotiated? If so, agents will often calculate the wrong end date and unwittingly invalidate the appointment. It needs to be clearer with less room for error.⁶⁰

Committee Comment

The Committee considers the sections are clear and appropriately drafted. It should not be too onerous on an agent to correctly calculate the correct day, up to a maximum of 90 days, when the appointment ends.

Assignment of appointments

The Bill includes provisions which provide for the assignment of Appointments, designed to facilitate the sale of an agent's business by avoiding the need for the new agent that purchased the business to enter into a new written appointment with every existing client when they take over the agent's business.

Clause 113 provides that the assignee must give each client written notice of the assignment within 14 days after the assignment. The maximum penalty for failing to do so is 100 penalty units.

⁵⁹ Legal Forms You Can Trust, Submission No. 11, page 6.

⁶⁰ Legal Forms You Can Trust, Submission No. 11, page 7.

In its submission to the Committee, Real Estate Dynamics suggested:

This clause will mean that the Client will be left in the dark without knowledge of the change in their Agent until AFTER the assignment of the Appointment has occurred when the assignee has given the Client notice.

This will result in conflict and disputes between the Client / Consumer and the Agents involved.⁶¹

To counter these impracticalities, Real Estate Dynamics recommended that the clause be reviewed as follows:

- *The Agent who holds the original Appointment under section 102 must give each Client 14 days written notice of the proposed assignment prior to the assignment.*
- *The Client may revoke the assignment by giving notice in writing to the Agent prior to the proposed assignment. If the Client Agent does not give notice to revoke the assignment prior to the advised proposed assignment, the Appointment may be assigned.⁶²*

However, both ARAMA and the REIQ supported the amendments stating that the amendment will remove unnecessary complications in the business sales process while maintaining a lot owner's rights and ensuring lot owners are provided with information about their right to terminate the appointment if they wish to do so.⁶³

Committee Comment

The Committee considers the amendments to be an important part of the red tape reduction initiatives contained in the Bill and does not consider that clients will necessarily be left in the dark without knowledge of the change of their agent. Agents would be expected to keep their clients appropriately informed as to what is happening in the event of a sale, but what this does provide, is a mechanism for the swift assignment of appointment of agent, without the need for the client to re-sign multiple assignment forms. The Committee is satisfied with the amendments.

Regulation of resident letting agents

No longer require letting agents to reside on-site

The PAMD Act requires a resident letting agent to reside in, and have their registered office in, one of the building complexes they have body corporate approval to manage. Failure to do so attracts a significant penalty. The Bill removes this requirement with the Explanatory Notes stating: *'This will benefit industry by substantially reducing red tape and the current limitations on operating more than one complex.'*⁶⁴

An interjurisdictional comparison of resident letting agents who manage building complexes in strata title community management schemes appears to indicate that New South Wales is the only other Australian state which currently requires property managers to live on-site.⁶⁵ There is little legislative recognition or regulation of resident managers in other states or territories.

⁶¹ Real Estate Dynamics, Submission No. 7, page 1.

⁶² Real Estate Dynamics, Submission No. 7, page 2.

⁶³ Australian Resident Accommodation Managers' Association, Submission No. 5, page 2; Real Estate Institute of Queensland, Submission No. 16, page 1.

⁶⁴ *Explanatory Notes*, Property Occupations Bill 2013, page 13.

⁶⁵ *Property, Stock and Business Agents Act 2002* (NSW).

At the departmental briefing, Mr Hart MP expressed ‘grave concerns’ about removing the requirement for resident letting agents to live onsite, amongst them the possibility that the standard of accommodation and building maintenance would not be upheld. In response, Mr David Ford, Deputy Director-General, Liquor, Gaming and Fair Trading clarified:

Firstly, the legislation is fundamentally about ensuring that people with proper probity and people with the proper training are licensed to perform activities, and there is nothing inherent in whether you live on site or off site that would alter your suitability to be licensed under the legislation. That is the first part of it. ... What is really important—and the legislation provides for this—is the quality of the agreement between the body corporate, which runs the property, and the letting agent. ... The body corporate essentially is going to be buying a set of services through outsourcing or letting to a letting agent, and how they choose to do that is a matter for them to negotiate with the letting agents. I think the requirement to live on site increasingly reflects the history of the industry rather than the future of the industry and may well be an impediment to the increasing professionalisation and therefore the opportunity for bodies corporate to get perhaps better and more professional managers in some instances, and that is not meant to be a slight on the traditional managers in any way at all.⁶⁶

In its submission, UOAQ was critical of this provision of the Bill, expressing its ‘serious reservations as to the service levels of tourists if the letting agent is not accommodated on site. Moreover, the enforcement of by-laws and proper conduct of visitors and residents, currently the responsibility of letting agents, has not been addressed in the Bill.’⁶⁷

By contrast, the Australian Resident Accommodation Managers’ Association supported removal of the requirement that letting agents live on-site, stating ‘the recognition that resident managers are not required to live on site is recognition of the maturity of the management rights industry.’⁶⁸

Committee Comment

The Committee is satisfied with the proposed amendments and considers the ability to allow letting agents to either live on-site (if that suits the operation of the property, the body corporate committee and the lot owners) or off-site is appropriate. As the duties and responsibilities of resident managers are largely a matter for the parties to determine when management rights agreements are entered into, it is appropriate that the Bill is not overly prescriptive in this regard.

Lawyer’s certificate requirements

Removal of requirement for lawyer’s certificate to be provided to waive cooling-off period

The PAMD Act provides that a person who proposes to enter into a relevant contract may only waive the cooling-off period by giving the seller a lawyer’s certificate in the approved form. The lawyer’s certificate must, amongst other things, state that the lawyer is independent of everyone involved in the sale; state that the lawyer has not received, is not receiving, and does not expect to receive a benefit for providing a service for the sale; and state that the lawyer has explained to the buyer the effect of a relevant contract (and agreement to waive the statutory cooling-off rights).

The Bill removes this requirement. Clause 167 of the Bill simply requires the buyer to give written notice to the seller.

⁶⁶ *Transcript of Proceedings (Hansard)*, Public Briefing, Legal Affairs and Community Safety Committee, 12 December 2013, page 8.

⁶⁷ Unit Owners Association of Queensland Inc., Submission No. 1, page 2.

⁶⁸ Australian Resident Accommodation Managers’ Association, Submission No. 5, page 2.

The Explanatory Notes state that these provisions ‘are unnecessary as the Legal Profession Act 2007 also provides a framework for ensuring the appropriate conduct of legal professionals, including the standards for acting independently. In addition, it is considered that a buyer should not have additional obligations and costs imposed on them if they choose to waive the statutory cooling-off period, possibly as a means of negotiating a better purchase price for the property’.⁶⁹

The Queensland Law Society expressed concern about this change in its submission to the Committee, on the following basis:

It would be too very easy for an unscrupulous or rogue seller/agent to obtain a signed notice of waiver from a buyer who did not realise the implications of what they were signing. This risk is particularly heightened for buyers who are unfamiliar with the process of residential contract formation in Queensland.

Members of the Society report that buyers rarely obtain legal advice prior to committing to a contract for the purchase of residential property and are often unfamiliar with the terms of the contract they have signed.

*Accordingly the protection of the independent lawyers certificate should be retained.*⁷⁰

The Queensland Law Society briefly spoke to this issue at the public hearing.

Committee Comment

The Committee notes the concerns raised by the Law Society however considers that the removal of the requirement is, as set out by the Department, consistent with the objectives of the Bill as it reduces red tape and regulation for buyers. The Committee agrees that a buyer should not have additional obligations and costs imposed on them if they choose to waive the statutory cooling-off period, possibly as a means of negotiating a better purchase price for the property.

The Committee understands the impacts in the marketplace of the removal of the requirement for a lawyer’s certificate will be monitored by the Department following the passage of the Bill. The Committee encourages the Department to ensure appropriate consideration of complaint data and feedback from legal practitioners and other stakeholders is taken on board to inform any future legislative changes, however at this point, the Committee is satisfied with the amendments.

Removal of requirement for a lawyer to provide a certificate of independence

Similarly, the Bill removes the requirement that if a prospective buyer engages a lawyer for the proposed purchase or purchase of a residential property, the lawyer must give the buyer a lawyer’s certificate in the approved form. The Explanatory Notes similarly refer to the framework under the *Legal Profession Act 2007* to ensure the conduct of legal professionals is appropriate, including the standards for acting independently.⁷¹

Removal of surplus obligations on businesses

Allowing a licensee or salesperson to be “in charge” of another place of business

The Bill allows a licensee or registered salesperson to be ‘in charge’ of a place of business that is not the business’s registered office. This is a shift in policy from the current provisions of the PAMD Act, which only allows a licensee to be in charge of a place of business or registered office.

⁶⁹ *Explanatory Notes*, Property Occupations Bill 2013, page 14.

⁷⁰ Queensland Law Society, Submission No. 17, page 2.

⁷¹ *Explanatory Notes*, Property Occupations Bill 2013, page 15.

The rationale for this change is explained in the Explanatory Notes as: *'requiring a licensee to be in charge at each place of business is not consistent with contemporary business practice. Many types of transactions are increasingly being made using the internet and technological developments will continue to change the way in which business practices are undertaken. As such, the requirement for place-based legislation becomes increasingly less significant and unduly restrictive.'*⁷²

In its submission to the Committee, the Urban Development Institute of Australia stated, it:

*...has long been on the record as deeming this requirement to be commercially impractical in most cases. The costs of employing a fully licenced person to supervise perhaps only one other person and only at one location is prohibitive. We therefore welcome the proposal to require only a principle licensee at the registered office and a registered salesperson in charge at a place of business.'*⁷³

Committee Comment

The Committee considers the Bill appropriately modernises the policy in this area to ensure the current business practices are reflected in the law.

2.3 Improvement of the legislation

In addition to the split of the PAMD Act into separate industry specific laws, another stated objective of the Bill was to improve the operation of the legislation and clarify particular provisions. The following highlights some of the improvements to the existing provisions of the PAMD Act.

Immediate suspension for failure to file audit report

Clause 76 of the Bill permits the chief executive, whether or not disciplinary proceedings have been started, to immediately suspend a licence in the event that a licensee fails to submit a required audit report.

This is not currently possible under the PAMD Act, which requires that a conviction be recorded before such action can be taken.

Use of independent contractors/on-hire labour

The Bill contains amendments to clarify the position regarding independent contractors and on-hire labour. Importantly, the definition of 'employ' has been widened to specifically encompass 'direct engagement (of a) person as an independent contractor'. Additionally, the Bill prevents property agents from employing a property agent or real estate salesperson as an independent contractor unless they hold a licence.

Register of enforceable undertakings

Clause 201 of the Bill provides the chief executive with the power to publish the register of enforceable undertakings on the Department's website. It is expected that this amendment will *'increase public accessibility to information in relation to enforceable undertakings entered into by businesses and individuals.... (and) improve licensee compliance with the legislation.'*⁷⁴

⁷² Explanatory Notes, Property Occupations Bill 2013, page 17.

⁷³ Urban Development Institute of Australia, Submission No. 3, pages 1-2.

⁷⁴ Explanatory Notes, Property Occupations Bill 2013, page 18.

Trust account payments

Clause 162 of the Bill removes the requirement that trust account payments be made within three business days and instead does not stipulate a timeframe within which this needs to occur. The Explanatory Notes⁷⁵ indicate that this is intended to promote consistency with the *Land Sales Act 1984*.

Approval of training requirements

The Bill allows for training requirements to be administratively approved by the chief executive, instead of prescribing them by regulation - the latter being an '*administratively burdensome process*'.⁷⁶

Suitability, Checking, Reporting and Monitoring Reports

Clause 41 of the Bill provides the Commissioner of Police with the power to notify the chief executive that there is a change in the criminal history of a licence holder, subagent or collection agent required to maintain trust accounts. This will occur through an automated reporting and checking process.

The Explanatory Notes indicate that '*without this amendment convictions for serious offences may only be identified through an investigation of a complaint or when the licence holder/subagent renews their licence/registration certificate*'.⁷⁷

Committee Comment

The Committee is satisfied that these initiatives will vastly improve the operation of the legislation and the Committee welcomes the changes.

2.4 Clarification of the legislation

The Bill also provides the following clarifications and replacements of definitions to improve the overall operation of the legislation:

- Clause 21 replaces the definition of 'residential property';
- Clause 20 provides that an open listing can be ended at any time with written notice;
- Clause 102 clarifies that a separate appointment is not required for conjuncting agents;
- Clauses 157 and 158 clarify that the disclosure of interest requirements for residential property apply to house and land packages, and further clarify that the full name of a person or entity who has received or expects to receive any benefit must be disclosed in the approved form;
- Clause 161 clarifies that bank guarantees and similar instruments are excluded from the trust account provisions which apply to property developers;
- Clauses 214 and 216 clarify that price guides at auctions are banned;
- Clause 160 clarifies that the statutory cooling-off period applies only to an option contract and not the final contract formed;

⁷⁵ *Explanatory Notes*, Property Occupations Bill 2013, page 19.

⁷⁶ *Explanatory Notes*, Property Occupations Bill 2013, page 19.

⁷⁷ *Explanatory Notes*, Property Occupations Bill 2013, page 20.

- Amendments to PAMD Act definitions clarify that the maximum term of a sole or exclusive agency appointment does not apply to the sale of a unit that is associated with the sale of a Management Rights business;
- Clause 35 clarifies that a corporation is not suitable to hold a licence if the corporation itself is convicted of a serious offence.

Definition of ‘residential property’

The Supreme Court of Queensland decision of *Hedley Commercial Property Services Pty Ltd v BRCP Oasis Land Pty Ltd*⁷⁸ and subsequent appeal highlighted the complexity involved in determining the scope of concepts such as ‘residential property’ and ‘residential purposes’, and indicated that extreme care needed to be taken when determining whether property could be characterised as residential, and therefore subject to the PAMD Act. In the appeal decision, Chesterman JA provided the following guidance:

There is no definition of “residence” or “residential” in either PAMDA or IPA. The word must be given its ordinary meaning and connotation which.... requires the occupant of the premises in question to live in them over a substantial period. The occupation must be “permanent or long-term”.⁷⁹

The Bill strips back the current definition. ‘Residential property’ is defined as real property that is used, or intended to be used for residential purposes, but does not include real property used primarily for the purposes of industry, commerce or primary production⁸⁰.

In relation to the revised definition proposed by the Bill, the Urban Development Institute of Australia stated, it:

... regards the simplified definition of residential property ... as an improvement and welcomes the exemptions from the residential sales contract provisions for contracts where the buyer is a publicly listed corporation (or subsidiary), a State or statutory body, or where the buyer is purchasing three or more lots at the same time.

The Institute does, however, still have concerns with the revised definition in section 21 of the PO Bill. Our concerns relate particularly to the words ‘intended to be used’. Take, for example, the sale of a property with a commercial use but in an area zoned residential. In this circumstance, is the seller expected to ascertain whether the intention of the buyer is to change the use to residential? Could the buyer terminate the contract if the seller didn’t ascertain the buyer’s intentions? A potential consequence of the use of the term ‘intended to be used’ is that sellers will take an overly cautious approach and include all transactions where there is any potential for that property to change its use to residential.

The Institute recommends including exemptions from the PO Bill for high value transactions to partially address the concerns raised above. Specifically it is recommended that transactions valued at over \$2m should not be caught by the PO Bill. This will assist with the uncertainty regarding whether some properties are ‘residential’ or intended to be used as ‘residential’ for the purposes of the PO Bill such as mixed-use developments and commercial properties which are located in residential zoned areas.⁸¹

⁷⁸ (2008) QSC 261

⁷⁹ Hedley Commercial Property Services P/L v BRCP Oasis Land P/L [2009] QCA 231 (14 August 2009) at 32.

⁸⁰ Section 21, Property Occupations Bill 2013.

⁸¹ Urban Development Institute of Australia, Submission No. 3, page 2.

The Queensland Law Society supported the simplified definition, however noted:

...that the definition includes property that is "intended to be used, for residential purposes". We agree that a definition that merely focuses on the current use at the time the contract is signed is not appropriate as the cooling off provisions are intended to apply to off-the-plan apartment sales and vacant land sales in housing estates. However the proposed definition is problematic in that:

- *it is unclear whose and at what time the intention is relevant;*
- *a seller may not necessarily know a buyer's intention for a property;*
- *it is not clear if a contract to sell a vacant development site for construction of apartment buildings would fall within the definition (i.e. whilst the buyer's intention is commercial, the ultimate intention is for residential use);*
- *it is unclear whether a holiday apartment being purchased by an investor for short term letting is being used for commercial or residential purposes.⁸²*

Committee Comment

The definition of 'residential property' is of critical importance as regards the overall operation of the Bill. With this in mind, the Committee is concerned to ensure that the workability and scope of the amended definition is appropriate for all transactions involving real property, and that the difficulties associated with differing interpretations of the current definition will not recur.

The Committee acknowledges the need for a more precise definition and considers the Bill achieves this, noting the response provided by the Department:

The amended meaning aims to address issues that have consistently been raised by stakeholders about the complex nature of the meaning of residential property provided for in the PAMD Act, which has been the subject of substantial litigation. The meaning in the Bill also ensures the definition does not unnecessarily focus on what the use of the property is at the time the contract is signed as the meaning (and statutory cooling off provisions) is intended to include off-the-plan apartment sales and vacant land sales in housing estates.

...It is likely that changing the definition contained in the Bill in an attempt to prescribe whose intention is relevant at different points in time, and how that intention is to be validated, is likely to result in the meaning of residential property evolving into a complex, overly prescriptive definition, which is a key concern of stakeholders about the current definition contained in the PAMD Act.⁸³

⁸² Queensland Law Society, Submission No. 17, pages 4-5.

⁸³ Letter from the Department of Justice and Attorney-General, 31 January 2014, Attachment 2, page 22.

3. Fundamental legislative principles

Section 4 of the *Legislative Standards Act 1992* states that ‘fundamental legislative principles’ are the ‘principles relating to legislation that underlie a parliamentary democracy based on the rule of law’. The principles include that legislation has sufficient regard to:

- the rights and liberties of individuals, and
- the institution of Parliament.

The Committee has examined the application of the fundamental legislative principles to the Bill. The examination raised a number of potential FLP issues in various provisions. The Committee is satisfied the majority of the potential breaches are minor in nature, and has not detailed them all in this report.

The Committee brings the following matters to the attention of the House.

3.1 Administrative power / Natural justice

Section 4(3)(a) of the *Legislative Standards Act 1992* requires that rights, obligations and liberties of individuals dependent on administrative power be sufficiently defined and subject to appropriate review.

Section 4(3)(b) of the *Legislative Standards Act 1992* requires that legislation is consistent with principles of natural justice.

Clauses 76 and 142 – Immediate suspension

Clauses 76 and 142 provide the chief executive may suspend a licence or registration certificate, without a show cause process, in specified circumstances. The circumstances include where the chief executive reasonably considers that the licence was obtained because of materially incorrect or misleading information or that an irregularity or deficiency exists in the licensee’s trust account.

Clauses 71 and 138 – Amendment of licence or registration certificate conditions

Clauses 71(5) and 138(5) provide that the chief executive may amend the conditions of a licence or registration certificate, without a show cause process, if the chief executive decides the amendment must be made urgently to avoid a potential claim against the fund or to ensure compliance with the Act or the proposed Agents Financial Administration Act.

Clauses 77 and 143 – Immediate cancellation

Clauses 77 and 143 provide that a licence or registration certificate is cancelled immediately, if:

- the licensee or registrant is convicted of a serious offence (e.g. fraud, dishonesty, trafficking of drugs, use or threatened use of violence, sexual offences);
- the licensee is an individual, the licensee is an insolvent under administration; or
- the licensee is a corporation; the licensee has been wound up or deregistered.

These provisions may adversely impact on the rights and liberties of licensees or registrants because they deny an affected person the right to be heard before action is taken against them. The provisions may also be inconsistent with the principles of natural justice.

The former Scrutiny of Legislation Committee considered that the lack of opportunity to make representations before an immediate cancellation, suspension or amendment of conditions arguably denies the affected person natural justice. The principles of natural justice include the principle that a person has a right to be made aware of an allegation made against them. It is also a principle of

natural justice that something should not be done to a person that will deprive the person of some right, interest, or legitimate expectation of benefit, without the person being given an adequate opportunity to present their case to the decision-maker.⁸⁴

As noted in the Office of the Queensland Parliamentary Counsel FLP Notebook, unless there is sufficient justification, legislation should not provide for immediate suspension of a person's licence without receiving and considering submissions from the person, even if the suspension is subject to a subsequent review and appeal process.⁸⁵

The Explanatory Notes state the power to take immediate action, without a show cause process is considered necessary to prevent significant consumer detriment. In relation to the immediate cancellation of a licence or registration certificate (clauses 77 and 143), the Explanatory Notes state that the inconsistency with FLPs is '*... justified on the grounds that immediate cancellation is limited to the most serious of instances that could cause the greatest detriment to consumers.*'⁸⁶

It is also noted that the power to immediately suspend a licence or registration certificate is limited to the circumstances specified at clauses 76(1) and 142(1) and a licence or registration certificate may, in most cases, only be suspended for a maximum of 28 days.

Committee Comment

The Committee is of the view that providing for the immediate cancellation or suspension of a licence or registration certificate, without a show cause process, is justified on the basis of preventing the likelihood of substantial detriment or further detriment to consumers.

In reaching a view on this matter, the Committee has noted that the power to take immediate action is sufficiently limited to the most serious behavior to protect consumers.

3.2 Other issues

The examination of the Bill has identified a number of potential drafting errors in the Bill as follows:

1. Clause 137(1) appears to incorrectly refer to a salesperson's *licence*. The Committee considers the correct reference should be to a salesperson's *registration certificate*.
2. Schedule 1 to the Bill specifies the decisions of the chief executive which are subject to review by QCAT.

Schedule 1 refers to section 62(1) as the provision which provides for the chief executive to restore or refuse to restore a licence. The correct section in the Bill appears to be section 63(1).

Schedule 1 also refers to section 134(1) as the provision under which the chief executive may restore or refuse to restore a registration certificate. The correct section appears to be section 135(1).

The Committee brings these drafting errors to the Attorney-General and Minister for Justice's attention.

⁸⁴ Alert Digest No.9 of 2000, page 6, at para. 34.

⁸⁵ Office of the Queensland Parliamentary Counsel, *Fundamental Legislative Principles: The OQPC Notebook*, January 2008, page 26.

⁸⁶ *Explanatory Notes*, Property Occupations Bill 2013, page 25.

3.3 Explanatory Notes

Part 4 of the *Legislative Standards Act 1992* relates to Explanatory Notes. It requires that an explanatory note be circulated when a bill is introduced into the Legislative Assembly, and sets out the information an explanatory note should contain.

The Explanatory Notes are fairly detailed and contain the information required by Part 4 and a reasonable level of background information and commentary to facilitate understanding of the Bill's aims and origins.

Appendix A – List of Submissions

Sub #	Submitter
001	Unit Owners Association of Queensland
002	Shopping Centre Council of Australia
003	Urban Development Institute of Australia
004	Greg Carroll
005	Australia Resident Accommodation Manager's Association
006	McGrath Estate Agents
007	Real Estate Dynamics
008	NQ Building & Pest Reports
009	QIC Limited
010	Real Estate Excellence Academy
011	ADL Software
012	Property Council Australia
013	REA Group Limited
014	RP Data
015	Property Training Qld
016	Real Estate Institute Queensland
017	Queensland Law Society
018	Bar Association of Queensland
019	Tenant's Union of Queensland Inc.
020	Jeff Ball
021	News Corp Australia
022	Australian Property Institute
023	Caxton Legal Centre
024	The Newspaper Works

Appendix B – Schedule of Witnesses at the Public Hearing

Shopping Centre Council of Australia <ul style="list-style-type: none">• Mr Milton Cockburn, Executive Director
McGrath Estate Agents <ul style="list-style-type: none">• Mr John McGrath, Chief Executive Officer
Real Estate Institute of Queensland <ul style="list-style-type: none">• Ms Antonia Mercorella, General Counsel• Mr Glenn Cream, Chief Operations Officer
Queensland Law Society <ul style="list-style-type: none">• Mr Matthew Raven, Chair – QLS Property and Development Law Committee• Mr Matt Dunn, Principal Policy Solicitor• Ms Raylene D’Cruz, Policy Solicitor

Statement of Reservation

BILL BYRNE MP

SHADOW MINISTER FOR POLICE, EMERGENCY AND CORRECTIVE SERVICES, PUBLIC WORKS AND NATIONAL PARKS

MEMBER FOR ROCKHAMPTON

PO Box 15057, City East QLD 4002

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19 February 2014

Mr Ian Berry MP
Member for Ipswich
Chairperson
Legal Affairs and Community Safety Committee
Parliament House
George Street
BRISBANE QLD 4000

Dear Mr Berry

Statement of Reservation – Property Occupations Bill 2013

I wish to notify the committee that the Opposition has reservations about aspects of Report No. 51 of the Legal Affairs and Community Safety Committee into the *Property Occupations Bill 2013*.

The Opposition will detail the reasons for its concern during the parliamentary debate on the Bill.

Yours sincerely

A handwritten signature in black ink, appearing to be "B. Byrne", written over a horizontal line.

Bill Byrne MP
Member for Rockhampton