

Friday, 9 July 2004

Mrs Margaret Keech, MP
Minister for Tourism, Fair Trading & Wine Industry Development
GPO Box 1141
BRISBANE QLD 4001

Dear Minister,

PROPERTY AGENTS AND MOTOR DEALERS ACT 2000

The PSAQ very much appreciated the opportunity to meet recently with your Policy Advisor, Kathie Standen, the Commissioner for Fair Trading, Matt Miller, and Principal Legal Officer, Catherine Niven.

We were also encouraged by your officials' response to our expressed desire for tangible outcomes in matters that we have raised. This letter has been written, at the request of your officials, to identify key areas which we believe need to be progressed.

In the meeting, the main issues discussed were as follows:

1. Licensing/registration delays and pre-vocational training.
2. Commissions on the sale of residential and rural property.
3. Co-regulation of licensing and industrial relations.

WHY THESE PARTICULAR ISSUES?

From the outset, it is important to clarify why the PSAQ has isolated these issues from the many others that may need attention.

The PSAQ's key function is to represent the industrial interests of sales people and property managers in Queensland.

Through its impact on the real estate industry, Fair Trading legislation has significant industrial relations implications, especially with respect to:

- Obtaining employment (i.e. artificial barriers to entry);
- Quantity of employment (i.e. the number of jobs); and
- Quality of employment (i.e. the opportunity for people to earn a decent living and enjoy their work).

Consequently, we believe that Fair Trading legislation must be considered in terms of its effect on the industrial climate it creates.

In the areas outlined above, the current legislation is having a damaging, detrimental effect on the opportunity for, and the quality and quantity of, employment.

For this reason, **we ask the Government to prioritise changes that can offer some relief** in these areas, especially where such changes will also bring a **tangible benefit to the consumer.**



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LICENSING & REGISTRATION DELAYS, PRE-VOCATIONAL TRAINING

For the past three years, feedback from potential new entrants to the industry, and their employers, has indicated that after completion of pre-vocational training, delays in receipt of Certificates of Registration are commonly between four and ten weeks.

There are two primary concerns here:

- With this passage of time, much of the information taught in the classes, if not applied, is forgotten, thereby negating the benefit of having done the training in the first place.
- Many potential new entrants are out of work, or have resigned employment in order to do the training. These people end up either without income for an extended period, or in receipt of (otherwise-unnecessary) social security benefits.

The latter of these issues was brought to the attention of the previous Minister, who in a letter dated 26 July 2001 stated as follows: “. . . I expect that there will be a noticeable improvement in the turnaround time for consideration of applications.”.

Far from a “noticeable improvement”, anecdotal evidence would suggest that any improvement has been marginal, at best!

In response to the PSAQ’s (26 October 2000) letter to the Minister about the need for mandatory pre-vocational training, departmental officials expressed concern that pre-vocational training may present an “artificial barrier to entry”.

The cruel irony is that such an artificial barrier has been created by the Office of Fair Trading (OFT) itself, yet those responsible seem totally unconcerned about the issue, and in particular its impact on those it disadvantages.

Further concerns surround:

- the structure of the current training (i.e. the quantity of material a potential new entrant is expected to absorb in the first instance);
- the ability of any training organisation to assess skills-based competency in a classroom situation;
- the delays being experienced in assessment of completed course material; and
- the course material itself.

Feedback consistently received by the PSAQ suggests that five solid days of mostly-theoretical instruction, without the recipient having any appreciation of how this would be applied, is too much for many new entrants to benefit from.

Additionally, pre-vocational training devolves into two categories – knowledge and skills.

Serious questions have been raised, and must continue to be raised, as to the ability to assess skill levels in a classroom-based (or worse still, correspondence-based¹) course of instruction.

It is also imperative that, once training is completed, assessment is finalised as soon as possible. Many people in the regional areas of Queensland have

¹ The PSAQ acknowledges that, due to travel constraints, correspondence-based training may be necessary for those in remote regional areas.

complained of multiple weeks' delays in completed assessments being returned.

Whilst this is a problem with training organisations, it is important that OFT understand the wider context of this issue, and how delays by any organisation potentially compound the problem.

It is also critical that the course material itself accurately reflect both the needs of the industry and the consumer-protection role of OFT.

In the transition to the new Training Package, the industry has not been asked by OFT to "sign off" on the Training Package units, and consequently some industry sectors have significant concerns about the adequacy of the newly-regulated prescribed educational qualifications.

Proposal

Apart from the (obvious to us) need for further involvement of industry by the OFT in the selection of Training Package units, all of the issues outlined above could be resolved by the adoption of interim/provisional registration for new sales people.

The PSAQ has long proposed the need for provisional registration upon issuance of a Certificate of Completion by a training organisation, and we envisage that it might work as follows:

1. The intending sales person would enrol in a pre-vocational training course.
2. Appropriate knowledge-based units from the Training Package would be undertaken, and a Certificate of Competency issued in the earliest instance.
3. Upon receipt of the Certificate of Competency, the intending sales person would then apply to OFT for a Certificate of Registration with OFT, including with the Application the Certificate of Competency and a fee.
4. This Application would be immediately receipted by OFT, and the intending sales person would be deemed to have an interim/provisional Certificate of Registration.
5. While OFT is processing the Application, the intending sales person would be able to be employed on limited duties in a supervised capacity, and would be required to complete the remaining, skill-based Training Package units.
6. The intending sales person would then forward the second Certificate of Competency to OFT [, together with an Agreement Registration Certificate²] to OFT within, say, two months.
7. OFT, having had ample time to complete its suitability checks, would then be able to immediately³ issue a Certificate of Registration as a Salesperson.

All of the above could be timed to occur within a normal three-month probationary period, and so would not cause any consequential industrial relations difficulties⁴.

² See comments on co-regulation of licensing and industrial relations.

³ We know this is possible, as we turn around registration of employment agreements, as required by our industrial Awards, on a same-day basis.

⁴ There may need to be some adjustment to probation periods for Traineeships.

COMMISSIONS ON THE SALE OF RESIDENTIAL AND RURAL PROPERTY

The PSAQ has been lobbying OFT since late 2000 to lift the restrictions on commissions, and there are sound reasons for our position on this issue.

The main reason is that due to the present, regulated scale, the maximum commission is now (in real terms) only 78% of what it was in 1986⁵, when the present scale was last adjusted. This is having a detrimental effect, not only on the real estate industry, but also on many consumers, many of whom are unable to access quality real estate services.

In its 5 February 2003 letter to OFT's Mr Pat Malone (a complete copy of which is attached), the PSAQ stated:

" . . . the consequences of the current system for calculating commission are as follows:

- *Withdrawal of real estate services from many outer-urban, regional and rural communities;*
- *Emergence of real estate traders (marketeers in the bush), who privately buy property and immediately resell it themselves for a profit – sometimes at double the price they just paid for it;*
- *Consequently to the above items, a marked reduction in the value of property so affected; and*
- *Significant loss of employment opportunity in the real estate industry.*

Additionally, the current system underpinned the emergence of (what has become known as) marketeering when, in the early 1990's, unregulated real estate marketers stepped in to fill the vacuum created by the departure of licensed real estate agents, who were unable to charge a realistic fee for the services . . ."; and

"The big loser in all this has been the consumer."

In the same letter, we also stated that:

"The real estate boom of the past two years has given some relief to these issues, however once the market starts to slow down, "doing nothing" to the current structure will only reinforce its failure to date."

Quite frankly, nothing has changed the validity of these statements, and the PSAQ stands by its original arguments, as expressed in that letter.

In the most recent discussions with your officials, the PSAQ was asked to provide evidence to support some of its claims.

Our response to your officials was that it is difficult, if not impossible, to get real estate industry participants to either put pen to paper or, worse still (as they see it), get them to "stick their necks out" when (in the regions in question) they often have regular contact with the people about whom they would be complaining.

However, we sent out an e-mail message (attached) to approximately two thousand industry participants, and received (the usual) handful of replies. Some of those responses are included with this letter.

⁵ Based on Brisbane Median House Price, 1986 & 2003.

PSAQ Proposals for Change

The PSAQ's Proposals for Change, as expressed in the 5 February 2003 letter, were as follows:

"the PSAQ continues to propose that:

- *"Doing nothing" is not an option;*
- *For the sale of residential property, the primary recommendation to be put to the Minister be a revised version of the current system, with indexation built-in;*
- *For the sale of rural property, the primary recommendation to be put to the Minister be some form of deregulation;*
- *If the working party determines that deregulation is the preferred option, then the industry (e.g. the REIQ, and the franchise and marketing groups) should be allowed to publish recommended scale/s of fees."*

In presenting its proposals for change, the PSAQ believes that it is fair to state the following:

- The PSAQ has more grass-roots contact with both employers and employees than any other organisation in the industry.
- Despite the protestations of others (both within the real estate industry and OFT) to the contrary, the success (or otherwise) of full deregulation in other states is open to debate.
- With a Labor Government being committed to maintain a protective, regulated environment for all consumers, full deregulation being considered as a legitimate option is unlikely.
- Feedback to the PSAQ over many years has indicated that non-rural industry participants do not believe that they want, need, or could effectively manage, deregulation.
- Those in the rural sector, on the other hand, having more specialised skills and working in a niche market, generally believe that deregulation would work well for all concerned.
- The simplistic argument that "it's Federal Government policy" and "everyone else does it, so it must be working" (and, by inference, "so why shouldn't we do it?"), does not in itself make a particular course of action the best option.

In short, the PSAQ believes that Queensland's real estate industry and OFT both have the opportunity to learn from others' (and their own) experiences with deregulation, and find a better solution.

Whilst the PSAQ has (privately) been frustrated at the Government's seeming-unwillingness to address this tough issue, the delays have been beneficial in terms of allowing further thought on the matter of how best to deal with commissions.

On further reflection, there seems to be opportunity for a compromise model which has the potential to satisfy the following:

- A mechanism for appropriate indexation of commission (thereby ensuring that real estate agents can afford to service the lower-priced end of the market);
- The ability for agents to offer "fee for service" options (ensuring that the environment for marketeers is stifled, and that those consumers who are willing to pay for a greater level of service may do so);
- The benefit of the public having a "yardstick" against which to measure an agent's suggested commission; and
- Something which will "bridge the gap" between the pro- and anti-deregulation camps.

A Hybrid Commission Model

Therefore, the PSAQ proposes that a hybrid model be considered:

- For the sale of residential property, an upwardly-revised version of the current system, with percentage-of-Brisbane-median-house-price-aligned⁶ (or CPI-aligned) indexation built-in; and
- For any form of (non-rural) Exclusive agency, the option of a higher-than-regulated-scale commission, on the basis of specific services being agreed in writing at the time of appointment, and subsequently provided by, the agent.
- For the sale of rural property, full deregulation.

OFT's "Downwards Commission" Policy

The PSAQ feels compelled to record its opposition to OFT's policy of encouraging the public to negotiate commissions downwards.

The only reason OFT has "got away" with this policy since it was introduced is because the real estate boom (which has now abated) temporarily eased financial pressures.

From a Labor Government, especially one which publicly states that it is pro-jobs, this policy is quite difficult to understand.

Not only does downwards pressure on commission reduce the ability of the industry to provide services, not only does it harm the consumer who cannot access real estate services, but it also directly undermines employment opportunities and reduces the income of people who are simply trying to make a living as real estate sales people.

Lower commission to a real estate employer means that commission to the sales person is reduced, in both net and percentage terms.

Please be under no illusion – within most real estate offices, the big loser in OFT's "lower commissions" policy is the employee, not the employer!

The consequences of this policy?

- Increased turnover of sales people;
- As a consequence, a diminished pool of competent sales people; and
- More acts of desperation by real estate employers and their sales people, many of whom are just trying to survive.

The net result is that, on the basis of "pay peanuts, get monkeys", the consumer suffers:

- Withdrawal of real estate services from many outer-urban, regional and rural communities;
- Emergence of real estate traders (marketeers in the bush), who privately buy property and immediately resell it themselves for a profit – sometimes at double the price they just paid for it;
- Consequently to the above items, a marked reduction in the value of property so affected; and
- Significant loss of employment opportunity in the real estate industry.

⁶ As per the original, 1971, model.

In simple terms, the PSAQ believes that the “downwards commission” policy is short-sighted, damaging to the agent, the salesperson and the consumer, and must be reversed!

CO-REGULATION OF LICENSING AND INDUSTRIAL RELATIONS

In early March 2003 the PSAQ’s Vice Presidents, Andrew Ross and Tom French, attended a meeting, convened by OFT, arising out of the Review of the *Property Agents and Motor Dealers Act 2000* (PAMDA), at which the PSAQ briefly outlined its thoughts on the link between sound employment practices and consumer protection⁷.

Subsequent to this meeting the PSAQ wrote a letter to the OFT’s Mr Pat Malone, dated 4 March 2003, detailing its views on the topic.

In the letter, the PSAQ also referred to an earlier (1998) position adopted by OFT, which the PSAQ paraphrased as “our (OFT’s) job is consumer issues, not industrial relations”.

In spite of some apparent resistance to this idea, the PSAQ would ask OFT to again consider this topic on its merit.

What is the PSAQ Asking For?

The PSAQ is asking the OFT to openly examine the employment practices – consumer protection links that the PSAQ first identified in 1998 and subsequently in 2003⁸, with view to co-regulation of the industry’s Award requirements through PAMDA.

In making a determination on this matter, there are three background issues the OFT would benefit from understanding:

The PSAQ’s Unique Role

The PSAQ is a free-enterprise based, non-political employee organisation. That alone makes it unusual in the trade union movement, but perhaps not unique.

⁷ At this meeting, the PSAQ also tabled a December 2002 Report by John Rau MP, into practices in South Australia’s real estate industry, wherein Mr Rau recommended that “A letter of appointment in a form compatible with the ‘Real Estate Award’ should be required in relation to each employee engaged in the industry.”

Our counterparts in South Australia have since informed the PSAQ that this recommendation was effectively “shelved” by the subsequent Working Party, without any substantive explanation being given.

This was in spite of the fact that:

- the proposal was supported by both the employer and the employee industrial organisations; and
- Mr Rau, who made the recommendations supporting the link between industrial and consumer issues, was well placed to understand both the consumer and industrial relations sides of the argument, due to his former occupation as a specialist industrial relations barrister!

⁸ Independently identified in South Australia in 2002.

What makes the PSAQ unique is the responsibility it has been entrusted with, to directly administer the enterprise bargaining process prescribed by the industry's Awards.

Under these Awards, the PSAQ is required to register and/or approve individual employment contracts for every property management and sales employee whose employer has promised to pay commission.

This process has been approved by the Queensland Industrial Relations Commission, and is supported by all of the corporate and representative organisations in Queensland's real estate industry.

Award Compliance

The PSAQ is able to present quantifiable data which shows that after seven years of operation of the Property Sales Award Queensland – State (and the more recent introduction of the Property Management Award), only 55% of the state's real estate employers are complying with the "minimalist" requirements of those Awards.

This begs the question – if, after seven years, only 55% of real estate agents were using Appointments to Act, would OFT see this as an acceptable level of compliance?

And in that situation, would OFT be looking for other solutions to such a problem, including the possibility of co-regulation?

Non-Compliance Reality

In other industries, some employers underpay wages, whereas in the real estate industry, by comparison, the issue of underpayment pales into insignificance against the real issue.

In the real estate industry, the real issue is a widespread, entrenched culture, where many real estate agents "employ" sales people for months at a time, without even paying them one cent. Additionally, many agents also fail to pay commissions promised to their sales people.

Due to the delays inherent in the conveyancing process, these sales people only finds out about the employer's refusal to pay commission some four to eight weeks after the Contract of Sale is signed.

In the meantime, the unpaid employees have potentially signed a number of other Contracts of Sale and Appointments to Act, and are now faced with the dilemma of waiting to see if commissions from these sales will be paid, or "cutting their losses" and leaving, with the likelihood that they will never get paid for many months of work.

The failure to pay wages and commission fosters a climate of desperation, while the failure of employers to make or register commission agreements ensures that those employees will never get paid what they are due.

Without any record of the employer's promise of commission, hundreds of sales people per year miss out on commissions they had legitimately expected, and many of these otherwise-good sales people leave the industry.

Such a culture, represented by those 45% of real estate employers who are failing to comply with the Award's agreement registration requirements, underpins the ongoing turnover of sales people in many real estate offices, and the associated consumer rip-offs that OFT is trying to regulate.

Not only does this reflect on the inadequacy of the State's enforcement regime in the area of industrial relations generally, but even more significantly, it should demonstrate to OFT the amount of malpractice some other industry regulators are faced with.

Cooperation Needed

It is imperative, in our opinion, that the various regulatory sectors cooperate as fully as possible, so that the real estate industry's two consumer groups – the public and the industry's sales people – are better served in the future.

As the PSAQ sees it, there are three potential solutions to the issues outlined above:

- Education;
- Enforcement;
- Co-regulation.

Education

Education can – and should – be addressed through mandatory Continuing Professional Development (CPD) for all Licensed Agents⁹, as well as through the PSAQ's already-established Field Officer programme, which has people conducting one-on-one office visitation along the eastern seaboard and much of southern Queensland.

Another means of education is for employees to be informed about what they should expect, and what obstacles to earning an income they might encounter, prior to entering the industry.

The PSAQ has the means (and because of the industry culture, the responsibility) to communicate this information to new entrants.

What the PSAQ lacks is data¹⁰ – who is entering the industry, and how they can be contacted. The PSAQ sees accurate, timely data flow as being part of the co-regulation process.

⁹ As proposed in the PSAQ's submission to the PAMDA Review, 30 September 2002.

¹⁰ For the record - in 1998, the PSAQ sought the co-operation of OFT in the provision of data, and the then Minister agreed to our request. The Department initially resisted the Minister's directive but after some delay, eventually provided one copy of its data to the PSAQ.

The Department further frustrated the process by asking the PSAQ to pay for a second data set, at a time when the Department was aware that the PSAQ was very short of funds. After some months, the PSAQ managed to scrape together enough money for the second data set and OFT accepted the money, but failed to provide the data.

The Department's credibility was, in our eyes, very much diminished by these actions.

The reason we mention this now is to highlight the resistance the PSAQ believes may emerge from within the Department as soon as our requests for closer cooperation are made known.

In our view, this could be very easily facilitated by a weekly, automated e-mail from OFT to the PSAQ, detailing the names and addresses of new applicants to be employed licensees and/or sales people. The PSAQ would then communicate with these new applicants about employment issues.

Alternatively, OFT may consider including a brochure about employment matters, provided by the PSAQ, in its first response to every application it receives, however this may place a greater load on OFT's resources than would the suggestion above.

Enforcement

The Department of Industrial Relations (DIR) is responsible for enforcement of State-based Awards. Like all departments, DIR has limited resources, and from our contact with DIR, it is apparent that these resources are being used to the limit.

Consequently, the likelihood of greater enforcement by DIR is minimal.

Co-Regulation

An industry-funded regulatory regime already exists through the licensing and registration process administered by OFT.

In its 4 March 2003 letter, the PSAQ proposed that PAMDA be amended to require registered sales people and employed licensees, and their employer, to provide information about the existence of a Registered Employment Agreement¹¹:

- each time there is a new application for, or renewal of, a Certificate of Registration or Real Estate Agent's Licence (as an Employed Licensee); and
- each time a notification is made to OFT about a sales person transferring to another Licensee.

This could easily be facilitated by the parties sending an Agreement Registration Certificate (from the PSAQ) as part of any application to OFT.

An additional possibility may be to co-regulate the industrial process by amending PAMDA's suitability criteria (for a Principal Licensee) to incorporate provisions relating industrial matters.

Award-enforcement is very expensive, whereas co-regulation, as described above, would cost OFT (almost) nothing, **and may in fact result in a net saving to Government as a whole.**

¹¹ As required by the Property Management & Property Sales Awards.

IN SUMMARY

To summarise, our specific proposals are as follows:

1. That licensing/registration delays be urgently addressed as an immediate priority.
2. That OFT review which Training Package units are included in pre-vocational training.
3. That the PSAQ's proposed hybrid model for commission be thoroughly examined.
4. That improvements to the present regulated commission structure be introduced in the earliest possible instance.
5. That OFT immediately cease its policy of driving commissions downwards.
6. That OFT and the PSAQ work together on a streamlined model to co-regulate the industry's Award requirements through PAMDA.

The PSAQ's commitment to reform Fair Trading legislation is driven by the belief that both the PSAQ and OFT are trying to regulate the same demographic group. After all, a Licensee who tries to rip off the consumer will most likely treat his or her employees in the same manner, and vice-versa.

Therefore it is our hope that the PSAQ's proposals will receive serious consideration by OFT.

The PSAQ is, by its own admission, primarily focused on industrial matters, however this should not be allowed to dilute the arguments we have put forward, especially when both types of real estate consumer – real estate sales people and the public – will benefit.

In closing, may we take this opportunity to express our desire for more regular consultation between your office, your departmental officials and industry stakeholders generally (including, but not limited to, the PSAQ).

On that basis, we would be happy to meet with yourself and/or OFT representatives as soon as possible to further progress both the issues outlined in this letter, and our earlier submissions regarding PAMDA.

Enclosed please find feedback received by the PSAQ, copies of previous PSAQ submissions, letters and draft letters, etc. Thank you.

Yours faithfully,

BARRY GANNON.
PSAQ State Secretary

Enc.