

GARRY DENLEY
122B Rangatira Road
Birkenhead
Auckland, New Zealand
Ph 09 4821004
Fax 09 4821034
Email garry.denley@xtra.co.nz

25 February 2008

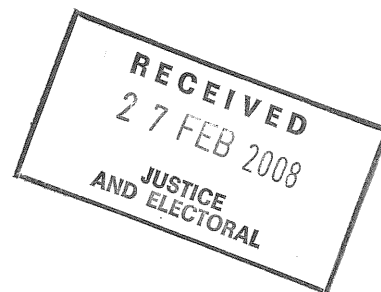
The Clerk of the Committee

The Justice and Electoral Select Committee

Select Committee Office

Parliament Buildings

Wellington



Real Estate Agents' Bill 2007 ("Bill")

Introduction

1. This submission is on the Real Estate Agents Bill 2007.
2. This submission is from Garry James Denley JP of 122B Rangatira Road, Birkenhead, Auckland.
3. I can be contacted at 122B Rangatira Road, Birkenhead, Auckland. My telephone number during the day is 09 481 0130 or mobile 0274 638 494.
4. I wish to be heard before the Committee in Auckland to speak to my submission.
5. Elected as a member of the Real Estate Institute of New Zealand Inc, ("REINZ") since 1977 after completing my real estate qualifications and obtaining a Real Estate Agent's Licence, I have been involved in the real estate industry in New Zealand since 1973 and elected a Fellow of the Institute in 1989.

6. Since 1977, I have been elected to various REINZ District Committees, Wellington, South Canterbury and Auckland. Employed in 1991 by REINZ head office as the National Legal and Licensing officer until 1996, responsible for Licensing and disciplinary matters. Elected as a National Councillor of REINZ in 1997 completing 5 terms, finishing in 2007. For the past 6 years I was the elected chairman of the REINZ ITO.
7. I have been a property auctioneer since 1975.
8. An independent arbitrator for real estate issues, principally involving commission and employment disputes for the past 10 years.
9. An expert witness to the High Court on real estate practice issues.

A summary of key points and recommendations

10. This Bill turns the clock back to pre 1963 and will promote unlicensed and uncontrolled activity.
11. The Bill sets up a Government Department to run the real estate industry, not what I understand is normal Labour Government policy. I may be wrong but it is my understanding that Labour Government policy prefers industries and professions to be responsible for the running of their own industry or profession.
12. The cost of setting up this large Government bureaucracy I believe is at best a tax on the real estate profession and its members. The current cost of running the REINZ and the Real Estate Agents' Licensing Board is about a third of what the proposed expenditure as stated by the Honourable Mr Cosgrove at the meetings he held around the country last year.
13. This Bill sets up a Government bureaucracy to run the real estate industry to make decisions about the real estate industry without any input from the industry, including appointments to the Real Estate Authority ("REA") or the Complaints Assessment Committee ("CAC"). The real estate industry has for a considerable period of time enjoyed a good relationship with the current Government, assisting them in a number of fields. This Bill would suggest the opposite.

14. This Bill has complete lack of reference to the REINZ, except for the winding up of the Fidelity Guarantee Fund.
15. In my view the real estate industry will give very little support to the REA if they have no say, no input, no feedback or association with it. The REA is at best a clobbering machine.
16. The Minister in discussing the Bill has completely ignored the work achieved by **(“REINZ ITO Ltd”)**, the Real Estate Industry’s ITO. The **(“ITO”)** is the standard setting authority for real estate education in New Zealand and is not a Provider. It has been given that authority by New Zealand Qualifications Authority **(“NZQA”)** and Tertiary Education Commission **(“TEC”)**, under the Industry Training Act 1992 – both Government Departments. This Bill completely ignores the REINZ ITO. It is my strong submission that the REINZ ITO be able to continue as the standard setting authority for real estate education/qualifications in New Zealand and that this be noted within the legislation. That the NZQA and TEC be the responsible body to approve any changes made to the current real estate qualifications as is the case now when National Qualifications and individual unit standards need changing on recommendation from REINZ ITO in consultation with all stakeholders.
17. The most recent Tertiary Education Strategy states that the roles of Industry Training Organisations will continue to be:
 - (a) Providing leadership within the real estate industry on matters relating to skill and training needs;
 - (b) Designing national qualifications and setting and assuring the quality of national standards; and
 - (c) Arranging for the delivery of industry training.
18. The Real Estate ITO is a successful organisation:
 - (a) It has never been issued with a notice under section 9 of the Industry Training Act;
 - (b) There has never been any suggestion that its performance has been inadequate in any way; and
 - (c) It was approved on 14 December 2007 for full funding by the Tertiary Education Commission **(“TEC”)**. This expands the ITO’s role to managing the delivery of training for the real estate industry in addition to setting skill standards.

- 19 The current situation is for the REINZ ITO to consult with all stakeholders involved with the real estate industry including employees, salespeople, branch managers and licensees. This practice has been established over a considerable period of time when the ITO Act commenced in 1992 where the industry have set the standards in consultation with NZQA and TEC before the relevant Minister has approved them as per the current Real Estate Act. To my knowledge as a past chairman of the REINZ ITO there has never been any complaint about the real estate standards. It is important that the REINZ ITO's activities continue in the present format with the approval of the current standards and any future changes by NZQA and TEC. Over the past 18 months the REINZ ITO has been trying to obtain Justice Department approval for changes to improve the education standards and qualifications which have been changed by agreement with all parties and stakeholders. This has now been approved. This delay in effect hindered the Polytech's and private Providers from commencing with the new qualifications and requirements for entry into real estate for some 18 months.
- 20 Had the Government wished to assist the real estate industry by reforming the current Real Estate Act most of the changes could have been made under the existing legislation without going to the extent of a new Act. REINZ and the Real Estate Agent's Licensing Board have requested changes to be made to the current Act for the past 10 years. In particular matters relating to discipline, consumer standards, however I do not believe the Government has given any reasonable consideration to REINZ or the industries points of view.

Part 1: Issue by Issue Analysis

Purpose of the Bill

- 21 Clause 3 sets out the purpose of the Bill which is to promote and protect the interests of consumers by regulating agents, raising industry standards, and providing accountability through a disciplinary process that is independent, transparent and effective.
- 22 This is reasonably straightforward and effective, however I have an issue in that that the Bill;

a. does not recognise the status of a real estate profession in New Zealand as stated in the Lawyers and Conveyancers' Act 2006.

b. is not providing something that "is independent, transparent and effective" as the Authority set up will set the laws, be the Policemen, the Judge, the Jury and the Executioner. Hon C Cosgrove is on record stating that it is unacceptable for REINZ to do this therefore why is it acceptable for a Government Department to do it?

Coverage of the Real Estate Agents' Bill

23 The way "*real estate agency work*" and "*transaction*" are defined in clause 4 of the Bill mean that property managers and residential letting and leasing agents will not be covered. It also creates uncertainty as to whether the commercial and industrial letting and leasing is covered.

24 I have a grave concern that the purpose of the Bill is not being achieved by failing to regulate these categories (mentioned above) as consumers will be left exposed. This is totally unacceptable because:

- a. Approximately one in five complaints received by the REINZ relate to the management of property. Almost all these relate to the holding of funds.
- b. REINZ Property Managers handle significant sums of money, there are a large number of firms that in my experience will handle well in excess of \$1 million dollars or more in a months trading of clients funds while acting as property managers. These funds go into the real estate agents trust accounts and are held there until the person who is entitled to the funds is ascertained and will then be paid out. Proper accounting methods are employed and their trust accounts are audited 3 times a year.
- c. It is my concern that by failing to regulate the real estate residential property managers, residential letting and leasing agents, including commercial and industrial letting and leasing, the Bill is inviting any old "*Tom, Dick or Harry or Jane*" to have a go at looking after property management and getting into strife and causing considerable loss to the public.

The fact that only small sums may be stolen from a wide number of people

in residential property management is no justification for saying that regulation is not necessary. Landlords may simply assume that regular payments are being made properly and not checking for discrepancies that audits would find.

- d. As part of my role as the Legal Licensing Officer for the REINZ in the early 1990s, (finished in 1996) I reviewed all complaints and recall an instance where a property manager working for a real estate agent, managed to squirrel away approximately \$300,000 out of rent payments, (paid in cash) over a period of time that should have been paid into the agents trust account. That was corrected by the real estate agent who had their own financial resources and insurance cover; the Fidelity Guarantee Fund was not required. The audit procedures required by the current Act ensured all funds were properly accounted for. This case went to the Real Estate Agents Licensing Board and in the salesperson quite rightly lost her sales certificate.
- e. An example of a property management issue that has arisen with a *Blue Chip* type companies that were involved in property investment, now in liquidation. The *Blue Chip* group handled rent collection with no checks and balances no requirement to report to an auditor as required by a licensed real estate agent. These *Blue Chip type* property investment companies are not subject to the normal checks and balances real estate agents are. I submit property management in all forms should come under the real estate act to protect the public as this would assist the public obtain some form of redress under this Bill. Where as with The Joneses Real Estate Company failure deposits that are held in the real estate agents trust account are secure and the consumer is protected.
- f. Because property management activities in the Bill will be unregulated, there is no requirement to keep money held on behalf of landlords or tenants, in a trust account, in the same manner real estate agents are currently required to keep sale deposits in a trust account. This means there is no separation between the property managers's trading funds and funds held on behalf of the landlord or tenant. I am aware of private property managers who are not members of REINZ or members of any

other group for that matter, who operate from home. Their client's funds are deposited into the property managers personal revolving credit trading accounts from where they pay their personal mortgages. The opportunity here for loss of funds is huge in this regard. There will be no checks or balances from the REA or any other authority, auditors etc in this situation.

- g. While there will always be two sets of lawyers' eyes watching sales deposits in a trust account, quite often no one is monitoring rental monies held by property managers. Currently REINZ picks up defaults in payments through its auditing procedures, often before the consumer becomes aware of the problem. Under the REA neither REINZ nor the Authority will have this function in relation to property management or letting and leasing.
- h. If property managers are not covered by the new regime, gaps in the current laws will leave consumers vulnerable. The Residential Tenancies Act, the Fair Trading Act, and the Consumer Guarantee's Act, do not specifically deal with the regulation of funds received and held by property managers (other than bond money). Therefore if anything goes wrong, the only recourse for consumers may be via the Courts, which can be a costly and lengthy process, well out of reach of the ordinary kiwi.
- i. The Bill requires licensees to meet a "*fit and proper person*" test which involve the examination of a person's criminal record. It is important that this test also applies to letting or leasing agents, and property managers, who hold funds on behalf of consumers in the same way licensees. They have access to keys, to private and personal property, both for the protection of consumers.
- j. Letting and leasing agents, and property managers should be entitled to relevant qualifications, continuing professional development and professional standards. Just as selling real estate agents, branch managers and sales persons are. These qualifications should be set as they are at present by REINZ ITO and should be a compulsory requirement of all property managers.

- k. The recent failure of 13 finance companies underscores the need for consumers to be protected in their investments. Given the high incidence of property investment in New Zealand, it is important that letting and leasing agents and property managers are covered within the ambit of the Bill to ensure consumers are protected.

Power to make exemptions

25 Clauses 7 to 13 relate to the power to grant exemptions from the provisions of the Bill. Clause 12(2) allows the responsible Minister to recommend the exemption of entire classes of people from the requirement to be licensed under the Bill.

- a If individuals or Companies are involved in the business of marketing property or acting as agents on behalf of members of the public for a fee they are “in trade”, and should be brought under the Real Estate Agent’s Act. All real estate activity conducted by all persons should be covered by the Bill to ensure that consumers are protected and that the status of the real estate profession is enhanced.
- b The ability of the Minister to exempt entire classes of people is a back door way of further limiting the Bill’s coverage.
- c There is no equivalent general power of exemption for being licensed in the Lawyers and Conveyancers’ Act 2006 or the Health Practitioners Competence Insurance Act 2003, so why should there be one here for Real Estate Agent’s.
- d If certain classes of people should be made exempt, it is more appropriate for this to be done by amending the Act and going through a parliamentary process, not by the Minister through regulations. Certainty must be required.
- e Should the Authority seek to grant an exemption for transaction or a particular series of transactions under clause 10 there must be a provision for industry representatives like the REINZ as the industry body to be given the right to be heard on the application. This particular issue is an

important part of the current process under the current Act, there is no reason why it should not continue. The industry, through the REINZ membership is a massive voluntary organisation and its members have a better understanding of the marketplace and those in it. I submit the REA must include industry representatives on its Board.

Part 2: Real Estate Agents' Authority

Functions of the Authority

- 26 The functions of the authority are found in a number of provisions. These functions include:
- a Administering the licensing regime (clause 16);
 - b Granting exemptions to the licensing regime for specified transactions or specified series of transactions (clause 10);
 - c Establishing and maintaining the register;
 - d Developing practice rules (clause 16), including a code of professional conduct and client care, and practice rules for continuing education, for the Minister's approval, and maintaining those rules;
 - e Setting fees and levies for the operation of the new regime (clause 16);
 - f Developing consumer information on matters relating to real estate transactions, including developing "*approved guidelines*" for the agency agreements and sale and purchase agreements (clause 16);
 - g developing and providing consumer information on matters relating to the provision of real estate services, including information on who to make a complaint (clause 16);
 - h Setting professional standards for agents (clause 16);
 - i establishing procedures for the lodging of complaints, receiving complaints, and investigating and initiating proceedings with the Tribunal (clause 16);

- j intervening in an agent's business and inspecting books relating to money received where certain grounds exist (clauses 29, 30);
 - l. The administration of trust accounts in certain circumstances (clause 122);
- 27 With the considerable experience in dealing with real estate agency practice matters since 1973 it should be up to the industry and their professional industry body, such as REINZ to set the professional standards and develop practice rules. Therefore I submit that the setting of professional standards and developing practice rules should remain with the industry body being the REINZ, for the following reasons:
- a Removing this role is fixing something that is not broken. REINZ performs its role well, and it possesses the industry expertise necessary to ensure professional standards and practice rules provide effective consumer protection while being practically workable. REINZ is in a position where it can react quickly to market changes. It is more in tune with industry needs and concerns.
 - b the fact that REINZ is an industry representative body will not mean it will be easier on its members – quite the opposite. REINZ has a real stake in enhancing the professionalism and integrity of the industry. Requiring approval of professional standards and practice rules by the authority would provide adequate checks on this role.
 - c The Authority would not be in the best position to make practice rules and set professional standards because there is no requirement that the Minister appoint a certain number of REA members with industry experience or expertise.
 - d Because the CAC is formed from members of the REA, there is a concern that the same people that will be making the rules will also be investigating breaches and enforcing the rules which undermines the doctrine of separate powers. (Is this not what the REINZ were accused of) Although the Minister has to approve the rules, he will be reliant on the REA advice.

- e as a representative body, REINZ has the necessary buy in from the industry to make such rules and professional standards effective in the marketplace, which the Authority will not necessarily get if it takes over this function.
- f REINZ should be the body that is providing consumer information and drafting approved guidelines for consumers, with any approved guidelines being approved by the authority. It is important that the industry be seen to be involved in this function. The Authority could well be made up of people who have no relationship at all with real estate practice, have no knowledge of real estate practice and come up with a set of guidelines and controls which have no bearing on reality. It is my submission that the industry body, REINZ, is in this best position to provide such information. If it is decided that these functions are not to be retained by REINZ then the Authority must consult with REINZ on these matters.
- g The Bill allows the Minister to amend practice rules simply by consulting with the Authority and may consult with other parties that the Minister thinks fit. I submit that there is far too much power with the Minister to make changes without any consultation with the industry that in my view is an unnecessary and unworkable arrangement.
- h for example. As an arbitrator dealing with commission disputes between members of REINZ the dispute is kept out of the courts with the commission differences between the two agents decided by the arbitrator. (Under the Arbitration Act) This assists the Vendor by making a saving in costs and time through court and legal involvement. In most cases the vendor and purchaser are not involved at all in the arbitration. However under the REA Bill this will not happen if you have a member and a non member disputing commission the REINZ rules will not apply and the commission dispute will finish up in court disadvantaging the vendor who will be faced with major legal costs.

Membership of the Authority

- 28 Clause 17 sets out the membership requirements for the REA. It is to consist of no more than seven members. Clause 17(4) requires the Minister to consider, when making appointments, (the need for the Authority to represent the views of a broad range of interests, including consumer and industry interests).
- 29 The REA Bill does not give sufficient weight to guarantee adequate industry representation and expertise on the Authority. There should be a requirement for a specific number of industry representatives, and a specific number of laypersons, to make up the Authority. Examples in other industries include:
- a The Electricity Board – five industry representatives and two laypersons;
 - b The Engineers Council – industry representatives, one consumer representative, and one to three other members;
 - c The Architects Board – can have up to four industry representatives and five other members;
 - d Authorities established under the Health Practitioners Competency and Assurance Act requires a majority of members to be health practitioners.
- 30 If the Authority is make up of people who have no practical real estate experience and even if the chairman does have some conveyancing experience it certainly is not practical real estate agency experience and it cannot even be compared with what happens in a normal real estate practice or agency practice, lawyers, accountants are not trained in real estate practice matters. Therefore for the Authority to be setting real estate agency standards, practice standards and education standards without any input from the real estate industry the results could well be counterproductive for the consumer and those in the industry alike. The real estate industry as with any other industry profession must be able to work in a commercial but practical manner to service the public. However it would appear that this Bill is trying to change the last 50 years of standards set by the real estate industry when an extremely small minority of the public are calling for change.

Education

31 The Bill provides no detail as to what the standards are for real estate training, or who will establish them. It merely empowers the Governor General, by Order in Council, to make regulations for “*Prescribing the qualifications necessary before a person is entitled to be licensed as an agent, branch manager, or sales person.*” There is no requirement to consult the industry prior to prescribing such qualifications, and there should be.

32 As I have previously stated in this submission, this Bill has a total lack of detail regarding the setting of qualifications standards. Currently the REINZ ITO is the recognised industry training body for the real estate industry under the Industry Training Act 1992. This recognition is given by two Government Departments, NZQA and TEC. However it is unclear what the reforms will mean for the REINZ ITO.

33 On the 4th December the Associate Minister of Justice, the Honourable Clayton Cosgrove, announced that:

“The Minister of Justice will approve the minimum qualifications needed to obtain a licence, and training unit standards will be developed by the Real Estate Industry Training Organisation.”

34 The Ministry of Justice in my view has no practical experience in the real estate industry, and it is difficult to see how they would be qualified to advise the Minister on this matter. It was interesting to note that during the consultation period for this Bill the Ministry of Justice were unaware there was a REINZ ITO dealing with qualifications/education.

35 There are already sufficient safeguards in place in terms of the qualifications for Real Estate Agents. Both the NZQA and the TEC have to approve qualifications and unit standards before they are implemented.

36 The Minister’s reference to the Real Estate Industry Training Organisation may not be a reference to the REINZ ITO. This is a concern to me personally and I submit that the REINZ ITO role should be able to continue unaffected by the reforms because:

- a If it isn't broke, why fix it – the way in which Real Estate Agents are educated has never been the subject of criticism, and it was not identified as a reason for instigating this review. This function is currently being performed well, and REINZ ITO is not aware of any complaints as to its integrity or competence.
 - b The REA will not be an industry body, and therefore it would be inconsistent with the Government's own tertiary education policy to place education under the jurisdiction of the REA and remove it from industry ownership. This has no precedence in other industries or professions. The REA may also lack the same industry expertise that REINZ ITO possesses, as there is no requirement in the Bill for industry participants to be on the REA.
- 37 Clause 19 provides the Authority with the ability to make practice rules for continuing education. I submit that the real estate industry should be in a position to control in setting practice rules for continuing education as they have the knowledge in this area and that the real estate industry is in a position through the REINZ ITO to put in place the necessary rules for continuing education at the commencement of this new Act.
- 38 The current Bill is not clear that continuing education is a requirement or prerequisite to having a licence renewed. There is no such provision in the current Bill.
- 39 There is no requirement under the Bill for the REINZ ITO to be consulted when prescribed qualifications or continuing education practice rules are set. As the recognised industry expert on education skill standards, the REINZ ITO would be able to add considerable value to these processes
- 40 I am also concerned that the Minister has stated that the minimum qualifications needed to obtain a real estate licence will be approved by the Minister of Justice on the advice of the Ministry of Justice¹. Such a regime would appear to usurp the statutory function of the New Zealand

¹ Question and Answer Sheet on the Real Estate Agents Bill supporting the Minister's press release.

Qualifications Authority under section 253(1)(a) and 258 of the Education Act 1989.

41 Accordingly, I submit that:

- (a) the prescribed qualification and continuing education provisions of the Bill be amended to make it clear that the REINZ ITO remains responsible for setting skill standards and managing the delivery of training in the real estate industry;
- (b) the Bill be amended to include a mandatory requirement that REINZ ITO prescribe the qualifications and the continuing education in consultation with the REA.
- (c) if it is considered desirable for the REINZ ITO to be subject to further independent oversight, that the REINZ ITO report to the Authority on an annual basis on the development of skill standards;
- (d) clause 51 of the Bill be amended to require an applicant for re-licensing to have fulfilled their continuing education obligations under the practice rules; and

42 Clause 65 of the Bill be amended to require that a licensee's compliance with continuing education practice rules be recorded on the register

Fees and Levies

43 Clauses 24-28 relate to setting of fees, the disciplinary levy (to fund the disciplinary tribunal) and the operational levy (to fund the operation of the authority and the CAC).

44 There is a lack of detail in the Bill as to how fees and levies will be set. There is no requirement within the Bill for the Authority to consult with the industry on the amount of any fee or levy set, or to consider efficiency, justifiability, and transparency in setting the amount.

45 As the real estate industry is expected to pay these fees there must be mandatory consultation with the industry through REINZ (the industry body). On the extent and nature of any fee or levy that is set as is required in the Electrical Industry, where the Electrical Commission sets any levy. I submit that it astounds me that it appears in this Bill there is no justifiability, fairness and transparency which I would have thought would be mandatory considerations when setting fees and levies that the industry is required to pay. Hon C Cosgrove has clearly stated the Bills purpose in clause 3 (*Clause 3 sets*

out the purpose of the Bill which is to promote and protect the interests of consumers by regulating agents, raising industry standards, and providing accountability through a disciplinary process that is independent, transparent and effective.) The levy setting process has no accountability to the Industry whatsoever.

Registrar

- 46 Clause 32 of the Bill sets out the functions of the Registrar, which are to:
- a Establish, keep and maintain the register;
 - b Make decisions about whether persons meet the requirements for licensing or continued licensing;
 - c Issue, cancel, and suspend licenses, and to perform the other functions relating to licensing in part 3; and
 - d Provide administrative support for the Board of the Authority.
- 47 The Registrar also has the ability under clause 33 to delegate its functions, duties and powers, except for the power of delegation.
- 48 Deciding whether a person meets the licensing requirements involves an assessment of whether the applicants are “*fit and proper*” persons to hold licence. Currently this role is performed by the Licensing Board, which possesses the necessary legal and industry expertise to do so. There is no requirement in the Bill that the Registrar must possess any legal or industry experience. The Bill also gives the registrar other substantive decision-making functions, such as cancelling a licence for fraudulent representation.
- 49 The Registrar’s functions are currently carried out efficiently as prescribed under the 1976 Act. The current Bill, give the Registrar huge powers where under the 1976 Act these powers are generally performed by the Licensing Board, or under this Bill they should be performed by the REA. The current Registrar should only carry out the administrative functions that he or she currently has under the 1976 Act. This is also consistent with the role usually given to Registrar’s appointed under other legislation, for example the Lawyers

and Conveyancers' Act and the Health Practitioners Competence Assurance Act 2003. This limited role is particularly important as the Bill does not specify any qualifications and/or skills the Registrar must possess in order to be appointed to the role.

Part 3: Licensing

Experience Requirement

- 50 Currently a person must have during the proceeding five years, at least three years' practical experience, full time in real estate agency work. Clause 34 of the Bill intends to alter this requirement to two years experience out of 10.
- 51 To allow only two years' experience out of 10 years is impractical and I would submit that when you consider the amount of legislative change over the last seven years by the current Government, not to mention regulation and Court precedents set by the Commerce Commissions Department of Fair Trading. To look at a practical example of someone who has been out of the industry for say seven years and during that time out of New Zealand their knowledge of changes to the New Zealand commercial environment and Law would be totally inadequate to deal with the "now" legislation. My experience of people who have come back into the industry after three years, they find a complete change to the marketplace, what is expected by the public and legislative change, therefore are not capable of providing a professional real estate service to the public and offer the necessary consumer protection in the process.
- 52 The ability for someone to become a licensed real estate agent, as opposed to a sales person at the age of 18, is inappropriate given the amount of responsibility that the role entails; and
- 53 There is no requirement that this be two full time years' of experience out of the last five years would be more appropriate.
- 54 The necessary skills and competence to become a licensed real estate agent have been well and truly honed through the REINZ ITO setting the qualifications over many years. REINZ has developed educational standards consistent with the current Act and therefore I believe the current real estate

licensees in this country are well qualified. Generally you will find in my experience that those that have caused the problems have not had the experience as owners of a real estate business, have employed a principal officer and at the end of the day the inexperienced person has been running the business, which proves that without the necessary qualifications those businesses that are run by inexperienced people get into trouble.

Persons prohibited from being licensed

55 Clause 35 sets out the grounds in which persons are prohibited from being licensed. These grounds include the conviction of a crime involving dishonesty within 10 years preceding the application for a license.

- a A real estate agent or a real estate sales person must establish empathy and trust between themselves and their vendors, and purchasers. It would be unreasonable to expect that persons only convicted of offences for dishonesty, but also persons convicted under the Crimes Act 1961 should also be barred from entry into the profession. If this was the case it would further promote consumer protection if agents who are entrusted with access to consumers' homes, have not been convicted of any crime, not just dishonesty crimes in the past ten years. However I would submit that any convictions should be examined when the REA determines if a person meets the "*fit and proper*" test and therefore if there is doubt that the REA would hold a hearing to establish if the person is suitable to hold a real estate licence.

Term of licence

56 Under the 1976 Act, there is one statutory date for the renewal of licences and sales person certificates. Clause 44 states that the licence will be valid for a period of 12 months commencing on the date that the Registrar enters the name in the register.

57 Currently Agents are well aware they must renew your real estate agents' licence by the 15th February each year. REINZ offer an excellent member service by reminding its members to renewing their real estate licences

by the 15th February each year. I am sure the REA will not be providing this service.

- 58 From a licensee point of view, having been involved previously in the employment of in excess of 600 sales people, to be constantly renewing sales people certificates or branch managers' certificates would be a totally unnecessary waste of time for the licensee and for that matter the REA. The renewal process should continue at a set date each year. The Registrar would be constantly processing renewals for each and every agent, branch manager and salesperson. Why not continue the current practice which works. Agents currently know and are aware of the renewal process and dates required.

Branch Managers' Licence

- 59 Clause 47 of the Bill removes the current premises – based licensing regime, but it is unclear what this is being replaced with. There is no definition of a Branch in the Bill so if you are going to have a branch manager as stated in the Bill, what are they going to be a Branch Manager of? What is a Branch? This needs to be defined clearly and concisely. (See the current Act)
- 60 Clause 48 replaces the requirements for agents to have effective control over their salespersons, with a requirement for “*supervision*”. Under the current Act, effective control has been defined by the previous decisions that came out of the Real Estate Agents Licensing Board. My understanding of “effective control” requires the branch manager or the licensee to be in effective control of real estate activities at that particular place of business. Does this clause mean supervising salespeople working from their homes? Whereas effective control has a far more distinct meaning.
- 61 To supervise according to the Collins Dictionary means “*to direct or oversee the performance or operation, to watch over so as to maintain order*” This would therefore imply that the manager or the agent is not responsible for the actions of the salespeople under their control. The current definition of effective control has been defined by case history and I submit should be retained.

Employment Status

- 62 Clause 49 of the Bill – supervisor’s employment status of independent contracts. I would submit that the system of independent contractors’ works well, has done so for many years or perhaps it is the intention of this Bill to completely change the manner in which sales people are engaged in real estate.
- 63 Clause 50 states the chief executive of the Ministry of Justice *must within five years* after the commencement of this Bill report to the Minister as to whether clause 49 should be removed from the Act, therefore removing the right to be an independent contract. Why create a long and unnecessary period of uncertainty within the industry. What is this Bill trying to do, destroy the real estate industry? Why should agents and their salespersons have uncertainty? This clause must be removed from the Bill so that agents and salespeople can plan their business activities and their lives with some certainty. The real estate profession should be entitled to have certainty with their business after all we supposed to live in a democratic country.

Renewal of Licenses

- 64 Clauses 51 and 52 relate to the renewal of licenses. Currently there is a right of public objection to renewal of licences; however there is no such provision in the Bill also REINZ, representing the industry has the right to object to the renewal of a real estate agent’s licence, and also the renewal of sales persons and branch managers’ certificates. In the past these objections have been well justified and upheld by the REALB and undesirable people removed from the industry. There is no such provision within this Bill to review annually those persons who are unfit to practice in Real Estate. I submit that the right for the public and for REINZ to object to renewals be included in the Bill.

Part 4: Complaints and Discipline

- 65 I have no difficulty with the establishment of an independent complaints and disciplinary process so long as it is established in a way that is efficient, cost effective and has the necessary industry and legal expertise which the current Bill does not give any regard to, however as noted earlier the combining of the Authorities functions would not make it independent.

Membership of the Complaints Assessment Committee (“CAC”)

- 66 The CAC as established by clause 74 is made up of three members of the Authority's board of seven, one of which must be a lawyer.
- 67 It is paramount that a member of the CAC must be an industry representative to give some guidance to the panel, to give guidance on practice matters within the industry and the barrister who chairs that panel needs to have some considerable experience, particularly in the property field and no less than seven years practical experience as a barrister or solicitor.

Negotiation, conciliation and mediation

- 68 Under clause 84 of the Bill the CAC encourages parties to complete negotiation, conciliation or mediation, and report back to the CAC within a specified time. This is a practical process and a service that REINZ currently does provide through its Districts within its disciplinary process to give the parties a chance to discuss and review and come back to REINZ. This service is currently provided by REINZ at no cost to either party.

On the papers

- 69 Under clause 87 there is no automatic right for complainants or defendants to be heard by the CAC when they are considering a complaint. Instead the CAC may simply decide to hear the case on the paper submitted by the parties. This is going to cause more problems that it is going to solve. It is essential that disputes involving the conduct of real estate agents are inherently fact specific but it is important that both sides appear before the CAC in person. I have found over the years from personal involvement in REINZ investigation panels that the panel must question both parties to cut through the emotional barrier before making a judgement.
- 70 As a real estate arbitrator/mediator for the past ten years dealing with commission disputes I have had considerable experience dealing with these issues. If you can get the parties together and discuss the issues and give them opportunity to express their points of view and ask appropriate questions about how certain procedures were followed, both parties will come through with a better understanding of what should happen.

Membership of the Disciplinary Tribunal

- 71 Clause 97 establishes the Disciplinary Tribunal which consists of a chairperson who is to be a barrister or solicitor with not less than seven years legal experience and up to four other members. Again there is no requirement for industry representation on the Tribunal.
- 72 As the representative body REINZ should be entitled as are other professions by legislation to have representation on the Disciplinary Tribunal. This is consistent with other legislation of professions, for example:
- a The Lawyers and Conveyancers Disciplinary Tribunal consists of seven to 15 lay-members, seven to 15 lawyers and three to five conveyancers;
 - b The Health Practitioners Disciplinary Tribunal must be made up of *“practitioners on each profession, each of whom must hold a current practicing certificate, as well of laypersons”*.
- 73 It is essential that the Deputy Chairperson is an experienced barrister or solicitor of no less than seven years experience. In order to ensure that the hearings are constituted under clause 98 when the Chairperson is absent or ill and is presided over by someone with adequate legal expertise.

Part 5: Duties Relating to Real Estate Agency Work

Agency Agreements

- 74 Clause 129 provides that a party may cancel a sole agency with an agreement 90 days after the agreement is signed.
- 75 This provision really is doing no more than creating a restrictive trade practice by legislation. Listing authorities or sole agency agreements are traditionally and normally negotiated between the parties. From my experience there are very few 90 day agencies given these days. The public have become very well aware of their rights and will normally negotiate the term and the commission charged.

- 76 Rural and commercial or industrial properties may take much longer than 90 days to sell and may require a considerable amount of marketing to get it up to speed so you can imagine the anguish of a company who has spent considerable funds marketing a property or a subdivision over period then lose it at the penultimate moment when the inquiries are starting to come in and the vendor opts out to give the property to another agency. This provision unduly restricts a person's freedom to enter into contracts.
- 77 Real estate agents make their own arrangements with their vendors as part of their over all customer service program. At the end of the day it is the customer's right to decide what works best for them. There is certainly no need to legislate a cooling off period. In my personal experience if you find you cannot work with a vendor or purchaser you discuss it and if it cannot be resolved, you move on. Customer relationships are important, bad ones can poison future business. The Consumer Guarantee Act, through the Disputes Tribunal do allow for the consumer to address an agency contract if the real estate company is not performing and will not release them from their agency agreement.
- This clause will not assist the vendor. (i.e. an agent lists the property on a Friday prior to a long weekend; Tuesday morning the vendor emails the agent cancelling the agency. Being aware this may happen the agent would be foolish to commence a marketing campaign and or open homes until after 5pm on the next working day thus the vendor is disadvantaged in losing valuable marketing time or suitable buyers. This clause does not assist the vendor or provide a customer service to the vendor.

Obligations relating to disclosure

- 78 Clause 120 requires an agent to furnish an account to the client "*as soon as the agent is asked by his or her client to do so and in any case not later than 28 days after the agent receives any money in respect of the transaction in his or her capacity as an agent,*"
- a This clause does not make commercial sense. What does "*as soon as the agent is asked*" to do so, mean, does that mean they drop everything and do it right there and then or should they be given say 24 hours to

provide the account? I have no problem with providing an invoice/statement but I think we should be given a period of time to do so. Twenty four hours would make more sense for a practical point of view, particularly over weekends as the Bill fails to specify “*as soon as the agent is asked*”. Does this relate to working days only?

- b as an agent you may be auctioning a property; the property has sold at on a Sunday at say 2.00pm in the afternoon. Under clause 120 the vendor has the right to demand an account “*as soon as the agent is asked*” stating for example how the marketing money has been spent and what commission is due. Any account issued must be checked to ensure it is accurate. If the vendor requires a commission/expense statement this should be provided on a normal business day.

79 Clause 126 requires an agency agreement to identify the source of all rebates, discounts, or commissions that the agent will or may receive in respect of those expenses, and to specify the estimated amount of those rebates discounts or commissions to the extent that the amount can be reasonably estimated.

- a this clause is quite onerous. With the competitive real estate market most real estate agents will pass on any rebates they get to the consumer. I submit that it would be enough to ensure consumer protection to state the source of rebates, discounts or commissions and should that become an issue at a future time then the full details can be obtained at that point. A considerable number of agencies and salespeople pay the marketing programs for their clients.

80 Clause 134 requires the licensee to disclose to every prospective party whether or not that licensee or any person relating to the licensee will benefit financially from the transaction.

81 For this clause to work a prescribed form be made available in the attached regulations. As is the current Act requirement.

Auctions

- 82 Clause 137 requires bidders to register for auctions. This clause should be deleted.
- a this clause is impractical in the New Zealand context. I am aware that since the REINZ auction code of practice took effect in 2004 that the REINZ have not received any complaints in respect of the auction process.
 - b I submit that compulsory registration would have an adverse effect in preventing members of the public from showing up and bidding on the spur of the moment which is what happens now. Many prospective buyers may be reluctant to register for fear that registering their interest may increase the bidding competition.
 - c It is quite common practice at auctions sales potential bidders keep “their cards close to their chest” until such time as they think they have a chance of bidding for a property and they certainly do not want the auctioneer to know of their interest pre auction. This clause will disadvantage the public by not allowing them to bid at the last moment. I have personally conducted a considerable number of auctions since 1975 and still surprised at the number of times the eventual buyer has literally walked off the street and bid.
 - d I am quite surprised that this provision which has been taken out of the New South Wales Auctioneers Act is even considered necessary when there is not an issue in this country. There were issues in Australia therefore it was quite proper over there for the authorities to change the legislation, it is not the case here and is unnecessary.
 - e This Bill fails to remedy the problem where a real estate agent cannot engage the services of a registered auctioneer, unless the real estate agent is also a registered auctioneer. I would submit that the Bill should amend the Auctioneers Act 1928 to specifically allow a real estate agent to hire an auctioneer without having to be a registered auctioneer themselves.

Part 6: Miscellaneous Provisions

Repeal of the Real Estate Agents’ Act 1976

- 83 Clause 156 repeals the current legislation, and with it the requirement for real estate agents (the licensee) to be a member of REINZ. This membership is not compulsory for sales persons or branch managers. I would submit that compulsory membership of real estate agents' through REINZ be retained as it provides another form of regulation. Further it will stop unlicensed activity.
- a The danger of this Bill by taking away compulsory membership to the Institute will give the opportunity for the real estate profession to revert back to the bad old days, pre 1963. In 1976 the current Act brought the real estate industry under one Industry body the REINZ and one spokesperson. The Honourable Mr Cosgrove, when he was Associate Minister of Justice, has used four or five high profile instances of problems (some of which were shown to be groundless) that were brought to him over the disciplinary process, and in doing so he persuaded the Government to come up with this Bill which completely unwinds the work done by the Real Estate Industry since 1963.
 - b The public know they can come to REINZ and approximately 250 people have done that resulting in approximately 60 genuine complaints being dealt with. REINZ members are involved in around 200,000 transactions in a 12 month period, 60 genuine complaints do not represent that the real estate industry is in dire straights.
 - c I would ask and submit that this Committee consider seriously why cause such an upheaval for the real estate profession when since 1976 REINZ runs a very successful service. I am aware of visits by overseas Government delegations commenting on how efficient the REINZ and the New Zealand Real Estate Agents Act is and they were looking to model there own legislation on it. I understand these groups are recommended to visit REINZ by the NZ Trade and Industry Department.
 - d certainly there needs to be some changes in the disciplinary areas so that there is some transparency. I have no problem with that as long as the costs are not prohibitive and the process is transparent. The proposals are neither cost effective nor transparent for the consumer.

Schedule 2 – Amendments to Other Enactments

84 Schedule 2 amends section 36 of the Lawyers and Conveyancers Act 2006 to allow a person who holds a licence as a sales person under the Real Estate Agents' Act 2007 to prepare agreements for sale and purchase of land or any interest in land and to give advice about legal rights and obligations incidental to preparing agreements, but only if that sales person has at least six months experience as a sales person.

- a For the salesperson to become established and gain experience they need the right to prepare agreements under the supervision of their manager, which is the normal practice anyway, because in effect the statement in the change to the Lawyers and Conveyancers Act basically says the sales person cannot work for six months.
- b if this restriction is to remain, which I submit hopefully it will be changed. I would recommend that salespeople be able to work under the control of their manager, otherwise they will require six months cash flow to live on which is commercially unacceptable and unnecessary.
- c also if this restriction is to remain it should be provided for in the Real Estate Agents' Bill not in the Lawyers and Conveyancers Act.

Overlap with the Financial Advisors Bill

85 The requirements under the Financial Advisors Bill ("FAB") introduced to Parliament in December 2007 – the intention of that Bill is to regulate financial advisors. Real estate agents are not financial advisors. They may advise on property and whether it a good purchase but they certainly do not get involved in the financial side of it.


86 I have a concern regarding real estate agents being covered by the FAB in that the requirements for real estate agents to provide details of their indemnity insurance and details about financial products about which advice is given and there is also a doubling of regulatory functions. It could be said that this legislation could involve the real estate agent and their salespeople in a double jeopardy situation or punishment twice for the same offence.

- 87 You may wish to consider that real estate agents are not required to be involved in this area at all as they are not involved as financial advisors. Their role involves property matters; financial advice is given by investment advisers, banks, mortgage brokers and the like.

Recommendations

1. That Property Management and Letting should be included in the Bill's regime.
2. The Minister's ability to exempt entire classes of people from the licensing requirements should be removed from the Bill as exemptions should only be provided for in the primary legislation.
3. That REINZ should be retained and its rules on setting practices and professional standards.
4. That REINZ ITO should continue to set standards in the same way as it does now without any further government oversight.
5. There must be a mandatory requirement to consult all effected parties before decision making, levy setting and regulation making, not only those parties that who, "*in the opinion of the Minister*" are affected.
6. Levies should be set after regard to efficiency, justifiability and transparency, and consultation with the industry.
7. The Registrar should not be given the discretion of determining whether a person is "*fit and proper*" to be an agent. This should be a role for the REA for which it should have the appropriate legal and industry expertise.
8. The requirement for a five year review of the employment status of sales people should be removed from the Bill, and liability of agents for their sales persons, regardless of employment status, should be kept.
9. There must be a specified requirement for industry representation on the authority, the CAC and Disciplinary Tribunal, and that those industry representatives should be recommended by REINZ as industry body.

10. Clause 137 establishing bidder registration should be removed from the Bill, and it should be made clear that agents can engage auctioneers without having to be registered as auctioneers themselves



Garry Denley

25 February 2008