

# **The Real Estate Institute of New South Wales Limited**

## **Submission on the *Review of Small Business Experience with Regulatory Policymaking Discussion Paper***

**11 July 2024**

**TO: Office of the Small Business Commissioner  
By email: [review@smallbusiness.nsw.gov.au](mailto:review@smallbusiness.nsw.gov.au)**

## 1. Introduction

This Submission has been prepared by The Real Estate Institute of New South Wales Limited (**REINSW**) and is in response to the Review of Small Business Experiences with Regulatory Policymaking Discussion Paper (**Discussion Paper**).

REINSW is the largest professional association of real estate agents and other property professionals in New South Wales. REINSW seeks to promote the interests of its members and the property sector on property-related issues, including by representing the interests of small real estate businesses. In doing so, REINSW plays a substantial role in the formation of regulatory policy in New South Wales.

In addition to feedback provided by the writer, REINSW's Chief Executive Officer, at an online consultation meeting on 4 July 2024 with representatives from the Office of the Small Business Commissioner, this Submission raises issues about how the regulatory policy development process impacts small real estate businesses and makes recommendations as to how Government can consider and support the needs of this key stakeholder group.

## 2. Consultation process – Questions 1 - 4 & 6 of the Discussion Paper

As the peak industry body for real estate agents and property professionals in New South Wales, REINSW regularly participates in public, and targeted, stakeholder consultation and provides feedback (including raising issues and proposing recommendations) on behalf of its members and the property industry more broadly. This includes representing the interests of small real estate businesses on property-related issues and how reforms might impact these entities.

REINSW's involvement in the consultation process usually includes lodging written submissions and providing feedback via industry forums and meetings (for example, roundtables and workshops) as well as meeting with Government representatives. REINSW is involved at all stages of the consultation process (depending on the reforms in question) and comments on discussion and consultation papers as well as public or confidential draft legislation. REINSW is also invited to participate in targeted stakeholder consultations.

When lodging submissions and commenting on proposed reforms, REINSW works closely with members of its Chapter Committees who are real estate professionals with experience and expertise in different sectors of the property industry. This allows REINSW to shed light on how the proposed reforms will impact day-to-day real estate agency practice. REINSW also encourages its members to participate in public consultation processes directly by lodging their own submissions, contacting their local Members of Parliament about important industry issues, or completing surveys issued by Government (for instance, on NSW Fair Trading's Have Your Say webpage).

In relation to the stakeholder and engagement process, REINSW:

- **recommends**, so far as possible, involving small business stakeholders and the property sector in all stages of the consultation process. REINSW's view is that early stakeholder engagement helps Government to clearly understand the issues which are

occurring in practice and so can design proposals from the outset which effectively address stakeholder concerns. Consultation at a later stage of the process (for example, in relation to draft legislation) is equally important as this allows industry and small businesses to address the practical implementation of such reforms, including any drafting which may seem unclear or ambiguous.

- **recommends** that the consultation period be as long as possible for maximum and complete stakeholder engagement. In REINSW's experience, a four (4) week consultation process is common, although this timeframe can be shorter or longer depending on the specific reforms. While REINSW understands that Government is working to its own internal agendas, timeframes and deadlines, small real estate businesses are extremely busy and may not have capacity to respond within a four-week timeframe, even though they may wish to provide feedback. Other stakeholders, who represent small business' interests (like REINSW or equivalent organisations for other industries) may need to go through internal processes, have limited resources and other priorities, so the longer the period of consultation the more capacity there is for detailed, comprehensive feedback to be provided to Government. This is particularly important for lengthy consultation or discussion papers that contain many questions requiring a response by industry.
- **recommends** making it as easy as possible for small businesses to give feedback on proposed reforms. Unlike industry bodies (such as REINSW), small real estate businesses are likely to have limited capacity to lodge written submissions which is why alternative, simplified methods for feedback such as surveys on a Government website (such as NSW Fair Trading's Have Your Say webpage) are helpful.
- **recommends** that where multiple versions of the same document are provided to stakeholders by Government as part of a consultation process (for example, different iterations of draft legislation), it would be helpful if Government could clearly identify the changes it has made to these re-issued versions. This could occur, for example, by the use of mark-up or by way of a summary of the changes. As mentioned above, it is important to make the consultation process as easy as possible for small businesses who have limited time and resources. REINSW's view is that this practice would make it easier for stakeholders to identify how their concerns have been addressed as consultation progresses, provide more targeted responses (by limiting feedback to the changes which have been made, or reiterating important changes not incorporated in a revised version) and increasing the overall transparency, efficiency and effectiveness of the consultation process.

### 3. Consultation feedback – Question 5 of the Discussion Paper

REINSW is pleased when its feedback is considered and implemented, albeit recognising that not every recommendation it puts forward will be implemented. There have been instances in the consultation process where REINSW's recommendations and comments have been taken on board as well as instances in which they were not. There have also been instances where recommendations or changes proposed by REINSW, which it feels would be beneficial for the industry, have taken some time to implement or gain traction. REINSW recognises that Government is balancing the needs and views of multiple different stakeholders and the community on any particular issue, and has its own internal agendas and priorities, however,

Question 5 of the discussion paper asks for examples of where stakeholders' perspectives were considered in the consultation process, or where they were not, and a few examples are set out below:

- REINSW welcomed the transitional period which was granted to the industry via a Statement of Regulatory Intent when the new *Property and Stock Agents Regulation 2022* (NSW) commenced. This grace period, which took an educational approach to compliance for the first 6 months, allowed industry time to familiarise themselves with the changes to this key piece of legislation and to update agency practices and procedures to ensure compliance over an extended period, without fearing immediate penalties. Transitional periods are particularly important for small businesses who have fewer resources to become aware and educated on the reforms, and to implement them in a short space of time. REINSW believes that industry would benefit from a similar transition period when Government introduces reforms which affect small real estate businesses.
- REINSW has long lobbied for a prescribed retail lease which it believes would support small retail businesses and reduce disputes in the retail leasing sector by:
  - Providing clarity and consistency about how key terms of the lease are to be interpreted, therefore, avoiding miscommunications or different interpretations of the same provisions.
  - Making it easier for lessees (who are often small businesses and lack experience dealing with legalised filled documents) to understand their rights and obligations under a lease. Current leases often vary in length and may be excessively long, may be filled with legal jargon and there might be provisions in the *Retail Leases Act 1994* (Cth) deemed to be included of which parties are unaware.
  - Reducing the NSW Civil and Administrative Tribunal's (**NCAT**) caseload. Disputes are less likely to arise where parties clearly understand the terms of the lease and their rights and obligations. Parties would also be able to reference previous NCAT decisions about provisions of a prescribed retail lease when negotiating solutions between themselves.

REINSW has been lobbying for this reform for more than a decade because of the benefits a prescribed or (at the very least) standard lease would have for the retail leasing sector, especially for small businesses. REINSW is pleased that there has been some traction in relation to the proposal and would encourage Government to implement the recommendations it made last year in the Small Business Commissioner's Report on the Review of the *Retail Leases Act 1994* dated July 2023 in relation to such a lease, as soon as possible to help reduce costs and disputes and to streamline the leasing process for small businesses in the retail sector. REINSW has previously lodged a number of submissions which address its comments and recommendations in relation to a prescribed retail lease and which it can provide to Government, if required.

**REINSW recommends:**

- updating stakeholders about the outcome of the consultation process (for example, by way of a report which addresses reoccurring themes, recommendations and why

certain proposals have, or have not, been implemented). REINSW notes that this practice already occurs in some consultation processes and welcomes this feedback when provided. In relation to small businesses specifically, this update would help them to understand how their concerns have been addressed and, for stakeholders representing small businesses interests, helps to inform the issues to continue to lobby in any subsequent consultation.

- implementing an internal log or register (if Government doesn't already have one) or some other method to keep track of issues raised in consultation which have merit, but which are unable to be addressed immediately. This would allow such issues to be re-evaluated at a later stage – for example, when legislation or regulations are reviewed.

## 4. Reducing the regulatory burden for small businesses

**REINSW supports, in principle**, the proposal of a Small Business Impact Statement. REINSW encourages Government to focus on, and support, small businesses when implementing reforms and believes that the Small Business Impact Statement could be a transparent way to ensure that their needs and potential impacts were considered and addressed during the policy development process.

REINSW's view is that it is important that proposed reforms consider the needs of small businesses as well as the impact such changes might have on them. **REINSW recommends** that Government (regardless of which party is implementing reforms) has regard to the following matters when considering the impact that regulatory proposals might have on small businesses more generally, but especially on small real estate businesses:

- **Compliance costs:** There are costs involved in complying with, and implementing, any type of reforms. These compliance costs especially impact small real estate businesses who generally have fewer resources and might have a smaller turnover. For example, there will be significant compliance costs associated with the proposed anti-money laundering and counter-terrorism financing laws (**AML CTR Reforms**). As proposed, these proposed reforms, which will apply to real estate professionals as “tranche 2 reporting entities”, will require risk assessments, customer due diligence (**CDD**) and reporting obligations on top of agencies' current compliance and supervisory requirements and day-to-day business and revenue making activities that are required to survive in the market. Many agencies will need to implement a full-time compliance officer to make sure that they stay on top of their increased compliance obligations when resources are already limited. This is a substantial compliance cost for small businesses as a result of Government reforms (in this case, federal reforms). **REINSW recommends** that before implementing any reforms, Government considers the compliance costs associated with the proposed reforms, how they will impact small businesses, ways to minimise this impact and whether any funding is available to assist small businesses with implementation.
- **Complexity:** **REINSW recommends** that Government should consider how to make compliance with proposed reforms and existing regulatory policy frameworks less complex. In the property industry, real estate businesses are expected to navigate compliance with different legislative frameworks at a state and federal level (the proposed AML CTF Reforms being one example of compliance obligations at a federal level). Requirement 2.1.3(c) of NSW Fair Trading's Supervision Guidelines requires licensees in charge of real estate businesses to identify, as part of their operational

procedures, a long list of state and federal legislation relevant to the conduct of agency business. Real estate businesses, particularly small agencies who might be operating with minimum staff and do not have a dedicated compliance officer available, are not lawyers and work in a fast-paced industry so find it difficult to stay on top of, and up to date, with the volume and complexity of legislation applicable in practice. This is especially so when different frameworks have potentially inconsistent obligations. For example, the AML CTF Reforms proposes that real estate agents should undertake CDD on buyers as well as sellers whereas section 48 of the *Property and Stock Agents Act 2002* (NSW) prohibits agents from acting for both the buyer and seller at the same time - potentially placing agents in a position of conflict. Further, NSW Fair Trading's Supervision Guidelines require real estate businesses to keep a record of having sighted the identity documents of their clients whereas the AML CTF Reforms require all verification of identity documents to be kept on file. REINSW is concerned that these inconsistencies in legislative frameworks adds to the complexity of the legislation with which small businesses are required to comply.

- **Transitional periods:** Providing industry with transitional periods (such as an extended commencement period or a Statement of Regulatory Intent where an educational approach is taken to compliance for a designated timeframe) can help small real estate businesses to implement new reforms. Small real estate businesses generally don't have a designated employee tasked specifically with ensuring compliance and might have just a few employees who "wear many hats". As such, they would benefit from an extended implementation period whereby they could learn about, and apply, changes, without fear of immediate penalties and with minimum disruption to day-to-day business and agency practice.
- **Education:** it is important that reforms are accompanied by educational resources so that small real estate businesses clearly understand the changes, how they impact them and the changes they need to make to their businesses to ensure compliance.
- **Pace of reforms:** *REINSW supports* reforms which seeks to lift the professional standards of the property industry. However, *REINSW also recommends* that Government considers the pace at which changes to regulatory policy frameworks take place. The property industry has seen widespread changes to the legislative landscape in the past few years and, while REINSW recognises the importance of many of the changes which have been made, it acknowledges that real estate businesses need time to breathe and adjust to each reform that has commenced so that they can become familiar with what they need to do to comply with their new legislative obligations. REINSW has recently received feedback at its industry Roadshows that agents are experiencing "change fatigue" and REINSW's view is that the pace at which all of these reforms have been rolled out has made it difficult for the property industry to understand and implement the different developments in this space. This is especially relevant to small real estate agencies (and REINSW believes, small businesses, more broadly) who have fewer resources available to ensure that they stay on top of, implement and comply with, constant reforms.
- **Collaboration and funding for industry bodies:** Small businesses often turn to peak industry bodies such as REINSW (or equivalent organisations in other industries) to understand and comply with new reforms. For example, REINSW already helps agents and real estate businesses meet their day-to-day compliance obligations and supervisory obligations by providing resources, such as template forms and agreements and its Supervision Guidelines Template (which helps agents create their

own operational procedures, as required by the Supervision Guidelines). **REINSW recommends** that when new property-related reforms are proposed, Government work closely with REINSW to develop and design industry resources or to provide funding to help prepare training courses and materials or educational resources, which can support small real estate businesses in meeting their compliance obligations under the reforms.

## 5. Summary

In summary, **REINSW recommends:**

- so far as possible, involving small business stakeholders and the property sector in all stages of the consultation process;
- leaving the consultation process open for as long as possible for maximum stakeholder engagement;
- making it as easy as possible for small businesses to give feedback on proposed reforms;
- that where multiple versions of the same document are provided to stakeholders as part of the consultation process (for example, different iterations of draft legislation), Government should clearly identify the changes it has made to these re-issued versions;
- Implementing the recommendations Government made last year in the Small Business Commissioner's Report on the Review of the *Retail Leases Act 1994* dated July 2023 as soon as possible as small businesses would benefit from a prescribed or (at the very least) a standard, retail lease;
- updating stakeholders about the outcome of the consultation process (for example, by way of a report which addresses reoccurring themes, recommendations and why certain proposals have, or have not, been implemented);
- implementing an internal log or register (if Government doesn't already have one) or some other method to keep track of issues raised in consultation which have merit, but which are unable to be addressed immediately. This would allow such issues to be re-evaluated at a later stage;
- supports, in principle, the proposal of a Small Business Impact Statement; and
- that Government consider the following matters when considering the impact that regulatory proposals might have on small businesses more generally, but especially on small real estate agencies:
  - compliance costs associated with proposed reforms, how these will impact small businesses and ways to minimise this impact;
  - consider how to make compliance with proposed reforms and existing regulatory policy frameworks less complex to make it easier for small real estate businesses to understand and meet their compliance obligations;

- whether a transitional period can be provided to give small businesses time to familiarise themselves with the proposed reforms and implement changes over a longer period of time;
- ensure reforms are accompanied by educational resources so that small businesses clearly understand the changes, how these changes impact them and what they need to do to adjust and comply;
- consider the pace at which changes to regulatory policy frameworks take place to allow small businesses more time to breathe and to avoid “change fatigue”; and
- collaborate with, and provide funding for, industry bodies (such as REINSW) who can help small businesses understand and comply with new reforms. REINSW recommends that when new property-related reforms are proposed, Government work closely with REINSW to develop and design industry resources or to provide funding to help prepare training courses and materials or educational resources, which can support small real estate businesses in meeting their compliance obligations under the reforms.

## 6. Conclusion

REINSW has considered the Discussion Paper and has provided its comments above, aiming to provide input on as many pertinent aspects of the Discussion Paper as possible. However, REINSW’s resources are very limited and, accordingly, it does not have the capacity to undertake a thorough review and is unable to exhaustively investigate all potential issues in this submission. Nonetheless, REINSW has identified a number of matters that it believes will cause significant consumer detriment, some of which appear above.

REINSW appreciates the opportunity to provide this submission and would be pleased to discuss it further, if required.

Yours faithfully



Tim McKibbin  
**Chief Executive Officer**