

The Real Estate Institute of New South Wales Limited

Submission on the *Water Markets Intermediaries - Code and Statutory Trust Accounting regulations Policy Proposal Paper*

22 August 2024

To: The Department of Climate Change, Energy, the Environment and Water
By email: water.markets@dcceew.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 *Water Markets Intermediaries -Code and Statutory Trust Accounting regulations Policy Proposal Paper (Proposal 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. In doing so, REINSW plays a substantial role in the formation of regulatory policy in New South Wales.

This submission outlines issues and recommendations for Government to consider in relation to the Proposal Paper.

2. General Comments

It is important to note that REINSW's feedback in this submission addresses the issues raised in the Proposal Paper from the perspective of the current legislative framework governing real estate agents, and the current water trading practices in New South Wales but recognises that this is a mandatory national Water Markets Intermediaries Code (**Code**) affecting different jurisdictions.

REINSW supports, in principle, the regulation of water market intermediaries to ensure effective and efficient water trading while preserving the integrity of transactions. However, many water market intermediaries are real estate agents (for instance, stock and station agents) who are already subject to the requirements of the *Property and Stock Agents Act 2002* (NSW) (**PSA Act**) and *Property and Stock Agents Regulation 2022* (NSW) (**PSA Regulation**). Accordingly, REINSW's position is that real estate agents should be exempt from compliance with the Code and statutory trust accounting framework on the basis that there is already a well-established legislative framework in place which governs issues addressed in the Proposal Paper (for instance, trust accounting, complaints handling and conflicts of interest requirements). Since these types of water market intermediaries must already comply with an existing regulatory framework, **REINSW opposes** dual regulation of real estate agents and **recommends** that they be exempt from compliance with the Code and the statutory trust accounting framework. REINSW refers Government to its response to "Feedback #1" in the Proposal Paper, which is outlined in the table below. In the event Government does not adopt REINSW's position to exempt real estate agents, then REINSW is of the view that there should be no cross-over of, or inconsistent, obligations between the Code and the PSA Act and PSA Regulation, and that the latter must prevail to the extent of any such cross-over or inconsistency.

REINSW supports, in principle, all other water market intermediaries who trade water and are not appropriately regulated to trade water, having to comply with the Code and the statutory trust accounting framework. **REINSW also recommends** that these water traders should be governed by a licensing regime with requirements to complete continuing professional development (**CPD**), in the same way as real estate agents are licensed and required to complete CPD. REINSW's concern is that there is no certificate IV or training for such water traders at the moment, permitting them to trade millions of dollars in water without

any qualification, licence, experience or knowledge. REINSW is of the view that this practice needs to be rectified with regulation.

3. Specific Comments

REINSW sets out the following issues, positions and recommendations for consideration by the Department of Climate Change, Energy, Environment and Water (**Government**), in an effort to ensure that water markets in New South Wales are properly regulated:

(a) REINSW's view is that there needs to be a more rigorous framework around water trading in a similar way to a property transaction. Issues experienced in practice include:

(i) **No prescribed timeframes:** currently a real estate agency might hold 100% of the funds for the water transaction on trust without a prescribed end date for holding these funds – as this end date depends on approval or registration by Water NSW which has an arbitrary timeframe ranging from 6 days to 6 months.

(ii) **Delays to property settlements:** Often water is transacting with a property but the contract for sale for water will be different from the contract for sale of the property. There can be delays to the settlement process if the sales transaction has finalised but the water transaction has not.

REINSW's view is that it would be helpful for the Basin State agency to have a trust account and property settlement platform similar to PEXA. The Code should include a definition of "settlement period" and that this settlement period should reflect the same timeframe as a sales transaction (i.e. 42 days).

(b) It is a prohibition under the PSA Act for licensed real estate agents to share commissions with an unlicensed person.

(c) It is REINSW's view that an intermediary providing non-brokerage services (eg. a water exchange) would always act as an agent on behalf of their client. Therefore, the intermediary should be required to act in the best interest of their client and communicate to them all buy and sell offers made. These requirements are covered in the PSA Act and PSA Regulation.

(d) With respect to Proposals 6-11 in the Proposal Paper, real estate agents are already required to comply with rules of conduct set out in Schedule 1 to the PSA Regulation (including, without limitation, to act in the client's best interest, act with care and skill and in accordance with the client's lawful instructions). There is also a duty not to act on behalf of both the buyer and seller in any one transaction. Furthermore, agents have fiduciary duties to their clients such that they should be exempt from the proposed Code and statutory trust obligations. In addition, REINSW notes the blanket prohibition in Proposal 11 whereby water market intermediaries are prohibited from trading or transferring water if they, or a related

party, has an interest in the tradeable water right. **REINSW recommends** that this potential conflict of interest could be dealt with in the same way as the PSA Act with prescribed disclosures.

- (e) REINSW's position is that generally an intermediary should only be obliged not to follow client instructions where it would breach an overarching law but in the absence of that they should follow client instructions. If the intermediary was a stock and station agent, as above, they would be subject to the PSA Act, which imposes certain obligations on agents (such as disclosure obligations under section 47 of the PSA Act). REINSW's view is that any water intermediary should also be subject to disclosure obligations equivalent to section 47. For instance, there might be a reference in the Code to section 47 with respect to real estate agents.
- (f) A water exchange should always have to disclose multiple fees/commissions received from trades matched through that water exchange to users of the exchange – notwithstanding that it is common industry practice for both the seller and buyer to pay the agent.
- (g) With respect to Proposal 12 in the Proposal Paper, real estate agents are already required to enter into agency agreements which must include certain information required by the PSA Act and PSA Regulation. **REINSW recommends** that Government should determine whether agents are sufficiently governed in this respect as there should be no duplication or inconsistencies. In addition, REINSW believes that intermediaries should be required to have a warning on any agreement that they have with their client to the effect that “selling water can significantly impact the value of your land”.
- (h) REINSW's position is that the Code should impose a restriction on intermediaries from providing financial and taxation advice to clients. This prohibition already exists under the PSA Act and PSA Regulation for real estate agents.
- (i) With respect to Proposal 13 in the Proposal Paper, REINSW's position is that an intermediary should inform a client of reasons for a water market authority rejecting or delaying the processing of an application within 10 days of the intermediary becoming aware of these reasons or notice has been issued – noting that stock and station agents can be out of mobile range for days in rural areas.
- (j) With respect to Proposal 14 in the Proposal Paper, REINSW notes that real estate agents are governed by the requirements of proper supervision pursuant to section 32 of the PSA Act and that the NSW Fair Trading Commissioner has issued Supervision Guidelines for agents to comply with that already requires them to have certain complaints handling procedures in place. Therefore, stock and station agents already need to comply with their agency's complaints handling procedures as required by the Supervision Guidelines. There should be no contradiction between the Supervision Guidelines and the Code and **REINSW recommends**

that Government should check to see whether agents are already sufficiently regulated in relation to complaints handling by virtue of the Supervision Guidelines.

- (k) With respect to Proposal 15 in the Proposal Paper, REINSW notes that the obligation to hold written authorities to submit trades for approval on behalf of clients is effectively an authority to exchange which agents are already subject to – just with slightly different wording.
- (l) In relation to the professional indemnity insurance coverage in Proposal 18 of the Proposal Paper, REINSW's position is that \$5 million would not be appropriate coverage. Water trades and irrigatable property are high value transactions and very few of them are under \$5 million. If something were to go wrong with the transaction there is a lot of money involved. **REINSW recommends** that Government obtain and evaluate statistics on the average value to determine the appropriate level of coverage. At this stage, REINSW understands from members of its Regional Advisory Committee that \$20 million would be sufficient.
- (m) As abovementioned, many intermediaries trading in water are licenced real estate agents who already operate within the framework of the PSA Act and PSA Regulation. REINSW notes that they already have record keeping obligations under this legislation (some of which are different to that in the Proposal Paper). With respect to Proposal 19 in the Proposal Paper, **REINSW recommends** that licensed real estate agents who sell property or water should be exempt from the Code. If Government does not support this position, **REINSW recommends** (although less favourably) that agents should be governed by a Code that either reflects the obligations in the PSA Act and PSA Regulation with respect to record keeping (including financial and accounting related records) to avoid inconsistency or it should refer real estate agents to the PSA Act and PSA Regulation with respect to record keeping. In particular, REINSW's view is that the timeframes in the Code for keeping records should reflect the timeframes required under the PSA Act for consistency and to avoid confusion.
- (n) In relation to the Code requiring client and trade related records to be kept, Government should review the temporary trade Water NSW form which includes proposed details (eg. client details – name, address, phone number, email address). Permanent trades should go through a solicitor. It would be unreasonable for the Code to include the requirement to keep the client and trade related records listed in the *Code and Statutory Accounting Regulations Discussion Paper*.
- (o) With respect to trust accounting procedures and Proposals 20 and 21 in the Proposal Paper, real estate agents are already sufficiently governed by the statutory trust account framework in the PSA Act and PSA Regulation. The relevant provisions in this legislation are equivalent in substance to the proposed statutory trust accounting framework for water markets intermediaries. They include requirements for agents when receipting, holding and disbursing trust money,

requirements to audit trust accounts and mandatory reporting obligations on licensees and industry associations in relation to a defalcation of trust money. Further, there is no need for agents to have a separate trust account as they could use their already existing sales trust account. Therefore, **REINSW recommends** that real estate agents be exempt from compliance with the proposed Code and statutory trust accounting framework. If Government were not to adopt REINSW's recommendation, **REINSW further recommends** (although less favourably) that any trust accounting schemes in the Code (including the requirements for trust account statements) should be equivalent to, consistent with, and reflective of the PSA Act and PSA Regulation. For instance, the Code should reflect the same naming convention prescribed by the PSA Act to ensure that there are no inconsistencies. It is REINSW's view that agents should not have to open a separate trust account so as to comply with the Code when their existing trust accounts comply with their well-established governing legislation. Essentially, REINSW believes that the Code should not apply to real estate agents but should apply only to those water market intermediaries not already appropriately regulated by equivalent legislation.

- (p) REINSW's position is that often water transactions are one off activities so it is reasonable for intermediaries to provide clients with a statement from their client ledger account at the conclusion of each trade, or upon the client's request. REINSW is of the view that it is not necessary to provide such a statement each financial year.
- (q) In relation to an auditor's report, any prescribed inclusions by the Code should be reflective of, and consistent with, the requirements in the PSA Act so that it doesn't accidentally cause a separate trust account to be required.
- (r) REINSW is of the view that the Code should also apply to Victorian rural water corporations.
- (s) The penalties for a contravention of a civil penalty provision of the Code should be equivalent to such penalties in the PSA Act and PSA Regulation.
- (t) **REINSW recommends** that Government should issue guidelines to industry on how to obtain an accurate market price for a water access licence. REINSW understand that currently agents work off fairly loose price estimates.

The following table sets out REINSW’s position in response to the three points of feedback in the Proposal Paper that Government seeks input on:

<p>Feedback point #1</p>	<p>REINSW is of the view that the Code should not apply to regulated persons, such as real estate agents, conveyancers or solicitors, who are providing intermediary services (such as preparing documents necessary for trade or transfer) in relation to eligible tradeable water rights, where the trade or transfer of the rights is or will be part of a sale or transfer of land, with the same purchaser/transferee.</p> <p>The PSA Act already imposes strict obligations on real estate agents that are equivalent to those proposed in the Code, including (without limiting):</p> <ul style="list-style-type: none"> • disclosure obligations under section 47 of the PSA Act; • duty not to act for both buyer and seller under section 48 of the PSA Act; • restrictions on obtaining a beneficial interest under section 49 of the PSA Act; • complaints handling requirements in the Supervision Guidelines issued by the NSW Fair Trading Commissioner pursuant to section 32(4) of the PSA Act; • requirements in relation to trust accounts in Part 7 of the PSA Act; • record keeping requirements in Part 8 of the PSA Act; and • general conduct requirements set out in Division 2 of Part 2 of the PSA Regs and Schedules 1-4 to the PSA Regulation. <p>It is important to note that whether water is attached to the sale of property is dependent on the buyer, not the seller. Often a buyer agrees to purchase a property but without the water (as they may not have the funds or desire) or they may elect to buy the property and water under separate and potentially unrelated entities. This will require two separate buyers, a contract for sale of land and a separate contract for sale of water, and two separate auctions (one for the property and one for the water). Essentially, the buyer of the water is unknown until the end of the process – so it is the buyer who determines whether the water is sold with the land or not. Therefore, it is too difficult and onerous for agents to comply with the Code when they won’t know whether they are trading water until the very end of the sale process. REINSW is concerned that to require them to do so will set them up to fail, which is an unreasonable expectation in the circumstances.</p>
<p>Feedback point #2</p>	<p>REINSW’s position is that generally an intermediary should only be obliged not to follow client instructions where it would breach an overarching law, but in the absence of that they should follow client instructions. Agents are already captured by this requirement by section 9 of Schedule 1 to the PSA Act.</p>

Feedback point #3	REINSW believes that there is no need for a requirement to disclose enforcement outcomes if there is a central register of enforcement actions taken which the public can search. This is similar to the requirements applying to real estate agents and lawyers.

4. Conclusion

REINSW has considered the Proposal Paper and has provided its comments above, aiming to provide input on as many pertinent aspects of the Proposal 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