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Mr Peter Cain MLA

Chair

Standing Committee on Justice and Community Safety (Legislative Scrutiny Role)

ACT Legislative Assembly

GPO Box 1020

CANBERRA ACT 2601

By email: scrutiny@parliament.act.gov.au

Dear Mr Cain

I refer to the Standing Committee on Justice and Community Safety (Legislative Scrutiny Role) Scrutiny Report 15 of 27 April 2022 in which the Committee made comments on amendments contained in the Fair Trading and Other Justice and Legislation Amendment Bill 2022 (the Bill), which was introduced in the Legislative Assembly on the 7 April 2022.

The comments relate to possible retrospective application of criminal laws, the inclusion of a Henry VIII clause and the displacement of section 47(5) and section 47(6) of the *Legislation Act 2001*. I address each of these issues below.

Retrospective criminal laws

As the Committee notes, the amendments to the *Agents Act 2003* (Agents Act) and *Agents Regulation 2003* (Agents Regulation) will commence on 1 July 2022. These amendments include a range of strict liability offences which support the enforcement of a new licensing scheme as provided for in the Bill.

I note the Committee's concern that the fixed date of commencement may result in the retrospective operation of the Bill, including the retrospective application of new strict liability offences, and as such may limit the right against retrospective criminal laws provided for in section 25 of the *Human Rights Act 2004*.

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The amendments to the Agents Act and Agents Regulation are intended to establish a licensing framework which supports the implementation of the National Real Estate Training Package (NRETP). As part of the development of the NRETP, all states and territories agreed to implement the new training requirements by a certain date. The fixed commencement date of 1 July 2022 aligns with the extended transition period provided by the Australian Skills Quality Authority (ASQA) to registered training organisations delivering training to ACT participants.

The ACT Government engaged extensively with Real Estate Institute of the ACT (REIACT), registered training organisations and the broader real estate industry throughout the development of the Bill. As part of this engagement, the industry indicated that to adequately prepare for the reforms, they required certainty on the timing of the commencement of the new licensing framework and transitional measures. The fixed commencement date supports the industry with forward planning in relation to upskilling staff. The fixed dates for the expiry of transitional measures also simplify the transition period as it aligns with the processing of agent licences in the Territory.

I note that the Bill was developed in anticipation of passage prior to 1 July 2022 and I do not anticipate any retrospective application of the strict liability offences. However, should the Bill not pass prior to 1 July 2022, there are mechanisms available to adjust the commencement date to ensure no retrospective application of the strict liability offences, such as the bringing forward of Government amendments to the Bill.

Henry VIII

The Committee also sought clarification on why it is necessary to include new section 238 which allows for the creation transitional regulations.

As highlighted above, the Government has undertaken significant consultation with REIACT and the real estate industry throughout the development of the Bill. Feedback by the industry has been extremely valuable in ensuring the amendments support improved outcomes for not only the broader community but also real estate professionals. While care has been taken to include adequate transitional measures in Part 22 of the Bill, due to the complexity of the reforms and industry's breadth of services there remains a risk of unforeseen consequences during implementation that could negatively impact a person's right to work.

The inclusion of the transitional regulation-making power also responds to lessons learned from other jurisdictions which undertook similar reforms. Key stakeholders advised that some transitional issues did not emerge until implementation was under way and that greater flexibility in the legislation would have been preferred so that transitional issues could have been quickly addressed.

Noting the foregoing and the need to implement the NRETP by 1 July 2022, I consider the inclusion of new section 238 to be a necessary and appropriate safeguard to ensure the Government can quickly and flexibly address any unforeseen issues that may arise.

The key alternative approach to addressing an unexpected implementation issue would be a further amendment bill. As you will appreciate, the development and passage of an amendment bill can be time consuming, resulting in a delay between the identification of an issue and action to remedy the issue. Noting that such an issue could impact on the ability of a real estate professional to work, this approach, with its risk of delay, was not preferred.

Displacement of section 47 (6) of the Legislation Act 2001

The Bill provides the Commissioner for Fair Trading with the power to declare, via disallowable instrument, the experience and education requirements for the real estate industry in the ACT. As part of this declaration, the Commissioner may incorporate a law of another jurisdiction or instrument as needed. The express displacement of subsections 47 (5) and 47 (6) mean that any incorporated law or instrument does not need to be notified on the legislation register.

The Committee has requested further information on why it is appropriate to displace notification requirements for any incorporated laws or instruments.

I acknowledge the Committee's concern that the displacement of subsections 47 (5) and 47 (6) may result in changes to licensing and renewal requirements without notice of the detail being given to via the ACT Legislation Register.

I can confirm that the Territory does not intend to incorporate the law of another jurisdiction or other instrument under the declaration at this time. However, these provisions have been included as a future-proofing measure should a more universal approach to real estate licensing across jurisdictions be taken in the future. For example, a declaration could refer to Commonwealth materials for the relevant training courses, which are readily available on the [Training.gov.au](https://www.training.gov.au) webpage.

The displacement of notification is not intended to circumvent notification to those impacted and would only be used in circumstances where the material referred to is readily available. A key intention of the reforms is to build a highly skilled real estate workforce which meets the needs of the community. Keeping those in the industry aware of their licensing obligations is key to achieving this goal. It is standard practice that information on the licensing requirements for an occupation is available to the relevant industry through a variety of avenues such as engagement with peak bodies and publication on the Access Canberra webpage. Should an instrument be incorporated under the declaration in the future, notification would be provided to those affected, having regard to such established communication channels.

Thank you for your consideration of the Bill. I trust the information above is of assistance to the Committee.

Yours sincerely

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