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## Application by New Zealand Institute of Forestry

### 1 Introduction

- 1.1 Thank you for your email of 26 May 2016. The New Zealand Law Society appreciates the opportunity to comment on the application of the New Zealand Institute of Forestry (NZIF) for exemption for its registered members (RMs) from the requirement to be licensed under the Real Estate Agents Act 2008 (REAA).
- 1.2 The Law Society refers to the stakeholder consultation document provided by you dated 26 May 2016 (Stakeholder Consultation), which sets out the framework for evaluating the exemption application, the scope of the application from NZIF and the Ministry's preliminary view on the NZIF application.
- 1.3 As noted in the Stakeholder Consultation, in order to grant an exemption to certain persons under section 156 of the REAA, the Minister of Justice must be satisfied that:
  - a there is no material consumer benefit to be gained by requiring the person or class of persons concerned to be licensed; and
  - b there are sufficient processes in place to ensure competent and ethical conduct on the part of that person or those persons.
- 1.4 The Law Society raises the following issues or concerns in relation to the NZIF application and the matters set out in the Stakeholder Consultation.

### 2 Memorandum of Understanding

- 2.1 In the Stakeholder Consultation it is stated that the Ministry envisages entering into a Memorandum of Understanding (MOU) with NZIF prior to the exemption being approved.
- 2.2 This is because terms and conditions imposed in relation to an exemption would bind the individuals concerned rather than NZIF.
- 2.3 Since the terms and conditions will be included in the Regulations granting the exemption, they will be available to the public. However, this will not necessarily be the case with the MOU. Accordingly, the Law Society suggests that the terms of the MOU should also be made public in order to enable consumers to be aware of all their rights when dealing with RMs.

### **3 Structure**

- 3.1 There is a substantive difference between the regulation of real estate agents and that of RMs.
- 3.2 Real estate agents are governed by legislation, namely the REAA and the regulations made under that Act. This legislation may be varied or amended only by the legislature.
- 3.3 On the other hand, RMs are governed by the rules of NZIF. These rules may be amended by a two-thirds majority of full voting members at an annual general meeting of the NZIF.
- 3.4 Appendix 1 of the Stakeholder Consultation (at Item 6.1) states that there is no material difference between the nature of the regulator of real estate agents, namely the Real Estate Agents Authority, and the NZIF. The Law Society questions this. The Real Estate Agents Authority is created and governed by statute whilst the NZIF is an incorporated society.
- 3.5 In these circumstances, the Law Society submits that the MOU should provide that the NZIF will not amend its Rules or its Code of Ethics in any respect which affects RMs (including their obligations and responsibilities) unless the changes have the prior approval of the Minister.

### **4 Consumer protection**

- 4.1 The Law Society submits that although the NZIF Rules and Code of Ethics do provide for various consumer protections, they are not specific enough in relation to the following matters.
- 4.2 *Defects in land*
  - a Under Rule 10.7 of the Real Estate Agents Professional Conduct and Client Care Rules (REAA Rules), real estate agents have an obligation to disclose known defects in land and in certain circumstances to make enquiry in respect of hidden or underlying defects.
  - b The Stakeholder Consultation (at Item 4.2 of Appendix 1) states that this obligation is covered by the NZIF Code of Ethics at 1.1, 1.2 and 1.6. However, the Code of Ethics does not specifically state that land defects must be disclosed. It states that (among other things) members must not prepare or certify a statement that is false, incorrect, misleading or deceptive, and that they must uphold the reputation of the Institute and practice their profession with devotion to high ideals of integrity, honour and courtesy.
  - c The Law Society submits that the obligations under the NZIF Code of Ethics as they presently stand are not directed to disclosure of defects in land, and are open to interpretation particularly in terms of whether enquiry in respect of hidden or underlying defects would be necessary.
  - d The Law Society submits that a condition of the exemption should be that RMs have the same obligations as set out in Rule 10.7 of the REAA Rules in regard to notifying customers of known land defects and making enquiry in regard to land defects in the circumstances set out in that Rule.
- 4.3 *Price expectations*

Under Rule 9.4 of the REAA Rules, real estate agents have an obligation not to mislead customers concerning the price expectations of the client. There is no similar obligation in the Code of Ethics or NZIF Rules, except for a broad obligation to act with integrity (Code 1.9)

and an obligation not to prepare or certify a statement which is known (or ought to be known) to be false, incorrect, misleading or deceptive (Code 1.6).

#### 4.4 *Conflicts of interest*

- a The REAA provides that real estate agents must obtain the consent of their client before carrying out work if a conflict of interest may exist, and such consent must be in a prescribed form and accompanied by the relevant valuation (section 134). Although the NZIF Rules state that members must inform their clients of any conflicts of interest in writing, there are no provisions concerning the form of consent that must be received by the RMs before proceeding with the work.
- b The Law Society submits that there is a material difference between obtaining the client's consent in a prescribed form and providing the client with the appropriate valuation (as required by the REAA), and simply informing the client of the nature of any business connections, interests or other affiliations the member may have in connection with the service.
- c The Law Society submits that a condition of the exemption should be that the client's consent to carry on with the work should be effective only if it is given in the prescribed form, and in the case of a proposed sale the client is provided with a valuation by an independent chartered accountant or registered valuer, at the cost of the RM. This would better protect clients' interests and align the RMs' processes further with the REAA.

#### 4.5 *Commissions*

- a Under section 7(2) of the REAA, lawyers or conveyancing practitioners who carry out real estate agency work are not entitled to be remunerated by commission in addition to, or instead of, their ordinary professional charges. The Law Society submits that consideration should be given to imposing the same restriction on RMs. There would appear to be no principled reason why a different approach should be taken to the charging of commission by RMs on the one hand and by lawyers on the other.
- b Under the REAA, real estate agents are required to explain to prospective clients that if they enter into, or have already entered into, other agency agreements they could be liable to pay full commission to more than one agent in the event that a transaction is concluded. The Law Society submits that this requirement is not sufficiently addressed in the NZIF Rules or Code of Ethics.

### **5 Preparation of agreements for sale and purchase**

- 5.1 Agreements for the sale of land or businesses may be prepared only by lawyers, conveyancing practitioners and real estate agents: see section 35 Lawyers and Conveyancers Act (LCA), also the definition of 'conveyancing' in section 6 and the real estate agents' exemption in section 36(2). These provisions recognise the degree of expertise required in the preparation of agreements of this kind.
- 5.2 There is a limited exception in section 36(4) LCA permitting others to fill in a printed form if the form was prepared by a lawyer or conveyancing practitioner. However, this exception would not extend to the drafting of additional clauses for inclusion in the form.
- 5.3 RMs will need to be aware of the limitation on their ability to prepare agreements, and to comply with this restriction.

## **6 Independent legal advice**

- 6.1 Item 4.1 of Appendix 1 of the Stakeholder Consultation sets out a proposed condition of the exemption, in relation to independent legal advice. The proposed condition is that before a prospective client signs a contractual document, an RM must recommend that the client seeks legal advice, ensure that the client is aware that they might need to seek advice from a real estate agent or from other parties, and allow the client a reasonable opportunity to do so. The Law Society supports this proposed condition.

## **7 Disciplinary orders and complaints**

- 7.1 The NZIF Rules contain certain procedures concerning disciplinary orders and complaints. Currently the NZIF Rules do not provide for an order for compensation to be paid to customers where a customer suffers loss due to a member's conduct.
- 7.2 Page 4 of the Stakeholder Consultation states that a likely term of the MOU will require NZIF to implement a new Rule whereby, if it appears that a person has suffered loss by reason of an RM's conduct, the NZIF Complaints Assessment Committee may make a finding that the RM pay to that person a sum by way of compensation not exceeding \$100,000. The Law Society supports this proposal.
- 7.3 However, the Law Society questions whether a Rule of this kind would have the effect of imposing a binding legal obligation on an RM to pay a compensation amount ordered by the Complaints Assessment Committee. Accordingly, the Law Society suggests that compliance with a ruling of the Complaints Assessment Committee, including a compensation order, be one of the terms or conditions of an exemption.
- 7.4 It is noted that in Item 7.4 of the Stakeholder Consultation: Appendix 1, a different approach is recommended, namely that an RM must make it clear to the client that a compensation amount may not be ordered. Clearly, this procedure would not apply if the approach taken in paragraph 7.2 above is adopted.

## **8 Extent of exemption**

- 8.1 Page 3 of the Stakeholder Consultation states that an exemption for RMs would not extend to any real estate-related work that an RM might wish to undertake outside of his or her forestry work. The Law Society agrees that any exemption should be restricted to the RMs' dealings in forestry land.

## **9 Conclusion and summary**

- 9.1 The Stakeholder Consultation poses two specific questions for consideration and response.
- 9.2 Question 1 is as follows:

Where we believe there is a material difference between the regime of the Act and NZIF's regime, we have proposed terms and conditions designed to mitigate that difference. Do you agree that the proposed terms and conditions in each case are appropriate and mitigate risks to consumers and exempted NZIF registered members?

- 9.3 The Law Society considers that the proposed terms and conditions of an exemption are appropriate and should mitigate risks to consumers, but also considers that the proposal should be extended or amended in the manner set out in this letter.

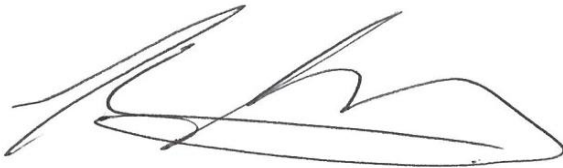
9.4 Question 2 is as follows:

Overall, do you agree, disagree or are you neutral about NZIF's application to exempt its registered members from the requirement to be licensed under the Real Estate Agents Act 2008?

9.5 The Law Society's stance is that on balance it does not favour the granting of the exemption which NZIF is seeking. The Law Society considers that the Real Estate Agents Act is a sound consumer-oriented piece of legislation and it is preferable that those engaged in real estate agency work are governed by the Act rather than by some separate regime unless in the particular circumstances there is a compelling reason why a separate regime should apply.

9.6 If you wish to discuss this submission, please do not hesitate to contact the Manager of the Law Society's Property Law Section, Katrina Thomas (04 463 2963 / [katrina.thomas@lawsociety.org.nz](mailto:katrina.thomas@lawsociety.org.nz)).

Yours faithfully

A handwritten signature in black ink, appearing to be 'Kathryn Beck', written in a cursive style.

Kathryn Beck  
**President**