



**Fair  
Trading**

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Mr George Rousos  
Director,  
Industry Training Consultants  
PO Box 2035  
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Dear Mr Rousos,

I refer to your recent emails concerning the sale of real estate by Australian legal practitioners in New South Wales. The following information is provided as a guide only and as Fair Trading does not provide legal advice, must not be relied on as legal advice. For more information please refer to the appropriate legislation or seek independent legal advice.

The *Property, Stock and Business Agents Act 2002* (the Act) regulates real estate agents in New South Wales. Real estate agents must be licensed under the Act. Section 3(1) of the Act defines a real estate agent as:

**"real estate agent** means a person (whether or not the person carries on any other business) who, for reward (whether monetary or otherwise), carries on business as an auctioneer of land or as an agent:

- (a) for a real estate transaction, or
- (b) for inducing or attempting to induce or negotiating with a view to inducing any person to enter into, or to make or accept an offer to enter into, a real estate transaction or a contract for a real estate transaction, or
- (c) for the introduction, or arranging for the introduction, of a prospective purchaser, lessee or licensee of land to another licensed agent or to the owner, or the agent of the owner, of land, or
- (d) collecting rents payable in respect of any lease of land and otherwise providing property management services in respect of the leasing of any land, or
- (e) for any other activity in connection with land that is prescribed by the regulations for the purposes of this definition.

but does not include a person who carries on business as an auctioneer or agent in respect of any parcel of rural land unless the regulations otherwise provide".

Section 8(1)(a) of the Act prohibits a natural person from acting as or carrying on the business of (or advertising, notifying or stating that the person acts as or carries on the business of or is willing to act as or carry on the business of) a real estate agent, unless the person holds a real estate agent's licence.

Section 5 of the Act provides for exemptions from the Act. In particular s. 5(2) states:

"This Act does not prevent any person for the time being entitled to practise as an Australian legal practitioner from exercising any function that, had this Act not been enacted, the person might lawfully have exercised as an Australian legal practitioner".

Fair Trading's view is:

- Section 5(2) indicates that the function must have been lawfully exercisable *as an Australian legal practitioner* ie not *as an agent generally*.
- Before real estate agents were regulated, *any person* acting as an agent could generally negotiate a sale on behalf of a principal or introduce potential purchasers to a principal. A solicitor doing so was not exercising a function *as a legal practitioner* but a function exercisable by *any person generally*.
- Section 5(2) exempts the acts of Australian legal practitioners comprised in conveyancing work which would otherwise have been caught by the definition of "real estate agent" or "real estate salesperson". Section 5(2) does not exempt Australian legal practitioners from performing the functions of a real estate agent or real estate salesperson *in general*. Rather, it only permits a practitioner to perform those functions *as such a practitioner* ie in the course of or incidental to acting as such a practitioner so that a practitioner can do conveyancing work without being subject to the regulatory regime under the Act.
- The exemption under section 5(2) does not extend to an incorporated legal practice.

Attached to your email dated 4 September 2009 was an email from Mr Peter Mericka which set out typical real estate transactions that his firm Lawyers Real Estate may undertake in Victoria. It is unlikely that the tasks numbered 1- 4, 6-7 and 9 in the email alone are comprised within the functions of a "real estate agent". A solicitor carrying out such tasks would not have to rely on the exemption under s. 5(2) of the Act.

In my view, task 8 (negotiate the sale on behalf of the vendor client) would be problematic if an Australian legal practitioner or incorporated legal practice were to carry on business in New South Wales in the same manner as indicated on the website [www.lawyersrealestate.com.au](http://www.lawyersrealestate.com.au) where it is apparent that the negotiation services provided are not in the course of or incidental to conveyancing work. The negotiation service described on the website appears to be aimed at matching the seller with a buyer and facilitating an agreement for the sale of property which will later be the subject of conveyancing work.

Similarly, task 5 (receiving contacts from potential purchasers, and putting them in touch with the vendor so that the vendor can show them through the property) may be problematic.

I am of the view that an Australian legal practitioner would have to hold a real estate agent's licence or where appropriate a certificate of registration as a salesperson under the Act if the practitioner carries out tasks 5 or 8.

With reference to Question 1 in your email, an incorporated legal practice would be required to hold a corporation licence under the Act and meet all other licensing requirements under the Act in order to act as or carry on the business of an agent selling real estate in New South Wales, as the exemption under s. 5(2) does not extend to incorporated legal practices.

There must be a licensee in charge at each place of business. Section 31 of the Act allows the Director-General to grant an exemption from this requirement. An application for an exemption can only be made in certain circumstances. Please refer to [www.fairtrading.nsw.gov.au](http://www.fairtrading.nsw.gov.au) for more information.

In response to Question 2 in your email, any Australian legal practitioner carrying out the activities of a "real estate agent" which are not activities that are in the course of or incidental to conveyancing work, must be licensed under the Act and comply with the Act.

Similarly, any employees of any Australian legal practitioner or of an incorporated legal practice, who carry out the activities of a "real estate agent" or "real estate salesperson", which are not activities that are in the course of or incidental to conveyancing work, would have to be licensed or hold a certificate of registration as a salesperson under the Act.

Yours sincerely,



**Robert Guthrie**  
**A/Manager, Licensing**

8 October 2009

