

***Complaints Register Guidelines Review:
Issues Paper***

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

25 May 2018

To:
Complaints Register Guidelines Review
NSW Fair Trading
complaintsregister@finance.nsw.gov.au

- **Introduction**

This submission has been prepared by The Real Estate Institute of New South Wales Limited (**REINSW**) and is in response to the Issues Paper on the Complaints Register Guidelines Review dated April 2018 (**Issues Paper**), issued by NSW Fair Trading (**NSWFT**) on 1 May 2018.

REINSW is the largest professional association of real estate agents and other property professionals in New South Wales. REINSW seeks to promote the interest of its members and the property sector on property-related issues and, in doing so, REINSW has a substantial role in the formation of regulatory policy in New South Wales.

- **Background**

In 2015, REINSW made two submissions in response to the Consumer Complaints Register Discussion Paper, both of which are **enclosed** with this submission. REINSW wishes to reiterate that it maintains its stance on the Consumer Complaints Register (**Register**) as set out in its previous submissions and makes this submission as a supplemental and additional submission, noting that most issues discussed in the previous submissions have not been resolved and remain topics for discussion in this year's Issues Paper.

REINSW continues to support, in principle, the concept of the Register and the intention to provide consumers with open and transparent information about traders/providers of goods and services. However, the object of providing clear, accurate and transparent information is not being met with the current Register. Rather, it is REINSW's view that the Register provides consumers with misleading and confusing information, encouraging and enabling consumers to make incorrect decisions and preventing them from making informed choices and using valuable traders.

In its previous submissions and in this submission, REINSW proposes practical strategies to ensure the provision of accurate and transparent data as well as to promote procedural fairness for traders who are the subject of a complaint or dispute.

- **Information appearing on the Complaints Register**

1. ***How relevant is the information published on the Register?***
2. ***What sort of improvements to the information on the Register would you suggest?***

The Issues Paper highlights that the Register accords with the NSW Government's open data policy, helping "*consumers make informed decisions about which businesses to transact with and provides an incentive for businesses to deliver better customer service*". Unfortunately, REINSW has heard too many examples confirming that the current administration of the Register achieves quite the opposite outcome.

The current information appearing on the Register fails to provide context for the circumstances surrounding the complaints made. For example, consider these situations which are based on true stories:

- (a) A tenant makes a complaint to NSWFT regarding the services of their agent because they have discovered that the property they live in is 'possessed by evil spirits'. This complaint made on the basis that the agent failed to provide this information to the tenant, dismissing it as absurd, caused concern to the superstitious tenant who believed it was a material fact. Whilst it would appear on the Register, there are many consumers who may not see these circumstances as justification for not using the specific agent. Yet, the agent appears on the Register without any context surrounding the complaint, tarnishing their reputation and affecting their business.
- (b) A tenant makes a complaint to NSWFT regarding the services of an agent but when the complaint is investigated it turns out that the tenant was difficult to deal with and had actually stopped paying rent, causing the agent to pursue legitimate avenues to mitigate loss that the tenant did not like, hence the complaint made against the agent.
- (c) A tenant makes a complaint to NSWFT regarding the services of an agent but when the complaint is investigated it is evident that the tenant is disgruntled because the bond was legitimately not returned to them, the Register being used as a vehicle to express the tenant's frustration and anger at the situation.

If consumers are not provided with the details on the context of the situation, they may be misled to believe that a specific trader provides inadequate services due to a complaint that is entirely subjective. Providing a context prevents the Register from being used as a tool for disgruntled consumers to seek revenge on traders and provides clarity to those consumers seeking a reliable and valuable trader.

REINSW proposes that the Register have the ability for traders to have a right to reply to the complaints made against them. This would provide further context to the circumstances and ultimately benefit consumers. Since complaints have consequences on traders and their businesses, it is only fair that they are given the opportunity to respond to allegations made against them. This is particularly so in Australia where there is a presumption of innocence until proven guilty. To deny traders of that opportunity equates to a denial of natural justice. Essentially, considering complaints carry with them a negative connotation, if accused, traders should have a valid right of reply.

In further support of the need for context, the Register should have regard to the size of the businesses being complained about. As emphasised in REINSW's previous submission dated 28 October 2015, it is no surprise that larger businesses with more consumers face more complaints compared to small traders. Essentially, REINSW is concerned that the inability of the Register to have regard to such information causes confusion and misleads consumers if they do not understand the nature of the structure and business size of the trader.

In July 2017, Ray White made a formal access application under the *Government Information (Public Access) Act 2009* (NSW) (**GIPA**) which revealed that although Ray White represents more than 10% of the market share, they were responsible for approximately 5.8% of complaints on the Register. The importance of having regard to the size of the business and market share puts complaints into perspective. The same can be said about franchise groups in general because it was revealed that Ray White is broadly in line with the other franchise groups on the Register in terms of share of complaints. The franchise groups named on the Register hold approximately 50% of the market share yet are only responsible for 21% of all

complaints. The inclusion of this kind of information or context will allow consumers to differentiate from traders that have a disproportionate number of complaints when compared to the size of the business itself or their market share, helping consumers better understand with whom they should transact.

In addition, REINSW wishes to reiterate its previous stance that regard should also be had to the distinctions of complaints - the Register and its format should not be treated as a one-size-fits-all response. A complaint against a trader's service is distinct from a complaint about the quality of a product that has been supplied. If the complaint relates to a trader's service, the complaint attaches to the trader whereas a complaint relating to the quality of a good attaches to the product itself. For example, this is of significance when comparing the situation where a consumer has complained about white goods purchased from a store compared to the service of an agent in their sale of a property.

The Register is currently comparing apples and oranges by combining many different industries under the one umbrella. The result is a situation completely opposite to what was intended by the operation of the Register. To address this issue and make the Register more accurate, useful and practical, REINSW suggests that the Register be split to draw a distinction between products and goods suppliers and front-end service providers. The service and goods industries are independently unique with different purposes, types of consumers and features. A consumer's reaction to a broken toaster is completely different to a tenant's reaction to the landlord refusing to pay for damage that they do not believe is a high risk to safety, ultimately causing the tenant to make a complaint against the property manager. REINSW proposes that the Register should treat the goods and services industries as separate and NSWFT should prevent instances where the services of a real estate agent are compared to the services of a retailer.

REINSW refers the reader to the "*Franchises, Chains and Corporate Groups*" section below for more detail on its position relating to the relevance of, and recommended improvements to, the Register.

- 3. *Should the Complaints Register only include data about complaints received (as opposed to outcomes)?***
- 4. *Should any further information about the resolution of those complaints be included? Why?***

Whilst REINSW recognises that processes are in place to ensure complaints are valid and not made by anonymous or vexatious complainants, changes should be made to the Register to include safeguards to ensure consumers are not misled by unsubstantiated complaints. In situations where a complaint has not been substantiated, such a complaint could cause commercial harm and damage to the reputation of traders when this is easy to avoid. This may also confuse and mislead consumers into believing that the trader offers insufficient services when, in fact, that is not the case at all and the complaints were simply not substantiated.

Unfortunately, the Register does not record situations where the trader has done the right thing and resolved complaints made against them with the consumer. Although REINSW believes the actual outcome of the complaint is not necessary to appear on the Register, the Register should at least provide information on whether the complaint has been afforded due process and an outcome or determination has been reached. Again, that would provide

context to consumers and enable them to make better informed decisions. Accordingly, REINSW questions what incentive traders have to resolve or improve areas and services subject to a complaint when a complaint that has no determination appears on the Register against them. REINSW recommends that NSWFT revisit point 15 of REINSW's submission dated 28 October 2015 for further recommendations and comments on this point.

- **Franchises, Chains and Corporate Groups**

8. How well is the current policy on the grouping of franchised businesses working, including the breakdown by location? What changes would you suggest?

As previously suggested in REINSW's submission dated 28 October 2015, it is unjust for parent companies and franchisors to face reputational damage when they are not at fault or the subject of a complaint.

Currently, the Register lists businesses according to their publicly recognisable trading name or brand. REINSW understands from NSWFT that this approach has been adopted because the individual corporations behind each of the franchises may be commonly unknown to consumers and that consumers often use traders because of their familiarity with the brand. However, REINSW insists that this approach is detrimental to franchisors and the brand as a whole and has seen examples in the market which demonstrate the unfair and unjust nature of this focus. REINSW wishes to reiterate that the purpose of the Register is to assist consumers and improve customer service, not to provide a platform to tarnish the reputation of traders and their brands, particularly if they are not the accused. Accordingly, the current policy on the grouping of franchised businesses is contrary to the sole purpose of the Register. REINSW does not consider it fair that a complaint made against a particular franchisee in a specific location could unnecessarily affect all branches of that franchise and, in particular, the franchisor. This becomes a risk when the Register fails to indicate that the complaint is made specifically against one particular branch/franchisee.

As a starting point, NSWFT should treat franchisees as independent entities. REINSW urges NSWFT to educate complainants when they first contact NSWFT by informing them that the franchisee or trader is the appropriate entity to make the complaint about. It is a separate entity to the franchisor, associated brand and business/trading name and, as such, it is independent of the franchisor.

Although there is a desire from NSWFT for franchisors to provide better customer service and improve the handling of their complaints, REINSW believes that a complaint must be made against the correct legal entity, and that a franchisor should not be publicly shamed on the Register if a complaint is made against its franchisee. The nature of the commercial arrangements between a franchisor and franchisee are private between the parties and not something that NSWFT is privy to. In most situations, there is a franchise agreement in place between the parent company and its franchisees, setting out the guidelines and obligations that must be adhered to by the franchisees. Such an agreement may have its own mechanism to deal with complaints against a franchisee and may also have provisions whereby a certain number of complaints on the Register for a certain number of months may result in termination of the agreement, but that arrangement is between the franchisor and franchisee. NSWFT acknowledges in the Issues Paper that its role is that of a mediator

only, however, REINSW fails to see how this position will be maintained if NSWFT attempts to affect the private franchise arrangements between a franchisor and its franchisees.

REINSW proposes that a solution to this problem is for NSWFT to encourage and recommend consumers to initially take the complaint to the parent company/franchisor who often have their own adequate complaints and dispute resolution processes in place. It is REINSW's understanding from discussions held at the stakeholder roundtable meeting on 16 May 2018 (hosted by NSWFT) that NSWFT temporarily and briefly adopted the approach of referring complainants to franchisors in the first instance to have the complaint resolved by way of the franchisors' internal complaints management processes. REINSW was informed that, in December 2016, the first full month whereby NSWFT adopted the above referral approach, not a single real estate group appeared on the Register. A low presence of real estate agencies on the Register was maintained for the following two months. However, the number of complaints significantly increased once NSWFT abandoned the approach. It is unknown why NSWFT ceased referring complainants to franchisors but statistics indicate that the strategy was effective in resolving complaints effectively and efficiently. A prominent franchisor has provided REINSW with statistics indicating that they are only aware of 7% of the complaints appearing on the Register, which means that over 90% of the complaints have never been referred to or brought up with the franchisor for resolution.

If NSWFT reinstates this approach and refers complainants to the franchisor in the first instance, this would limit the strain on NSWFT's resources and prevents minor complaints or those capable of resolution from making it on the Register. REINSW acknowledges that some consumers will always prefer to deal with NSWFT but this will undoubtedly increase the number of complaints being privately resolved with the franchisor, who would act as a third-party intermediary in much the same way as NSWFT would. This also prevents NSWFT from taking consumers away from the established internal processes and mechanisms that the franchisors already have in place and that have proven to work time and time again. Undoubtedly, the above statistics highlight the effectiveness of this approach in allowing franchisors to deal with complaints prior to being addressed by NSWFT, and REINSW would like to see this approach be reinstated.

9. Should the same approach be taken with chains and related companies/corporate groups even if they operate under different brands? Why?

REINSW sees no reason why the same approach (detailed above) should not be taken with chains, related companies and corporate groups.

- **Notice to businesses**

10. How well has the process of notification to businesses about their imminent appearance on the Register been working? What changes would you suggest?

11. Is three working days a suitable period of notice? Should it be shorter or longer?

The current notification process alerts businesses of their imminent appearance on the Register. Whilst REINSW supports the provision of at least three working days' notice, REINSW suggests the implementation of preliminary reminders to businesses who are likely to appear on the Register. Once a business has received five complaints, reaching 50% of the

current threshold, REINSW strongly encourages NSWFT to notify such businesses of their likelihood of appearance on the Register. Once notified, traders are given ample time to address their alleged shortcomings which may prevent further complaints from being recorded, thus reducing the likelihood of the trader reaching the threshold. If traders have had the opportunity to and, in good faith, made attempts to rectify areas the subject of complaints, their overall service is likely to improve. In effect, such a process will assist in making the Register more effective, helping consumers make informed decisions about traders who continually fail to provide satisfactory service.

- **Format**

12. What changes, if any, do you think should be made to the published format of the Register?

If NSWFT is considering changing the format of the Register, as mentioned in REINSW's previous submission dated 28 October 2015, there are consequences surrounding the potential manipulation of the data found on the Register, and NSWFT needs to bear that in mind. REINSW's concern is that businesses could face serious ramifications if the data is manipulated incorrectly. Accordingly, if data can be downloaded and reproduced, REINSW suggests the implementation of a requirement for users who are re-publishing the data to indicate the date and issue of the Register from which the data has been sourced. As an alternative, the format of the published data should be locked and cannot be manipulated or re-published.

REINSW refers the reader to the "*Information Appearing on the Register*" section above for its further recommendations on the format and proposed split of the Register into a register for services and another register specifically for products.

- **Conclusion**

REINSW, in principle, supports the objectives and intentions of the Register in providing access to open information about traders and their products and services. However, REINSW has significant concerns surrounding the way in which the Register has been implemented, particularly its potential to mislead and deceive consumers who access and make use of the Register. The Register must record accurate, complete, useful and contextual information and not facilitate the tarnishing of a trader's reputation, for instance, through the inability to allow any context or right of reply from traders and the failure to separate franchisees from franchisors and brands. If the current procedure for dealing with franchises is not improved, the Register will continue to serve as an injustice to consumers, traders and the economy as a whole.

REINSW is thankful to have been invited to the stakeholder roundtable discussions on 16 and 18 May 2018 in relation to these very important issues affecting the property industry (amongst others). It welcomes further discussion of the issues raised by this submission and supports NSWFT in making the Register more effective in helping consumers make informed decisions, not misinformed and misled decisions.

Yours faithfully



Tim McKibbin
Chief Executive Officer
The Real Estate Institute of New South Wales Limited

Consumer Complaints Register: Discussion Paper

The Real Estate Institute of New South Wales Submission on the Contents of the Discussion Paper 21 August 2015

To:

Mr Rod Stowe
Commissioner
NSW Fair Trading
Policy and Legislation
Department of Finance, Services and Innovation
PO Box 972
Parramatta NSW 2124

By email:

Introduction

This Submission has been prepared by The Real Estate Institute of New South Wales (**REINSW**) and is in response to the request by NSW Fair Trading (**NSWFT**) for input on the contents of the Discussion Paper relating to the Consumer Complaints Register (**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 believes it has a substantial role in the formation of regulatory policy in New South Wales.

REINSW appreciates the opportunity to provide its input on the contents of the Paper.

This Submission should be read in conjunction with the Paper. REINSW's comments are set out below and are categorised by using the same headings as in the Paper.

Specific Comments on the Contents of the Paper

Minister's Message and Executive Summary

- The third paragraph of the Minister's Message states that NSWFT is working with industry and consumers on developing a new public register showing individual traders receiving *a large number of complaints*. Similarly, the third paragraph of the Executive Summary mentions that the register will highlight traders that are attracting *a significant number of complaints*. REINSW believes these statements may be confusing because there may be traders who receive a large or significant number of complaints but who do not reach the threshold or Top 25/50/100 and will, therefore, not be on the register.
- The last line of the last paragraph in the Executive Summary states that the register will ensure that the interests of consumers and traders are met. The Paper highlights that the register will improve customer service and help customers make informed decisions about where to shop, however, it does not set out how the register will ensure that the interests of traders are met. The Paper needs more information on how the register will benefit traders and satisfy their interests.

Why have a public complaints register?

- The first paragraph in this section advises that the idea of sharing performance data is not new and that many organisations are doing it. It would be useful to provide some examples of such organisations at the end of this paragraph.

Open data and open Government

- The Paper should clearly state that the register is proposed to be published as open data and whether users can sort and manipulate it using different criteria to suit their purposes. If so, the Paper needs to discuss how the currency of the data is ensured following its incorporation into different formats (for instance, a user's app). Further, if the data can be sorted and manipulated by users, REINSW would like to see a requirement that if re-published then users must indicate the date and issue of the register from which the data has been sourced.

- However, the Paper should ask whether the data should be locked or able to be re-published and/or manipulated. It should also specify the safeguards and/or controls in place to prevent misuse, misinterpretations and misunderstandings of the data. For instance, it could be damaging to businesses if the data is manipulated the wrong way. Additionally, open data that is available to the public has the potential for being misunderstood and re-published in a way that could have serious detrimental impacts on a trader's reputation. An example of this is the current matter involving McGrath Hornsby where allegations have been made against it for underquoting. An article relating to those allegations has been published in the Sydney Morning Herald on 11-12 July 2015, entitled "*Prestige agents accused of underquoting*". The article states that numerous complaints have been made against McGrath Hornsby but that the principal, Mr Mark Saad, is unaware of any complaints. This is a clear example of the detrimental ramifications a complaints register might have on the reputation and business of a trader when the public does not know how to interpret or understand the information published.
- On a separate but related point, REINSW is concerned that open and available data might provide article topics for journalists who are experiencing a quiet media day. Those articles might relate to complaints based on uncorroborated information, which would ultimately tarnish and potentially destroy the reputations and businesses of innocent traders.
- The last paragraph in this section discusses the power of social media. The Paper should also discuss whether there is a market or need for the register and what market gap NSWFT is trying to address by its introduction. For example, consumers are already posting experiences they have with traders on social media so detail is required on the need for such data to be backed by the NSW Government by way of a statutory register.
- The Paper could ask stakeholders to comment on how the availability of open data will effect consumers, traders and the community. That way, NSWFT will have feedback on whether the register will be received positively or negatively.

What is a consumer complaint?

- REINSW suggests a clearer distinction be made between a complaint and an enquiry.
- The Paper needs to clarify when a contact is recorded as a complaint. That is, whether it is when the consumer makes initial contact with NSWFT expecting it to intervene, after the consumer has attempted to resolve the complaint with the trader directly (following encouragement by NSWFT) or when NSWFT actually intervenes. In fairness to all interested parties, a complaint should only be recorded on the register if there is an outcome on the issue, not just when NSWFT has been asked to intervene or has intervened. To do otherwise could damage a trader's reputation, like that of McGrath Hornsby (refer above for more detail on that case).
- The Paper should clarify whether the register will record a complaint even if it is resolved between the parties (following initial contact and encouragement by NSWFT to resolve).

- The last paragraph of this section sets out examples of what a complaint might indicate. That paragraph should also include the fact that some complaints are:
 - (a) vexatious, futile or duplicate complaints intended to tarnish the reputation of others (for the purpose of reducing competition or unrelated personal reasons); or
 - (b) complaints that arise not from the conduct of the trader but out of the unreasonable and/or unrealistic expectations of consumers.
- The Paper should also describe how a complaint that falls within paragraph (b) above will be treated. An example of such a complaint is where a vendor/landlord has unrealistic expectations of the value of their property and considers it to be worth more than what it sells or rents for, resulting in a complaint made against the agent.

What happens when a complaint is received? – NSW Fair Trading’s complaint process

- This section should set out:
 - (a) how complaints are received by NSWFT (for instance, by way of telephone, online or in person);
 - (b) at what stage in the process does NSWFT encourage the consumer to resolve a complaint directly with the trader; and
 - (c) the dispute resolution mechanisms available to NSWFT to resolve complaints (for example, negotiation, mediation, etc.).
- The Paper should distinguish between multiple and duplicate complaints. REINSW is of the view that a trader might have multiple complaints made against them from different people with unrelated issues or they might have duplicate complaints from the same complainant or relating to the same subject matter. With that in mind, the first paragraph in this section should not be limited to allocating multiple complaints to case managers. It should also mention duplicate complaints and those that are vexatious.
- The Paper states that NSWFT aims to finalise complaints within 30 days of receipt. REINSW suggests the Paper include an average of how long it takes to resolve complaints, not just the timeframe which NSWFT aims to achieve.

What happens when a complaint is received? – What will be counted as a complaint?

- Again, there is confusion and ambiguity on what constitutes a complaint. This section states that complaints are those contacts that have been “ticked” for intervention on NSWFT’s Customer Assistance System. It needs to be made clear when in the process a complaint is recorded (e.g. when a consumer makes contact with NSWFT expecting NSWFT to intervene, after the consumer has attempted to privately resolve the dispute directly with the trader (following NSWFT’s encouragement to do so), when NSWFT determines that its intervention is necessary to resolve the dispute or when NSWFT actually intervenes.

- The Paper should clarify whether the register will record only new complaints received by NSWFT during the relevant publication period.

What happens when a complaint is received? – Vexatious complaints and complaint managers

- The Paper states that if a complaint is vexatious then the “tick” for intervention will be removed and the complaint would be recorded as an enquiry. The Paper should make it clear whether this type of contact will be recorded as a complaint on the register until it is determined to be an enquiry. It is REINSW’s opinion that the register should not record that type of complaint. It is not in the interests of consumers or traders for a complaint to be recorded on the register before it is properly determined to be a complaint or enquiry.
- The Paper should specify how long before the complaint is removed from the register (e.g. immediately) if determined to be an enquiry and whether there will ever be a record of the trader being on the register for that particular matter. In addition, the Paper should discuss whether NSWFT offers traders any recourse or remedy if damage is suffered from incorrectly being on the register.
- Clarity is required on whether duplicate and/or vexatious complaints will be identified as such on the register.
- The Paper states that a case manager is appointed when there are six or more complaints against a trader in six months. REINSW understands that to mean that it could take more than six months for a complaint to be determined by a case manager to be duplicate or vexatious. If that is the case, the Paper should clarify whether that type of complaint would remain on the register for that length of time (that is, until a case manager determines it to be duplicate or vexatious) and, if so, the likelihood of and timeframe for its removal once determined to be duplicate or vexatious. Further, the Paper should discuss whether there would be any historical record of the complaint ever being on the register if found to be duplicate or vexatious.

What happens when a complaint is received? – Diagram of process

- More steps need to be included in the diagram before the first box (“*Complaint received*”) so that stakeholders understand the entire complaints process. REINSW suggests that the diagram starts with a “*Consumer makes Contact*” box, followed by the steps involved for determining whether a complaint is an enquiry or complaint. The diagram should indicate where NSWFT encourages private resolution of the dispute between the parties and, if a complaint, when a complaint is recorded on the register.
- The Paper should clarify the reference to “options” in the box entitled “*Consumer contacted advising of results of intervention and options*”. For instance, is it the options available to the consumer if the trader does not respond within 5 working days? The Paper should discuss what happens if the trader does not respond and how far in the process NSWFT takes the complaint.
- The diagram should indicate whether NSWFT follows up the trader if they do not respond within 5 working days or whether NSWFT contacts the trader only once (pursuant to the fifth box).

- The diagram should also indicate what happens after the consumer is advised whether the trader has/has not responded.
- According to the diagram, the last step in the process is to consider whether the conduct complained about constitutes a breach of law and, if so, it may be referred to compliance and enforcement. That seems to be in contradiction to the fourth paragraph under the heading “*NSW Fair Trading’s complaints process*”. That paragraph states that if the conduct complained of potentially constitutes a breach of law then it may be referred to the compliance and enforcement area for assessment of whether action should be taken against the trader. REINSW recommends the deletion of the last box in the diagram and its contents included in the “Triage” box. The reason for that is because NSWFT should determine the following before NSWFT contacts the trader (and not after):
 - (a) whether the relevant conduct constitutes a breach of law; and
 - (b) whether the compliance and enforcement area should take action against the trader.

What information does NSW Fair Trading record about complaints?

- This section sets out the most common categories of complaint for the 2013-2014 period. If available, NSWFT should include more recent data.
- The Paper lists categories used to describe the practice or problem complained about. The Paper should include more information about those categories, for instance, whether they are the most common for 2013-2014 or whether they are examples of the categories which NSWFT records. If the latter is the case, REINSW is of the view that “A range of tenancy and strata related practices” should be deleted so that the categories are kept general, particularly since the Paper does not refer to other industry sectors. REINSW considers that singling out real estate agents could insinuate that more complaints are made against them than any other professionals.

The Proposed Model – Key components

- The first paragraph could list other data which the register might record (for example, product type, industry sector, the practice complained about, etc.). That would reduce the potential for uncertainty and concern. REINSW recommends that the paragraph also mention that the data will be publicly available for a specified period of time.
- The second paragraph could make it clear that the register will not include case notes and personal information. However, there should also be a discussion on what type of information the register should record about a complainant. For instance, REINSW considers it useful for consumers to know how many complaints a complainant has made about other traders, particularly to get a sense of whether the complainant has made a one-off complaint or regularly lodges complaints. If the latter, then a consumer might treat the complaint with a grain of salt, especially if the register indicates when a complaint is vexatious, frivolous or duplicate.

Information appearing on the complaints register

- As abovementioned, the Paper should clarify whether the register will record only new complaints received by NSWFT during the relevant publication period.
- This section of the Paper should be made consistent with the type of information included in the section entitled "*What information does NSW Fair Trading record about complaints?*". The Paper should make clear the exact information that will be recorded in relation to a complaint (for example, the supply date, sale method, industry code, product code, practice code and category of complaint). Although the Paper confirms that the "*nature of the issues*" will be recorded, that is too broad and unclear.
- It was noted at the second Roundtable Discussion on 31 July 2015 that the register will not name goods, only retailers as it is their responsibility to address the customer issue, even if it is a manufacturing fault. Whilst that might be the legal position, there is a distinction to be made between a consumer's legal recourse for faulty or defective goods versus a complaint against a retailer because of a product, which should be a complaint made against the manufacturer and not the retailer.

An example of REINSW's concern is where an agent accepts, in good faith, representations from a vendor or representations in documents provided to the agent by the vendor (for instance, survey reports and pest and building reports) and then makes those representations to prospective purchasers believing them to be true. If found to be untrue, with the existence of a complaints register, a complaint against the agent could be published, damaging their reputation and business. REINSW considers it unfair and unjust for a vendor of a product or a service provider relying on representations in a report to be held responsible for the product which they receive from a reputable source and passes on the information in good faith. The issue might be with the agent at law but it should not be a complaint against the agent who acted appropriately. REINSW is of the view that this distinction needs to be made to avoid the register distorting public perceptions about traders in this particular circumstance.

In addition, REINSW considers it important for the register to name goods and services so that consumers know whether the complaint is about a product or service or the trader's conduct. People might want to know which retailer is selling defective goods so as not to buy the goods from them. REINSW is of the view that the more information given to consumers will allow them to make a better and more informed decision when determining which trader to use.

- The Paper proposes that the register will record a trader's parent company (where relevant), franchise (where relevant) and licences (where relevant), however, an explanation is required on who determines the relevance of these factors and how that determination is made. The Paper should also clarify when those factors will be recorded on the register. REINSW does not consider it fair to record a trader's parent company, franchise or licence at the time a complaint is initially recorded because if they are subsequently determined not to be involved then their reputation could unnecessarily be tarnished by being named on the register. It is REINSW's opinion that NSWFT must determine there to be a nexus between the trader and its parent company, franchise or licence before they are published on the register in connection with a complaint made against the trader.

- The Paper states that the outcome of complaints will not be included in the register. REINSW believes that if consumers are to make an informed decision then it is their right to know whether the parties have privately resolved the complaint without NSWFT intervention, whether the complaint was vexatious or duplicate and whether the complaint was not from the conduct of the trader but out of the unreasonable expectations of the consumer.
- The Paper should include discussion about whether the register should include the status of complaints. Although the outcome of a complaint proposedly will not be recorded, REINSW is of the view that the register should record the status of complaints (that is, whether a complaint is pending or resolved). At the very least, the register should indicate whether the complaint is open or closed. That way consumers can conduct their own due diligence on whether to use a particular trader. If that type of information is not readily available to NSWFT, the Paper should suggest how it could be made available.

Number of traders on the register

- Stakeholders should be asked whether the top 25, 50 or 100 traders should be those who are subject to the most complaints *irrespective of industry or in each industry*. A consumer buying a car may not be interested in the number of complaints recorded against a real estate agent. Further, REINSW is concerned that the top 25, 50 or 100 traders might not have good representation across all industries each time the register is published. In addition, the representation will change each publication.

A threshold number of complaints

- The Paper states that a minimum threshold avoids the situation where one or two complaints per year would result in a trader being on the register. However, REINSW believes that would also be the case if a top 25, 50 or 100 solution were used. The Paper should clarify whether that would also be the case.
- Question 4 should also ask how the threshold should be determined (e.g. by percentage).
- Whether there is a minimum threshold or a top 25, 50 or 100, the question remains as to why the traders listed on the register are still trading? REINSW is concerned that the register will serve mainly to damage a trader's reputation and business as well as the community's perception of NSWFT. REINSW is concerned that if a trader delivers services to the community and NSWFT forms the view that it has received a number of complaints worthy of being published on the register, then NSWFT's disciplinary powers (including to delist repeat offenders) will come into question.

Frequency of publication

- The third paragraph should also have the option of the data being published less frequently (for instance, six-monthly).
- Question 5 should include the example of six-monthly.

What time period should the data cover?

- This section should specify the benefits of the data covering a longer period. Currently, the Paper only discusses the benefits relating to a shorter period.

How long should the data remain available?

- The second sentence in the first paragraph of this section states that detecting changes in the data would be easier if the data remained on the register for a longer period. That is inconsistent with the paragraph under the heading “*What time period should the data cover?*”, which provides that the shorter the time period covered the easier it may be to detect changes in the data. That discrepancy needs to be rectified.
- There are two consecutive references to “are” in the second paragraph.
- This section should open the discussion for other ways in which traders might be removed from the register. REINSW is of the view that if a complaint is determined to be vexatious or a duplicate then it should not be on the register or any archive. Additionally, if a complaint is resolved to the consumer’s satisfaction before the register is published then the complaint should not be published.

From what date should complaints data be counted?

- The first paragraph of this section gives an example of counting data from a specific future date, however, it should also discuss what happens with a retrospective date.
- The second paragraph gives examples of benefits associated with a specific future date, however, it should also include benefits associated with retrospective counting.

Information about business size

- Questions 9 and 10 should be broadened so that they also ask about the number of transactions and not just the size of businesses.

Franchises, chains and corporate groups

- The first sentence in this section states that many big retailers operate as franchises, however, there are many small retailers who also operate as franchises. The Paper should clarify that.
- The first question in Question 11 should be expanded so that it reads as follows: “*Should complaints about a particular franchise branch be recorded as complaints about the franchise brand as a whole or should the register specify the particular branch complained about?*”. REINSW is concerned that a complaint made against a particular franchise in a specific area could unnecessarily affect all branches of that franchise if the register does not indicate that the complaint is made specifically against the particular branch.
- REINSW recommends that stakeholders be asked whether there are any other ways in which complaints made against franchises, chains and corporate groups could be treated and recorded in the register (noting that listing by business location is not appropriate because, for example, a large franchisee with several branches may not

end up on the register even if many complaints are made against its branches because the number of complaints made against the individual branch locations may not reach the requisite threshold).

Notice to Traders

- Paragraphs 2 and 3 in this section refer to “complaints” but should refer to “complaint”.
- The second paragraph should also mention that advance notice allows traders to make the appropriate arrangements with respect to their insurances.
- Question 12 should also ask whether traders should be given notice each time they are published on the register or just the first time.

Information accompanying the register

- Traders should be included in the last line of the first paragraph in addition to businesses.
- The second paragraph should also refer to the delivery of better customer service.
- Question 13 should not be limited to supporting information but should also refer to warnings and notes that need to be considered whilst interpreting the register. For instance, REINSW recommends a warning be included in the register to the effect that businesses have different sizes and numbers of transactions and that this should be taken into account when considering the data. A note could also be included on the register which lets users know that recorded complaints are first put to the trader to resolve and are only referred to NSWFT if the consumer is not satisfied with the trader’s response.

Appendix B

- The submission deadline should change from “August” to the appropriate month.
- Delete the drafting note “*Insert Demographic Questions from the Survey*” in the “*Background Information*” section.
- Questions 5, 6, 9, 10, 11 and 13 do not exactly reflect those questions as they appear throughout the Paper. In addition, “should” is misspelt in Question 4.

General Comments on the Contents of the Paper

The Paper does not have any discussion on the effect that the register will have on commercial and business interests. That is an issue that needs to be included.

The Paper needs to focus more on the fact that traders are consumers of NSWFT’s services and are also consumers more generally. It is REINSW’s opinion that NSWFT has a responsibility to provide services to traders within the marketplace and not to focus purely on damaging their businesses and reputations in the market through the publication of a complaints register.

References to NSWFT throughout the Paper are inconsistent. "Fair Trading" and "NSW Fair Trading" have been used interchangeably and need to be made consistent.

The questions requiring stakeholder feedback should not fall under the heading "*The Proposed Model*". For clarification purposes, they should fall under a separate heading (e.g. "*Issues for Discussion*").

Conclusion

REINSW welcomes a discussion on the potential introduction of a public complaints register.

REINSW believes that if the Government is going to introduce the register then it must record accurate, complete and useful information that will result in the delivery of better customer service and more informed decisions being made by consumers. Otherwise, it will result in death by a thousand cuts where too many issues will lead to the register's failure.

REINSW is concerned that the particulars of the register, in the form detailed in the Paper, is likely to mislead consumers and tarnish or destroy reputations as well as business and commercial interests.

The result needs to be a fair, simple to use register which takes into account the interests of its various stakeholders.

As detailed above, REINSW feels there are numerous areas in the Paper which need to be addressed or clarified.

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
The Real Estate Institute of New South Wales

Consumer Complaints Register: Discussion Paper

The Real Estate Institute of New South Wales

Submission on the Discussion Paper

28 October 2015

To:

Consumer Complaints Register
Fair Trading Policy
PO Box 972
Parramatta NSW 2124

By email:

Introduction

This Submission has been prepared by The Real Estate Institute of New South Wales (**REINSW**) and is in response to the Discussion Paper on the Consumer Complaints Register, issued by NSW Fair Trading (**NSWFT**) on 1 October 2015 (**Paper**).

REINSW is the largest professional association of real estate agents and other property professionals in New South Wales. It 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.

REINSW supports, in principle, the Government's initiatives designed to provide consumers with access to information about traders and their products and services to deliver better customer service, encourage economic efficiency and growth and to ensure consumers make informed decisions about their purchasing decisions.

However, if the Government introduces the Consumer Complaints Register (**Register**) in the form detailed in the Paper, it will likely mislead consumers and tarnish the reputation and business of traders. REINSW believes that the Register must record accurate, complete and useful information to achieve the Government's objectives. However, those objectives cannot be met with the current proposals. Rather, the Register will potentially prevent consumers from making informed decisions and using valuable traders likely to satisfy their needs.

REINSW has no problem with the concept of NSWFT receiving complaints from consumers, triggering an investigation by NSWFT. However, REINSW opposes those complaints being made publicly available before the conclusion of an investigation and without an adverse determination. That would serve an injustice to consumers, traders and the economy as a whole. Further, traders should be given the opportunity to respond to complaint allegations and to deny them that opportunity, in REINSW's opinion, equates to a denial of natural justice.

Issues for Discussion

1. What information should the Register publish about a complaint and why?

REINSW is of the view that the Register should publish the essence of a complaint only after an investigation and adverse determination has been made.

When considering the essence of a complaint, regard should be had to the distinction between a complaint about a trader's service and a complaint about the quality of a trader's product that has been supplied to the complainant. If the complaint is about a trader's service, then the complaint attaches to the trader. If it is about a product's quality, the complaint attaches to the product and should not be recorded on the Register. Such complaints should be distinguished from a contractual claim at law where the legal liability rests with the retailer and manufacturer.

An example of REINSW's concern is set out in its previous submission dated 21 August 2015 in relation to the contents of the Paper. That example is where an agent accepts, in good faith, representations from a vendor or in documents provided to the agent by the vendor (for instance, survey reports and pest and building reports) and then makes those representations to prospective purchasers believing them to be true. If found to be untrue a

complaint could be made against the agent on the Register, damaging their reputation and business. REINSW considers it unfair and unjust for a vendor of a product or a service provider relying on representations in a report to be held responsible for the product which they receive from a reputable source and passes on the information in good faith. The issue might be with the agent at law but it should not be a complaint against the agent who acted appropriately. REINSW is of the view that NSWFT needs to make this distinction to avoid the Register distorting public perceptions about traders.

So that consumers can engage the best traders to satisfy their needs, it is their right to have access to information about a complaint only after its quality has been assessed and its validity substantiated. To record a complaint on the Customer Assistance System as having no documentation to support the complaint (which would be the case if a complaint was vexatious or a duplicate) could cause commercial harm and damage to the reputation of traders for no reason.

REINSW has no issue with making available transparent and open information, but it must not result in the possibility of substantially damaging the reputation of innocent traders. That is particularly so where no supporting evidence is provided by the complainant or where complaints arise from unreasonable and/or unrealistic expectations of consumers and not from the conduct of traders. For instance, where a vendor or landlord considers the value of their property to be worth more than what it sells or rents for, resulting in a complaint being made against the agent. NSWFT must uphold its duty and responsibility of ensuring the validity and accuracy of a complaint before it is publicly disclosed.

A mere complaint suggests a potential dissatisfaction with a trader but it does not mean that the trader has done anything wrong to warrant the making of the complaint. It may trigger an investigation by NSWFT and REINSW is comfortable that the Register publish adverse determinations. However, REINSW believes it would be unfair and unjust to prevent consumers from conducting appropriate due diligence by providing inaccurate information. It is in the interests of consumers and traders that only valid complaints be recorded on the Register once they have been investigated and assessed on their merits to have adverse findings. For that reason, REINSW is of the view that a complaint found to be vexatious or a duplicate should not be recorded on the Register until properly determined to be a valid complaint. However, if the Government proceeds to publish those types of complaints then they should be removed from the Register (and any archives) immediately if they are subsequently determined to be unsubstantiated, uncorroborated complaints or initially miscategorised as complaints and are actually enquiries.

REINSW believes that the Register should also record information about the complainant. For instance, it is useful for consumers to know how many complaints a complainant has made about other traders, particularly to get a sense of whether they have made a one-off complaint or regularly lodges complaints. That would assist consumers to make informed decisions about their purchasing decisions and how they should treat specific complaints (for instance, with a grain of salt or with sincerity).

2. What information should the Register publish about a trader and why?

REINSW is of the opinion that the trader's registered name, business address and industry should be published on the Register. The service complained of may also be recorded but not a complaint relating to a product (refer to REINSW's response to Question 1).

The Paper states that the Register may include information about a trader's parent company (where relevant), franchise group (where relevant) and licences held (where relevant).

REINSW queries who determines the relevance of these factors and how they are relevant. REINSW would not want to see the unfair situation where a trader's parent company, franchise and/or licences are recorded if they are subsequently found not to be involved. That could tarnish their reputation unnecessarily. REINSW suggests that NSWFT find a nexus between a trader and its parent company, franchise or licence in relation to a complaint before those details are published on the Register.

Nevertheless, REINSW considers it unfair to publish the trader's entire corporate and franchise group on the basis that they are separate legal entities and their reputations should not be affected because of the services of the trader, which is outside of their control. Essentially, where a consumer receives an unsatisfactory service from one trader within the group, it would be unjust for the rest of the group who are not at fault to have reputational damage by being named on the Register.

3. Should the Register publish data about complaints received or about finalised complaints? Why?

Please refer to REINSW's response to Question 1.

4. How many traders should be identified on the Register and what might be the benefits of including more or less?

REINSW does not recommend the Register be limited in any way if there is an adverse finding following an investigation of a complaint.

As abovementioned, REINSW is of the view that complaints must only be published if they have been investigated and substantiated with adverse findings. If NSWFT determines that a complaint is valid and that a trader has poor service quality then those details should be made available to consumers, regardless of the number of complaints made against that trader. It would reflect badly on NSWFT if it had investigated a complaint and knew the trader's service to be inadequate but did not publish the information because the trader did not have enough complaints against them to reach a minimum threshold or Top 25, 50 or 100.

REINSW considers it reasonable to publish the Top 50 traders who are subject to the most complaints in a given time period but the Register should not stop there. The Register should also record valid complaints that have adverse determinations against a trader even if they only had a few finalised complaints against them. To solely implement a Top 25, 50 or 100 or minimum threshold would be contrary to the concept of transparency and open data because consumers would not be provided with accurate and complete information.

On a side note, REINSW worries that if NSWFT introduces the Register then it may be shooting itself in the foot. If a trader has received a number of complaints worthy of being published on the Register then NSWFT's disciplinary powers (including to de-licence repeat offenders) could potentially come into question.

5. Should there be a minimum threshold for number of complaints before appearing on the Register? If so, what should it be?

Please refer to REINSW's response to Question 4.

6. How often should the Register be updated (eg. monthly, quarterly, six monthly)?

REINSW considers that the Register should remain current and should be updated quarterly.

7. What time period should the Register data cover (eg. previous 12 months, previous 3 months) and why?

REINSW considers 12 months to be an appropriate time period over which the data should cover. That period would allow users to be better informed and to identify trends, changes and patterns in the data.

8. How long should the Register data remain on the NSW Fair Trading website before being archived?

The benefits of having available data is the encouragement of higher quality service delivery and product preference. Accordingly, REINSW is of the view that traders should be removed from the Register, NSWFT's website and any archives as a reward for improving their conduct, evidenced by a decreased number of recorded complaints on the Register. Therefore, REINSW considers a sufficient time for a complaint to remain on the Register to be 12 months from the date of publication.

However, there should be other ways in which traders are removed from the Register. For instance, a complaint should be immediately removed if it is determined to be vexatious or a duplicate. In addition, a complaint should not be published if it is resolved to the consumer's satisfaction before the Register is published.

9. Should the Register data be available to be searched after being archived and for how long?

Please refer to REINSW's response to Question 8. The Register data should not be available to be searched after being archived as a reward for improving conduct and service.

10. From what date should complaints data be counted and included in the public Register?

REINSW recommends publishing complaints data from a specific forward date to give traders the opportunity to improve their customer service and address existing complaints before facing the possibility of being published on the Register. It would be quite draconian to introduce the Register and apply it retrospectively.

11. Should the Register show information about the size of businesses being complained about?

REINSW believes that the Register should show information about the number of transactions and size of businesses that are the subject of complaints.

It is expected that larger businesses with more customers might have more complaints made against them than that of smaller traders. The bigger the business the greater opportunity for more complaints. However, small businesses might also end up on the Register due to commercial issues or insolvency.

Essentially, users of the Register could easily be misled if they do not understand the data, including business size of the trader being complained about. REINSW suggests that the Register warn users of its limitations before they are able to access the data to assist with their analysis and understanding.

12. Is there a practical and simple way of providing information about the size of the business being complained about?

REINSW considers this whole project to be difficult to implement and this question is a prime example of where the data can mislead the public and damage a trader's business and reputation. The complaint needs to be completely understood, analysed, explained and viewed in context.

In some cases, large traders are able to view the information in context (for example, Telcos or other large companies can contextualise data internally) but not all businesses have the opportunity or ability to do so. REINSW recommends a warning be published on the Register to highlight the fact that different business sizes should be taken into account when considering the data. The Register needs to provide context so that consumers can compare apples with apples, not apples with oranges.

13. Should complaints about a particular franchise branch be recorded as complaints about the franchise brand as a whole?

Whilst this project's goals of providing consumers with more information may be admirable, this question highlights a further example where there can be reputational damage to a brand and/or supplier resulting in adverse commercial outcomes. REINSW's concern is that, unless the data is correctly collated and analysed, the data can mislead consumers, particularly unsophisticated consumers.

There is not a one-size-fits-all response to this scenario. For instance, a franchise might be a product provider in which case it may be appropriate to warn consumers on a global scale about the product. However, other franchises might be service-related and complaints may relate to the service of an individual service provider.

REINSW is concerned that a complaint made against a particular franchise in a specific area could unnecessarily affect all franchisees if the Register does not indicate that the complaint is made specifically against the particular branch or employee of that branch.

Unless the data and reporting of complaints is properly presented, analysed and understood, there will potentially be damage to franchisors, franchisees, brands and, most importantly, consumers who will ultimately make poor decisions.

14. Should the same approach be taken with chains and related companies/corporate groups?

REINSW's response to Question 13 also applies with respect to chains and related companies/corporate groups.

15. Should traders be notified in advance that they are going to appear on the Register for the first time? If so, what period of notice should they be given?

REINSW is of the view that traders should get sufficient notice each time they are going to appear on the Register.

It would be useful for the Government to carry out an analysis on how the tenancy reference model works to encourage good behaviour amongst tenants. In that model, a tenant can only be listed on a tenancy database if:

- (a) the NSW Civil and Administrative Tribunal terminates their residential tenancy agreement; and/or
- (b) an amount exceeding the rental bond for a breach of the residential tenancy agreement is outstanding at the time of being listed.

The tenant cannot be listed if they are not given at least 14 days' notice to review the information and object to the proposed listing. They can also dispute proposed listings in the NSW Civil and Administrative Tribunal. Essentially, if a tenant adequately addresses the relevant issues then they are either removed from the register or do not appear on it at all.

REINSW believes that the incentive for traders should be to do the right thing and that their reward for doing so is not to be recorded on the Register. If they do the right thing and resolve a complaint before the complaint is published on the Register but it is subsequently recorded anyway, REINSW queries what incentive traders have to do the right thing.

16. What other supporting information should accompany the new Register to explain it to the public?

As abovementioned, to ensure users of the Register have an understanding of the information for analysis purposes, there should be a warning before they can access the data informing them that the Register does not provide information about a trader's business size and number of transactions.

Other Issues

- The Paper states that the Register will be available in two formats – a spreadsheet, which can be used by third parties and app developers, and an interactive dashboard.

The Paper fails to discuss how the currency of the data is maintained following its incorporation into different formats. For that reason and to ensure consumers are provided with the most accurate and current information, REINSW is of the view that the data should be locked and not able to be re-published and/or manipulated by users. However, if the data can be sorted and manipulated then REINSW recommends a requirement be introduced that users indicate the date and issue of the Register from which the data has been sourced. REINSW's concern is that businesses could have serious consequences if the data is manipulated incorrectly and that the Paper fails to detail any safeguards and/or controls that will be put in place to prevent misuse, misinterpretations and misunderstandings of the data.

An example of publicly available information being misunderstood or misinterpreted and republished in a way that has a serious detrimental impact on a trader's

reputation would be with respect to the allegations made against McGrath Hornsby for underquoting. Those allegations were televised and also published in an article in the Sydney Morning Herald on 11-12 July 2015, entitled "*Prestige agents accused of underquoting*". The article states that complaints have been made against McGrath Hornsby but that the principal, Mr Mark Saad, is unaware of any such complaints.

- The information recorded on the Register may be adversely used against a trader by its competitors in marketing campaigns to gain a competitive edge.
- Another issue is where journalists, on a quiet media day, turn to the Register for article topics. Those articles might be based on uncorroborated complaints, ultimately tarnishing and potentially destroying the reputations and businesses of innocent traders.

Conclusion

The proposals in the Paper have significant impacts on consumers, traders and the economy in New South Wales. Whilst REINSW welcomes initiatives designed to improve standards, the delivery of customer service and efficiency in the market, the way forward needs to be carefully considered by Government so that the Register achieves its objectives without detrimentally affecting traders, consumers and the economy.

REINSW would like to remind NSWFT that traders are also consumers of NSWFT's services and are consumers more generally. NSWFT has a responsibility to provide services to traders within the marketplace and should not be developing a Register which will potentially damage their businesses and reputations.

Therefore, if the Government is going to introduce the Register, then REINSW would like to see it record accurate, complete and useful information that will result in the delivery of better customer service and more informed decisions being made by consumers. REINSW is concerned that the proposed particulars of the Register is likely to mislead consumers and tarnish or destroy reputations, and business and commercial interests.

With the deepest respect, REINSW feels that Government often poorly researches and implements projects that ultimately result in substantial issues. Examples of such projects include legislative changes relating to swimming pools, smoke alarms and window safety devices. Whilst the Government's goals are admirable, there are implementation and resourcing problems associated with such projects. This project is no different. Whilst there are benefits to introducing the Register, a lot of work is required to ensure that it does not unnecessarily damage or destroy reputations or mislead consumers by providing them with incomplete, inaccurate and useless information resulting in poor purchasing behaviour and decisions. That would be contrary to its objectives.

The result needs to be a fair Register which takes into account the interests of stakeholders.

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
The Real Estate Institute of New South Wales