SHOPPING CENTRE
COUNCIL OF AUSTRALIA

9 May 2014

The Chief Executive
Economic Regulation Authority
PO Box 8469
PERTH BC WA 6849

By email: publicsubmissions.erawa.com.au

Dear Sir or Madam

Draft Report: Inquiry into Microeconomic Reform in Western Australia

Thank you for the opportunity to comment on the Economic Regulation Authority's Draft Report released on 11 April 2014. We commend the Authority for producing such a comprehensive report for public consideration.

We provided two separate submissions on the Authority's Issues Paper on 6 September 2013 in relation to shop trading hours and unnecessary real estate licensing.

We endorse the Authority's Recommendation No. 27 (outlined at page 232) to amend the *Retail Trading Hours Act 1987* so that shop trading hours are fully deregulated with the exception of Christmas Day, Good Friday and the morning of ANZAC Day. This would be a similar approach to that which currently operates in Victoria and Tasmania.

Unfortunately the Authority did not provide any commentary or recommendations in relation to our proposal to remove unnecessary real estate licensing. A copy of our submission dated 6 September 2013 is **attached** for your further consideration. The removal of unnecessary real estate licensing for 'sophisticated investors' and 'related entities' would be a positive reform for companies that do not want or seek the protection of the state. As one example, AMP Capital Investors (as the 'consumer') is being protected from AMP Shopping Centre Management as a result of the current legislation. This is a complete nonsense, and merely ties up resources in unnecessary costs and compliance.

It should be noted that small retail tenants are protected under the *Commercial Tenancy (Retail Shops) Agreements Act*.

Since releasing the draft report, the Queensland Parliament has approved the *Property Occupations Bill* on 6 May 2014 which provides exemptions for 'sophisticated investors' and 'related entities'.

This would be a positive reform for the Western Australian Government to pursue.

Please free to contact us to discuss this submission on 02 9033 1902 or by email on anardi@scca.org.au.

Yours sincerely

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Deputy Director

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SHOPPING CENTRE
COUNCIL OF AUSTRALIA

6 September 2013

Mr Lyndon Rowe
Chair
Economic Regulation Authority
Inquiry into Microeconomic Reform in Western Australia
PO Box 8469
Perth BC WA 6849

Dear Mr Rowe

Unnecessary Real Estate Licensing in Western Australia

The Shopping Centre Council of Australia (SCCA) welcomes the inquiry by the Economic Regulation Authority into microeconomic reform in Western Australia. We would like to bring to your attention an example of unnecessary regulation which should be removed. This would remove an unnecessary business cost on large property owners in Western Australia and would generate savings to the WA Government in reducing the staffing resources necessary to administer and ensure compliance with this unnecessary regulation. Most importantly this reform would come at no cost or risk to the community in Western Australia.

We have set out this problem in the **attached** submission to the Department of Commerce in relation to the *Decision Regulation Impact Statement: Proposal for national licensing of the property occupations*. The reason we have also brought this to your attention is that there is considerable doubt whether or not the proposed national license for real estate agents will proceed. You may also be aware that Western Australia has still not signed up to the national occupational licensing scheme so even if the proposed national license does proceed, which is problematic, Western Australian real estate agents may still remain regulated by the *Real Estate and Business Agents Act*.

This reform does not need to await the arrival of the proposed national license. Nor would this reform hinder or jeopardise the national license. We have addressed this issue at the top of page 2 of the submission.

Our suggestion for providing exemptions from the *Real Estate and Business Agents Act* for 'related entity' property owners and other financially sophisticated property owners is a simple but important example of microeconomic reform which would remove costly and unnecessary red tape from businesses in Western Australia.

Yours sincerely,

Milton Cockburn
Executive Director

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SHOPPING CENTRE
COUNCIL OF AUSTRALIA

3 September 2013

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Dear Mr Newcombe

Decision Regulation Impact Statement: Proposal for national licensing of the property occupations

The Shopping Centre Council of Australia (SCCA) supports the proposal in the *Decision Regulation Statement: Proposal for the national licensing of the property occupations* ("the Decision RIS") that the National Law allow for exemptions in the property regulations for large non-residential property transactions. We also strongly support the proposal for an exemption for non-residential transactions between related entities and note that this proposed exemption has received full support from industry.

Currently anyone involved in buying, selling, leasing or managing property for someone else must be licensed and comply with the relevant State or Territory legislation regulating real estate agents, even if they are a subsidiary or a related entity to the property owner. The aim of the legislation is to protect property owners in their dealings with property agents (property managers). This is valid for residential property owners and may be valid for some small commercial property owners where the 'consumers' (i.e. property owners) are individuals and small businesses with limited knowledge of real estate practices. It is not valid for the sophisticated segment of the commercial property industry where the 'consumers' being protected are large national (and multinational) professional property-owning entities which are more than capable of looking after their own interests and which do not need consumer protection. (Individual investors in these entities are protected by Commonwealth regulation of companies, trusts, etc.)

The legislation imposes significant costs on these professional property owners and managers, for no benefit to the owners, to tenants or to the public more generally. We have accurately assessed these costs to Western Australian commercial property owners as being at least $1.32 million a year. It is difficult to think of a more obvious example of costly and unnecessary 'red tape' on businesses in Western Australia. These exemptions would reduce the regulatory burden on Western Australian businesses and would free property owners and managers from unnecessary red tape. This reform would also generate significant savings for the Western Australian Government by reducing the staffing resources necessary to administer and enforce the National Law.

We assume that the word 'transaction' is used in the broadest sense in the Decision RIS. Property transactions involve more than just sales of property. Transactions also involve property management and property leasing so it needs to be made clear that the exemptions referred to above will apply to all transactions: buying, selling, management and leasing. We have previously argued for a monetary threshold (based on the total value of property holdings) for exemptions. Nevertheless we have no concerns about a floorspace threshold such as recommended in the Decision RIS if it is thought this would provide greater certainty. However this should not be a combination threshold: it should be either a monetary threshold (based on the total value of property holdings) or a floorspace threshold (of all property holdings).

The Western Australian Government should not await the National Law before acting on these proposals

Even with goodwill all around the National Law, as it relates to property occupations, will not operate until late 2014 and, more likely, not until July 2015 at the earliest. Unfortunately an unreasonable campaign has been launched against national licensing of real estate agents by the Real Estate Institute of Australia (REIA). This body has imposed conditions on its acceptance of national licensing (such as compulsory professional development and diploma level qualifications, both of which would add nearly $55.5 million a year to the costs of real estate agents around Australia), which are effectively designed to torpedo the proposed national license. In such circumstances, therefore, it would be intolerable to expect professional property owners in Western Australia to wait several more years (at least) for a national license which may not eventuate, and continue to spend at least $1.32 million a year on unnecessary licensing and regulation. For this reason we urge the Western Australian Government to effect these exemptions in the *Real Estate and Business Agents Act* ("the *REBA*"). This action would not hinder or frustrate the proposed national license. We understand the Queensland Government will be providing for these exemptions in its forthcoming *Property Occupations Bill*, to be introduced into the Queensland Parliament later this year. In NSW we have received a commitment from the Minister for Fair Trading that he will discuss this issue as soon as the consultations on the Decision RIS are concluded and we have commenced consultations on this matter with Consumer Affairs Victoria.

Exemption for agents managing on behalf of related corporate entities

People or entities who directly sell, manage or lease commercial property do not need to be licensed in Western Australia since there is no agency relationship. However when, because of the organisational structuring of large businesses, the buying, management or leasing of such property is not performed directly but through a related entity, such agents are required to be licensed, even though there is still no proper agency relationship between the owner and the manager.

It is obviously absurd, and was never the intention of the *REBA* and similar Acts around Australia, that employees of, say, Westfield Shopping Centre Management are required to be licensed when managing or leasing shopping centres on behalf of the Westfield Group or that employees of AMP Office and Industrial must be licensed when managing and leasing offices on behalf of AMP Capital Investors. That is the bizarre situation that exists today, however.

We fully support the Decision RIS's recommendation that there be an exemption from licensing requirements for non-residential property transactions between related entities. As the RIS notes this has received full support from the industry – as well as having been supported by all parties on the Property Occupations Interim Advisory Committee and in the Consultation RIS.

An exemption for related parties from the relevant Act in Victoria has been policy for many years. This followed the National Competition Policy review of the Victorian Estate Agents Act, which found that "*the costs of the current provisions [of the regulation of the Estate Agents Act] reserving property management, commercial property sales, and business sales to licensed agents exceed the benefits*". The subsequent Victorian regulation to give effect to this finding exempts a corporation which carries on the business of an estate agent in relation to the assets of another corporation which is directly or indirectly owned by the first corporation, or vice versa, or where both corporations are owned by the same person.

Unfortunately this regulation was drafted too narrowly to be of much assistance to the professional property owning industry. The term 'corporation' does not capture the most common owner/managers in today's commercial property industry, such as real estate investment trusts. As a result, most large shopping centre and commercial office owners in Victoria, who manage their centres and offices through a related party, are still not exempted in practice and must still go through the estate agents licencing process with all the costs and that involves. We are seeking to have this corrected in Victoria.

The *NSW Statutory Review of the Property Stock and Business Agents Act* in 2008 also recommended *"that commercial property agents who sell or manage property for a related corporate entity should be exempted from the Property Stock and Business Agents Act."* This followed a recommendation by the NSW Independent Pricing and Regulatory Tribunal in 2006, following its investigation of the burden of regulation in NSW. IPART recommended that the Government consider *"exemptions from requirements for commercial property agents who are managing the property of a related company".*

In April 2008, in its response to the IPART report, the (then) NSW Government stated: *"A regulation to exempt commercial property agents who work for a related corporate entity will be brought forward in the coming months."*

Exemption for agents managing on behalf of sophisticated property owners

The fact that there are risks in commercial real estate transactions – as there are in all business-to-business transactions – does not mean that such transactions should be regulated by governments (in this case by means of licensing and compliance with the *REBA*). This is most certainly true for sophisticated property owners who fully understand the risks involved in property transactions.

A 'related entity exemption', while being a significant advance in removing unnecessary and costly business regulation, would not of itself be sufficient in removing burdensome regulation. Some large property owners, who do their own management through a related entity, would then be free of the costs of licensing requirements and associated regulation. Other major property owners, who choose to use an external agent for the management of their properties, would still ultimately bear the costs of unnecessary licensing requirements and regulation.

Large shopping centre owners, and large owners of commercial and industrial property, are not ordinary consumers who need or want legislative protection. Property ownership is their business and they employ large staffs to ensure their interests are protected. Their relationship with their property manager (agent) is a professional, business-to-business relationship, not a business-to-consumer relationship. The have recourse to legal and commercial avenues if a property transaction goes wrong. The risks in the owner-agent relationship should therefore be a matter for commercial negotiation between the parties, not a matter for regulation by government.

There are legislative precedents, at both the state and national level, for treating certain persons as 'sophisticated consumers' who do not require legislative protection. As well as those cited in the Decision RIS, there are also precedents in Western Australia. In the regulation of retail leases, for example, those retailers whose floorspace exceeds 1,000 square metres are considered to be sufficiently large as to not require the protection of the Western Australian *Commercial Tenancy (Retail Shops) Agreements Act* in their negotiations with their landlords. (Similar floorspace thresholds also apply in retail tenancy in all other States and Territories except Victoria and South Australia where, instead, retailers whose rent or occupancy cost exceeds a certain amount per annum, set by regulation, are also not covered by the relevant retail tenancy legislation).

Nationally the *Corporations Act* recognises that some investors are 'sophisticated investors' who do not require certain disclosure protections that are required for ordinary retail investors. A sophisticated investor is deemed to have sufficient investing experience and knowledge to weigh the risks and merits of an investment opportunity without regulated protection. A 'sophisticated investor' must have net assets of at least $2.5 million, or have had a gross income of $250,000 or more in each of the previous two years. The *Corporations Act* also defines a 'professional investor', who is also exempted from various regulatory protections, as a person with net assets of at least $10 million.

Threshold for determining sophisticated property owners

The Decision RIS suggests that "large non-residential property transactions for a contract price of a prescribed amount and for an area greater than a prescribed area of property" should be the basis for exemption from licensing (p.29). Later in the same paragraph it refers to "a figure of at least $10 million has been proposed as the base point for developing the prescribed monetary exemption and an area of 10,000 square metres is proposed as the base point for the prescribed area." There seems to be some confusion here. The reference to "contract price" seems to suggest the only property transactions are property sales. An amount of $10 million, if it relates to transactions, would exclude the majority of leasing transactions and would also appear to exclude property management.

The figure of $10 million has previously been proposed as the total value of property holdings when considering whether or not a property owner is a 'sophisticated consumer'. This figure has also recently been used in NSW as the threshold for exemption from the requirement for real estate licencees to hold professional Indemnity insurance policies (see the NSW *Property, Stock and Business Agents Amendment (Professional Indemnity Insurance) Regulation 2013).* All previous discussion of the relevant threshold has been based on a monetary threshold based on the value of total property holdings, not the monetary value of the transaction. It would be confusing (and unworkable) now to revert to a transaction threshold.

We have no concerns about using a floorspace threshold if it is thought this would involve greater certainty in determination. However this must not be a combination threshold. We therefore recommend that the proposed threshold be **either** a monetary threshold (based on the total value of all property holdings) or a floorspace threshold (based on the total floor area of all property holdings). A floorspace threshold works well in other States, as noted on page 3 of this submision, in delineating those retail businesses which are included or are excluded from the application of the relevant retail tenancy legislation.

A person or entity which owns at least 10,000 m^2 of commercial property is undoubtedly a sophisticated owner who does not need the protection of the state in their relationship with their property manager. To put this in context, 10,000 m^2 represents a large neighbourhood shopping centre. For example, the lettable area of Kalgoorlie Central shopping centre, in Kalgoorlie, is less than 10,000 m^2 and the centre contains a Woolworths supermarket and 14 other stores. It is obviously nonsense to suggest that a person or an entity with the financial resources and commercial understanding to buy a large neighbourhood shopping centre then requires the protection of the state in their dealings with their property manager.

Regulators should not be too concerned about the operation of the threshold. Undoubtedly, when the 1,000 m^2 threshold was adopted for retail tenancy legislation, there were concerns about how this would operate in practice. In fact it has worked well and very few anomalies have been identified in practice. Concern over the precise operation of the threshold (which will presumably be overseen by NOLA) should not be a reason for denying this vital red tape reduction reform.

Rationale for regulation and licensing

Two questions should be asked when considering whether work relating to the buying, selling, management and leasing of non-residential real property should be regulated by governments. The first is: "if state governments were moving today to regulate the activities of real estate agents in order to protect the interests of property owners, as they were in the 1940s and 1950s when the predecessors of the various Estate Agents Acts were being introduced, would those governments have considered as an act of policy that the interests of commercial property owners needed to be protected and therefore regulated?

The second is: "would those governments have considered that the interests of financially sophisticated property owners, who have accumulated millions of dollars of commercial property and who fully understand the risks involved in property transactions, needed to be protected and regulated?" The answer to both questions is unequivocally "no".

The coverage of commercial property by the various Estate Agents Acts is an accident of history, not a deliberate public policy decision. When state governments first began regulating real estate agents after World War 2 they were concerned with protecting individuals dealing with their local real estate agents to buy, sell or rent their house. These home owners generally knew little of real estate practices and could be vulnerable to an incompetent or dishonest agent. So the governments started licensing real estate agents to ensure they had the requisite skills, education and 'good character' to minimise the chance that they might take advantage of a client. The governments also introduced numerous rules on how real estate agents should operate, again in an attempt to protect home owners against incompetent or unscrupulous agents. These rules govern everything from the signing of cheques and the collection of rent to the establishment of trust accounts. The governments also set up statutory funds, funded by agents and property owners, to compensate people who lost money because of actions by their real estate agents.

Through the intervening years governments have continued to regulate real estate agents on this basis. Over this period, however, enormous changes have taken place in Australia's commercial environment and the nature of commercial property ownership has changed dramatically. Today's commercial property market is characterised by large companies, real estate investment trusts, superannuation funds, property syndicates and managed investment schemes which own and invest in property across state and national borders. Many of today's large professional property owning companies, such as Westfield and Stockland, did not exist when the State Parliaments first began regulating the activities of property agents.

If such companies had existed then, and certainly if they had existed in the scale they have today, it is inconceivable that legislators would have decided that such companies needed legislative protection if they engaged an agent to manage their properties. Yet this is the absurd situation we find ourselves in today.

The 'consumers' being protected by the Estate Agents Act are in many cases large national and multinational entities and the relationship between the owner and agent/manager is a commercial, business-to-business relationship where all parties are professionals and fully informed. Indeed, many property managers in this sector are related corporate entities of the property owner. These owners do not need a statutory fund to compensate them if their arrangements with their agents fail but, by historical accident, these owners and managers remain within the purview of regulation designed to protect non-professional owners and buyers of residential property.

In the commercial property market, where properties can be worth hundreds of millions of dollars, property managers and agents negotiate a comprehensive management agreement tailored to the property in question and setting out in detail accounting and audit requirements, the obligations of the property manager, and the requirements for fidelity guarantee insurance and professional indemnity insurance. Significant resources are applied by both parties to ensure these agreements are thorough and comprehensive and in line with the scale and extent of transactions undertaken in the commercial property market. The scope of these agreements extends well beyond the matters addressed in the *REBA*. Given the millions of dollars at stake in the successful management of a shopping centre, these issues are not left to a standardised property management agreement that has been designed with residential property in mind.

Cost of unnecessary regulation and licensing in Western Australia

Last year we surveyed a sample of our members to establish the annual costs of the requirements of licensing and other obligations of the various Estate Agents Acts around Australia. We asked these members to quantify the costs of annually renewing qualifications; continuing professional development; and the auditing of real estate trust accounts. This information, and the basis on which costs were apportioned (including employee time), was included as an Appendix to our submission on the *Consultation Regulation Impact Statement: Proposal for national licensing for property occupations*. We can supply this on request.

We did not attempt in these calculations to assess the costs of a range of other unnecessary requirements including the plethora of rules on the signing of cheques, receipts and the collection and banking of rents; the establishment and maintenance of separate trust accounts in each state; and the organisational restructuring and organisational inefficiencies often necessary to meet state licensing requirements. Nor did we include in these costs the amount of interest 'foregone' by property owners as a result of interest from the trust accounts being directed into the statutory interest accounts, instead of being money earned by the property owner.

Nor did we seek to quantify the management time involved in implementing and overseeing systems to ensure compliance with the legislation. This includes the following: identifying who requires a licence/salesperson certificate (which can be difficult as both roles and people change); maintaining an up-to-date register of people and roles; organising a basis level of training for all affected employees; ensuring directors of the property management entity hold licences where required; and reporting to the board of the property management entity on all of these issues.

These additional requirements and consequences of regulation add considerably to the costs we have directly measured.

On the basis of our sample of members we have estimated, with reasonable accuracy, that the licensing, professional development and trust account regulation requirements alone are currently costing SCCA members around $3.62 million a year. Since SCCA members own around 60% of the total gross lettable area of Australian shopping centres, a reasonable estimate of the cost of this regulation for the Australian shopping centre industry is around $6 million a year.

This cost of $6 million a year is the cost only to the shopping centre sector of the Australian commercial property industry. Since retail property accounts for around 40% of the commercial property industry[1], and office property accounts for roughly a similar proportion, the total cost of licensing and regulation for the commercial property industry would exceed $12 million a year. It can reasonably be assumed that the cost in Western Australia would exceed $1.32 million a year.[2]

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[1] *David Higgins, Nadia Ditrocchio, Nathan Hughes 'Mapping the Australian Property Investment Universe' RMIT 2008*

[2] *Using the proportion of the Western Australia population to the Australian population*

Where possible, of course, such costs are passed back to the owner of the property through the commissions and management fees they pay. This is particularly frustrating since the only reason these property owners are incurring these costs is to protect themselves against the agent or property manager they have personally chosen, which is often a related corporate entity to the owner, and with whom they have a detailed and legally enforceable commercial contract.

Removal of licensing requirements would therefore bring major benefits to investors in superannuation funds, real estate investment trusts, managed investment trusts, life insurance funds and other investment vehicles. Such investors are mainly people who are saving for, or living out, their retirement.

Removal of such licensing requirements would also free up considerable government staff resources currently occupied in licensing, compliance and enforcement. This is an important consideration at a time when Western Australia, like all state governments, is struggling to control its budget. Most importantly this reform would come at no significant cost to the community.

Other independent inquiries have recommended the removal of regulation

Prior to the recommendations of the Decision RIS various independent inquiries have recommended either the complete removal of regulation for property agents involved in commercial agency work or the removal of regulation for property agents working for an owner which is a related entity to the property owner or property agents working for a 'sophisticated property owner'.

The National Competition Policy review of the Victorian *Estate Agents Act* in 2000 found that "*the costs of the current provisions [of the regulation of the Estate Agents Act] reserving property management, commercial property sales, and business sales to licensed agents exceed the benefits*". (KPMG Consulting, National Competition Policy Review of Victorian Legislation relating to the Regulation of Estate Agents, Department of Justice, October 2000.)

The NSW Independent Pricing and Regulatory Tribunal (IPART) in 2006, in its report on the *Investigation into the burden of regulation in NSW and improving regulatory efficiency* recommended that the Government consider recommended the Government consider "*other potentially viable exemptions from requirements of the [Property Stock and Business Agents Act 2002] for specific classes of commercial property, taking into account the costs and benefits (including administration costs) of such exemptions.*"

The *NSW Statutory Review of the Property Stock and Business Agents Act* in 2008 also recommended "*that commercial property agents who sell or manage property for a related corporate entity should be exempted from the Property Stock and Business Agents Act.*"

It should also be noted that last year the NSW Government sensibly removed the need for its own property staff (and Commonwealth Government property staff in NSW) to hold real estate licenses under the relevant Act in NSW.

Tenants would be unaffected by the exemptions being sought

It is occasionally claimed that the *REBA* needs to continue to regulate agents managing on behalf of large property owners and even related entity property owners because the Act also protects tenants. According to this argument, an agent (acting on behalf of an owner) could be found guilty under the misconduct provisions if they engaged in misconduct. However, this argument does not explain how this action would provide relief to a tenant (as opposed to an owner). Nor does it explain what protection is offered to those tenants of a property whose owner handles property management directly (not through an agent) and who is therefore not regulated by the *REBA*.

Retail tenants in Western Australia are directly protected against actions of landlords (and their agents) by the *Commercial Tenancy (Retail Shops) Agreements Act,* not by the *REBA*. The *Commercial Tenancy (Retail Shops) Agreements Act* (which has only recently been extensively amended by the WA Government following a review) provides minimum lease protections for a tenant in a wide range of areas beginning even before a lease is signed. If the lease does not meet these minimum protections, the Act overrides the provisions of the lease.

The claim that the *REBA* is a protection for tenants is therefore a myth. Why would the Western Australian Parliament have passed the *Commercial Tenancy (Retail Shops) Agreements Act* if the *REBA* was a protection for tenants?

Shopping Centre Council of Australia

The Shopping Centre Council of Australia represents the major owners, managers and developers of shopping centres. Our members are AMP Capital Investors, Brookfield Office Properties, Charter Hall Retail REIT, Colonial First State Global Asset Management, DEXUS Property Group, Eureka Funds Management, Federation Centres, GPT Group, ISPT, Ipoh Management Services, Jen Retail Properties, Jones Lang LaSalle, Lend Lease Retail, McConaghy Group, McConaghy Properties, Mirvac, Perron Group, Precision Group, QIC, Savills, Stockland, Westfield Group and Westfield Retail Trust.

We would be happy to discuss any aspect of this submission, particularly matters relating to the proposed threshold, with your or other relevant staff of the Department of Commerce.

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