

# The road to exemption

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## Abstract

After a seven-year process of investigation and negotiating by a small team of New Zealand Institute of Forestry (NZIF) members, government granted an exemption to NZIF registered members under the Real Estate Agents Act 2008. This permits those members to assist in real estate transactions related to forestry without also being required to become licensed real estate agents. This paper is a blow by blow account of what was involved and the delays and frustrations experienced by the team.

## Introduction

1 November 2017 was a historic moment for the NZIF Registration Scheme. On this day, the coming into force of the Real Estate Agents (Exemptions) Regulations 2017 was the first time NZIF registration was formally recognised by the government in legislation.

This marked the end of a nine-year process that began with the passage of the Real Estate Agents Act 2008. The main provisions of the Act came into force in mid-November 2009. At the time, no-one in NZIF realised the significance of the provisions of the Act on what was routine work for many NZIF registered members and (probably) some non-registered members. Few of us considered that legislation covering real estate agents would have any impact on forestry professionals assisting their clients in forest management and forest investment.

Not so!

In 2010, the Property Institute of New Zealand became aware that under the Act it was probable that many of their members, including land valuers and property managers, were required to become licensed real estate agents. Their investigation suggested the requirement to be licensed would extend to other professionals including property consultants, land surveyors, and farm and forestry advisers.

## Understanding the issue

The Property Institute alerted NZIF and other professional bodies to the issue in September 2010 and sought cooperation for a joint approach to the Minister. Before this they had already been in contact with officials.

NZIF joined the group and itself approached officials in October 2010 expressing concern that registered members, when advising clients involved in property transactions, might need to be licensed real estate agents. We also suggested that real estate agents when involved in transactions, including forest and forest land, should have specialist forestry knowledge and should preferably also be NZIF registered members bound by the NZIF Valuation Standard and Code of Ethics.

Later we were included in a joint letter to Ministers from the Property Institute, NZ Institute of Surveyors, Property Council and Institute of Primary Industry Management, and we attended a meeting of the group with the Associate Minister of Justice on 16 December 2010. At the time the Minister, Nathan Guy, was also Associate Minister for Primary Industries. The Minister advised the group he had asked the Real Estate Agents Authority to conduct a review to identify any issues arising from the Act and to report to him in early 2011. Attendees left the meeting, confident officials were well briefed on the problems with the legislation and would be expecting to receive applications for exemptions from some of the associations represented at the meeting.

## Legal advice

The next step was to obtain legal advice relating to NZIF members. This came from Phillip Merfield of Simpson Grierson, who was also providing advice to the Property Institute. The opinion first examined various aspects of the Real Estate Agents Act. The particular aspect of interest to NZIF members is that under the Act a person must not carry out 'real estate agency work' unless they are licensed under the Act or are exempt from the licensing requirement.

It is immaterial whether or not the work is done as a business in its own right or as part of, or in connection with, another business. The exemptions under the Act apply to lawyers, conveyancers and licensed auctioneers. Additionally, a person can be exempted by regulations made under the Act. At the time no exemptions had been created through regulations, so the opinion concluded that members of NZIF undertaking real estate agency work would need to be licensed under the Act.

To understand the definition of real estate agency work fully, it is necessary to understand the term 'transaction'. In the Act, this is defined as:

- a) *The sale, purchase, or other disposal or acquisition of a freehold estate or interest in land;*
- b) *The grant, sale, purchase, or other disposal or acquisition of a leasehold estate or interest in land (other than a tenancy to which the Residential Tenancies Act 1986 applies);*
- c) *The grant, sale, purchase, or other disposal or acquisition of a licence that is registrable under the Land Transfer Act 1952;*
- d) *The grant, sale, purchase, or other disposal or acquisition of an occupation right agreement within the meaning of the Retirement Villages Act 2003;*
- e) *The sale, purchase, or other disposal or acquisition of any business (either with or without any interest in land);*

*To avoid doubt, the sale, purchase, or other disposal or acquisition of shares comes within the definition of transaction ... if, and only if, the shares entitle the holder to a licence that is registrable under Part 7A of the Land Transfer Act 1952.*

At this point it is clear the Act requires a person to be a licensed real estate agent if they are doing work or providing services, on behalf of another person, in trade (i.e. you are being paid to do it), for the purpose of bringing about a sale, purchase, acquisition etc, of freehold land or a lease in land or a licence that is capable of registration or a business.

One problem faced by NZIF members is the fine line between the excluded activity of 'provision of general advice' and the included requirement of bringing about a transaction. As an example, consider the case of a forest valuer who provides the client with a value for a forest that is the subject of negotiations for a sale or purchase. That action does not appear to be caught. But when the client then asks the valuer to get together with the valuer for the other party to sort out differences between the two valuations, the valuer has quickly become part of the negotiating team and is acting on behalf of the client for the purposes of bringing about a transaction. At that point, the law requires the valuer to be a licensed real estate agent.

## Four assessment scenarios

The legal opinion considered four scenarios of the type of work an NZIF member might undertake to assess whether they might infringe the Act. These were:

### Acquisition of a freehold site for new afforestation

The steps involved include locating suitable land, matching of buyers and sellers (with or without

assistance from a real estate agent), undertaking a feasibility analysis (for which a fee would be charged), liaising with a solicitor, implementing the afforestation project and possibly assisting in ongoing management.

The legal opinion was that work was being done and services provided, in trade, on behalf of another person (the client) to effect the sale and purchase of freehold land. Consequently, the NZIF member would need to be licensed or exempt under the Act.

### Acquisition of mid-rotation crop under a forestry right

The acquisition could be of either a business or just an asset, depending on the nature of the forestry right. The process is similar to the first scenario except it involves a forestry right instead of freehold land. A forestry right is a profit à prendre, and therefore an interest in land, and so falls within the definition of a transaction. Consequently, the NZIF member would need to be a licensed real estate agent.

### Emissions Trading Scheme (ETS)

The steps involved may include providing information on entry to the ETS, estimates of the value of carbon credits, liabilities and changes in carbon stocks in a forest, advising on trading, sales and purchase of emission units, and advising on offset options.

The legal advice was that emission units are personal property, not interests in land, so a transaction does not occur and a licensed real estate agent is not required. However, if obtaining rights to units involved the sale or purchase of land or forestry rights, then we are back into transactions of freehold land or interests in land and so a licensed agent is needed.

### Other interests in land

This scenario considered the preparation and registration of a sustainable management plan under Part 3A of the Forests Act and an assessment of returns of a timber sale from a forest area subject to an interest in land. In both cases no sale or purchase of land occurs. As far as registration of the management plan is concerned it is a notice registered on the title to advise people of the existence of the plan, but it does not deal with the land itself. So, in both cases there is no transaction and no need for a licensed real estate agent.

## Support from members

The conclusions from the legal advice were:

- Some of the work NZIF members undertake is clearly 'real estate agency work'. The situation is less clear for other activities and this is an unsatisfactory situation for NZIF members
- There was no exemption under the Act that applied to NZIF members, so to undertake 'real estate agency work' the member would need to be licensed

- While some members may wish to become licensed real estate agents, the majority would not
- NZIF should consider seeking an exemption for its members.

In early 2012, NZIF was approached by TV1's *Fair Go* programme about the advice being given by real estate agents to prospective purchasers of blocks of land with trees on them. The programme (Carbon Copy) was aired on 22 February 2012. We were asked to comment on that advice and to 'set the record straight' on a number of the claims and promises that covert filming of some agents in the semi-rural areas south of Auckland had revealed. The behaviour vindicated our suggestion to officials in October 2010 that real estate agents dealing with forestry properties should be required to have specialist forestry knowledge and be NZIF members.

In April–May 2012, NZIF held a number of workshops to brief NZIF members on the situation and to canvass support for making an application for an exemption under the Real Estate Agents Act. There was good support for this, so we met with Ministry of Justice officials to discuss the process for seeking an exemption and sought some further advice from the Real Estate Agents Authority (a Crown Entity appointed by the Minister of Justice that administers the licensing regime for real estate agents). It is completely separate from the Real Estate Institute of New Zealand, which is the membership body for real estate professionals in New Zealand.

## The NZIF application

The NZIF application for an exemption for NZIF registered members under sections 9 and 156(1)(a) of the Real Estate Agents Act 2008 was sent to the Associate Minister of Justice, the Hon Chester Borrows, on 5 August 2012. It was the first application made under the Act.

The application only sought an exemption for registered members. This was because such members are required to have recognised qualifications and experience, to comply with ongoing continuing professional development requirements and to abide by the Code of Ethics, which stipulated that they should not undertake work for which they are not qualified or about which they have any doubt of their competency and experience to undertake. Registration is subject to peer review while the NZIF complaints and disciplinary process could see registration cancelled in the event of a breach of the Code of Ethics.

The application also discussed the requirement that, for an application to be granted, no material consumer benefit would be gained by requiring the applicant to be licensed. We stated that licensing a forestry professional would not provide any better forestry input into the transaction, whereas preventing the forestry professional from participating in the

transaction would likely bring about a worse result for the client. We used the *Fair Go* programme as an example of this.

## Early frustration

The Minister's response, two months later on 10 October 2012, was less than encouraging. He said the application raised significant policy questions about the appropriate application of the Act and the types of activities that should be considered real estate agency work. As the Act had only been in force for less than three years he considered it prudent to give the regime more time to settle in before undertaking detailed assessment of exemption requests or reviewing activities regulated by the Act. He had asked officials to report on whether a policy review was warranted once the Act had been operating for five years. Finally, he said he would not be recommending that exemption regulations be made for NZIF registered members.

NZIF responded to the Minister's letter on 18 October 2012. We covered the background to our application, including the legal advice, consultation with our members, officials and the Authority, the meeting with Associate Minister Guy two years earlier, and the fact that the Authority had confirmed advice that work traditionally carried out by our members on behalf of their clients was illegal under the Act unless the member was also a licensed real estate agent.

We referred to the *Fair Go* programme that demonstrated how licensed real estate agents were giving incorrect and misleading advice about forestry matters to their clients. We said that at no point in all the work we had done, with officials and with the Authority, was there any suggestion of a moratorium on applications for an exemption. We said that his refusal to even consider our application was depriving the clients of our members from obtaining the specialist forestry advice necessary for forestry transactions and placing them in the hands of real estate agents who, as *Fair Go* had reported, clearly did not have the specialist knowledge. The only alternative was for our members to continue the service they had traditionally provided and place themselves at risk of prosecution.

Finally, we said the Act provided for the Minister to consider an application, but did not provide for him to refuse to consider an application on the basis the legislation was new and officials needed more time to address policy issues. We requested that he address the application, as required by the Act, without further delay.

On 13 December 2012, we again wrote to the Minister commenting on the outcome of a court case in which a real estate agent was found guilty of carrying out work without a licence. In particular the judge said:

- 'The moment the service provider goes beyond dealing with the owners and begins dealing with the potential buyers in an endeavour to bring about a sale, he is performing real estate agency work'

- ‘The moment you had direct contact with any prospective purchaser you were acting on behalf of the vendors and acting as a real estate agent’.

We pointed out to the Minister that this is the sort of situation our members traditionally find themselves in. Clients may be long-standing customers who decide they want to expand or reduce their forest estate and ask their trusted adviser if they know someone who might want to sell to/purchase from the client. If the member talks to people in that position, they have ‘crossed the line’.

We asked the Minister to take this into account when he replied to our letter of 18 October 2012. The response from the Minister came on 18 December 2012. He advised that the NZ Institute of Chartered Accountants was now also seeking an exemption and officials were going to examine it before the NZIF one because they considered it was less complex. Officials were due to report on the accountants’ application by the end of June 2013 and the NZIF would be looked at after that.

## No mincing the response

NZIF did not mince matters in its response of 24 January 2013. We saw no reason for consideration of our application to be contingent on the content or outcome of applications by other professional bodies. We continued by saying that the Minister appeared to be suggesting it should be completely acceptable for the clients of our members to be required to receive sub-standard advice rather than advice from professionally qualified members of NZIF and further suggested members might need to consider emigrating to a country where their skills were valued. We suggested the provisions of the Real Estate Agents Act demonstrated that the government, contrary to its stated aims of wanting more investment in forestry because of its value to the economy and associated environmental benefits, didn’t really care and was not interested in investment in forestry.

NZIF had also briefed the Minister for Primary Industries on the situation. The response from the Associate Minister on 13 March 2013 suggested options available for NZIF members were to engage the services of a licensed real estate agent or the services of a lawyer or conveyancer or to undertake the necessary training to become licensed under the Act. This showed a lack of understanding of the requirements of the Act and the nature of work undertaken by NZIF members, something which we told the Associate Minister when we responded to her letter.

NZIF representatives met Minister Borrows on 21 March 2013 and received a commitment that consideration of our application would begin in early April with a response by the end of June. Meetings with officials started in April and continued in May. NZIF was also seeking feedback from registered members on issues that arose during meetings.

In late May 2013, officials sought submissions from a limited number of organisations on the application by the Institute of Chartered Accountants. NZIF obtained a copy of the request and made a submission that focused on the need for specialist professional advice to be available to the parties in a real estate transaction. The Act, by preventing specialists from being involved in negotiations (unless they are also licensed real estate agents), meant the parties to the transaction would be advised by those who have no qualifications or experience in complex technical matters. To require the specialist to become a licensed real estate agent was unnecessary and impractical. Accordingly, NZIF supported the accountants’ application.

Around this time NZIF agreed to await progress on the accountants’ application, recognising that officials had already progressed that application further than ours. Unfortunately progress slowed right down. We repeatedly asked officials for an update on the accountants’ application and received repeated responses that it was taking longer than expected. We also found that the officials handling the application kept changing, which added further delays.

In July–August 2014, NZIF was invited to make a further submission on the accountants’ application. The response, while supporting the application, expressed concern at the prescriptive nature of some of the conditions proposed for inclusion in an exemption.

## Reigniting action

In April 2016, having heard nothing from officials or Ministers for some time, NZIF wrote to the Minister (who of course was now different from the one we had previously dealt with, although still of the same political party) expressing our considerable concern at the continued delays in processing the application we had submitted in August 2012. We reminded the Minister of the commitment to provide a decision by the end of April 2013.

The response from Associate Minister Bridges was received just six days later and advised he had already raised the matter with officials. We also learnt the accountants had withdrawn their application some time earlier during the merger of the Australian and New Zealand Chartered Accountants’ associations in 2014.

From that point, things started to move. NZIF met officials on 4 May 2016 and received a strong impression they were in favour of a positive outcome. Not surprisingly, the officials we were now dealing with were not the same ones we had previously been working with (and more changes were to come over the next few months). Time was spent analysing the NZIF Rules, Code of Ethics and the type of work that NZIF members, particularly registered members, undertook. This was compared with the regime applied to real estate agents under the Act and terms and conditions were proposed for an exemption to deal with situations where there was a material difference

between the two. Because the exemption could only set conditions for those members who would be exempt under the Act, officials proposed that NZIF enter into a separate Memorandum of Understanding (MoU) with the Ministry of Justice, to deal with matters that NZIF would need to undertake to observe if the exemption was granted to registered members.

A consultation document was released to selected organisations on 26 May 2016, with responses due by 24 June 2016. The document set out proposed terms and conditions for an exemption to deal with situations where there was a material difference between the regime applied to real estate agents under the Act and the NZIF regime (based on the NZIF Rules and Code of Ethics) and asked respondents two questions:

- Do you agree, disagree or are neutral to the NZIF application?
- Do you agree that the proposed terms and conditions are appropriate and mitigate risks to consumers and exempted NZIF registered members?

Seven submissions were received. Four supported the exemption and three objected. While submissions were being sought, negotiations between NZIF and officials continued on changes that would be needed to the NZIF Rules, the conditions to be included in the MoU and answering queries from NZIF members and others. These included restrictions on the scope of real estate agency work an NZIF registered member would be able to undertake, how an NZIF member could charge a client for real estate work and the nature of trust funds used for moneys received as part of a real estate transaction.

We also had to consider how to manage a proposed requirement to prohibit registration of NZIF members who had been convicted of offences relating to fraud, who had been made bankrupt or who had been guilty of similar offences. Some members wanted to know whether an entity involved in forestry consulting could be exempt as well as the individual registered members operating within the company. The answer to that question was a definite no! NZIF only has individuals as members and has no power over the entities that employ them. An exemption, if granted, would apply only to NZIF registered members.

## The exemption is approved

Once submissions had been received, further work was required to accommodate points raised by some of the submitters. A motion to amend the NZIF Rules was presented at the NZIF AGM in Dunedin on 30 August 2016. The meeting passed it unanimously. This allowed officials to complete their recommendation to the Minister. All the submitters on the proposal were informed that changes to the terms and conditions had been made to accommodate points raised by them and that the Minister had decided to grant the exemption. Cabinet had approved the drafting of the required regulation to implement the Minister's decision.

The MoU between the Ministry of Justice and NZIF was signed on 8 November 2016. In January 2017, the NZIF negotiating team was invited to review the drafting instructions for the regulations that were prepared for the Parliamentary Council Office. We were also able to review a draft of the regulations before it was sent to the stakeholders group for submissions. The submissions closed on 10 March 2017.

As a result of issues that arose in drafting the regulations and in submissions on the draft, it became obvious that further changes were going to be needed to the MoU, the NZIF Rules and the draft regulations. Officials approved proposed changes to the NZIF Rules, to be submitted to the 2017 NZIF AGM, and the revised MoU was signed on 26 July 2017. On 14 August 2017, the Governor-General, acting on the advice and with the consent of the Executive Council and on the recommendation of the Minister of Justice, made an Order in Council to approve the Real Estate Agents (Exemptions) Regulations 2017, which would come into force on 1 November 2017. We were relieved this happened before the General Election on 23 September 2017 as this avoided further delays while a new government was formed.

The amendment to the NZIF Rules was passed unanimously at the NZIF AGM in Rotorua on 3 September 2017. Unfortunately, during final checking of the changes, a few matters were picked up that had been overlooked during the final rush to get everything through. The necessary changes were agreed with officials and members were advised, in order to comply with the Regulations, to proceed as if the changes had already received approval at an AGM. The changes were unanimously approved at the NZIF AGM in Nelson on 9 July 2018.

## What does the exemption mean for NZIF members?

The exemption means that NZIF registered members can once again assist clients and employers negotiate real estate transactions, something they have not been legally able to do since November 2009. However, there are a lot of requirements they must observe so as not to be in breach of the Act or the Regulations. These include:

- Registration is not possible for people convicted of various offences, such as dishonesty and bankruptcy, or if they have been banned from being a director, etc
- They must hold a current annual certificate of registration
- They must be acting within the NZIF Code of Ethics (e.g. not undertaking work outside their competency)
- They must advise the client (in writing) that they are not a real estate agent, that the client may need to seek legal advice and of any actual or potential conflicts of interest

- They must advise the client (in writing) of remedies the client has if the registered member fails to advise the client of a conflict of interest (this could include a substantial payment to the client).

The exemption has also seen the NZIF Registration Board tighten up the processes for application for, and review of, registration.

NZIF has some additional obligations, including seeking approval from the Ministry of Justice for any change to the NZIF Rules or the Code of Ethics and providing an annual report to the Ministry on matters associated with the exemption.

## How did NZIF succeed with its application?

As far as we know only three applications for exemption have been submitted to the Minister since the legislation came into force. As noted, the Institute of Chartered Accountants withdrew their application during a merger of the New Zealand and Australian associations. The application from the Property Institute was rejected by the Minister in June 2018. So how did NZIF succeed?

Factors that contributed include:

- A core negotiating team was maintained throughout that included the two Presidents in office during the process (James Treadwell and Andrew McEwen) and the Chair of the Registration Board (John Schrider). On appointment as Chair of the Board during the process, Simon Rapley was added to the team
- Making sure we understood the issues and that we had NZIF member support before making the application
- A willingness by NZIF to confine the application to specialist forestry knowledge and transactions involving or potentially involving forestry (as defined in the NZIF Rules)
- Acceptance of conditions requiring changes to the NZIF Rules and procedures. These were supported by unanimous approval for Rule changes at two NZIF AGMs
- Support from members, particularly registered members.

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## Appeal for Funds

The NZIF Foundation was established in 2011 to support forestry education, research and training through the provision of grants, scholarships and prizes, promoting the acquisition, development and dissemination of forestry-related knowledge and information, and other activities.

The Foundation's capital has come from donations by the NZ Institute of Forestry and NZIF members. With this, the Board has been able to offer three student scholarships and a travel award each year. It has also offered prizes for student poster competitions at NZIF conferences.

To make a real difference to New Zealand forestry, including being able to offer more and bigger

scholarships and grants, the Board needs to grow the Foundation's funds. Consequently it is appealing for donations, large and small, from individuals, companies and organisations.

The Board will consider donations tagged for a specific purpose that meets the charitable requirements of the trust deed. A recent example has seen funds raised to create an award in memory of Jon Dey who was known to many in New Zealand forestry.

The Foundation is a registered charity (CC47691) and donations to it are eligible for tax credits.

To make a donation, to discuss proposals for a targeted award or for further information, please email [foundation@nzif.org.nz](mailto:foundation@nzif.org.nz) or phone +64 4 974 8421.

*Please help us to support NZ forestry education, research and training*