

Property Services (Regulation) Bill 2009

IAVI President Áine Myler, Second Vice President Roland O'Connell, Residential Panel Member Simor Ensor and CEO Alan Cooke met with Seamus Carroll and Noreen Walsh, officials at the Department of Justice, on Monday 15th June to set out the concerns of the IAVI in relation to certain elements of the Property Services (Regulation) Bill 2009 published recently. The Bill was debated in the Seanad but did not reach Committee Stage and the Department of Justice has informed the IAVI that the Bill will not come before the Dail until September or October. The following letter was sent to record the points raised by the IAVI.

18th June 2009
AC/VB

Mr Seamus Carroll
Principal Officer
Department of Justice, Equality & Law Reform
Bishop's Square
Redmond's Hill
DUBLIN 2

RE: **Property Services (Regulation) Bill 2009**

Dear Seamus

We found Monday's meeting very useful and I am pleased to respond to your invitation to set out our relatively few but important concerns regarding the Bill as presented to the Oireachtas. The IAVI is pleased with the Bill, which closely mirrors the Review Group's recommendations to the Minister which, in turn, were hugely influenced by the IAVI submission to the Working Group. I would like to thank you personally for accepting my earlier suggestion of Advised Market Value so as to benefit from the widespread acceptance of the acronym AMV, introduced unilaterally by the IAVI in 2005 in response to the Working Group's recommendations.

We have no doubt that our industry will benefit from the new regime and that the consumer will also benefit, even though it is clear from the Bill that the practice issues so roundly condemned by sections of the media cannot be addressed without changing the law of contract and/or the law of agency (which is not proposed) as agents are constrained by those laws in terms of what they can and cannot do. As was evident at our meeting, there are a small number of important issues we need to raise for the Department's consideration.

The PSRA can only operate effectively if the property

profession is adequately represented on its Board – a fact recognised by some members of the Seanad during the Second Stage debate. The Review Group that examined the profession would still be about its work if it did not have a small number of people on board who really knew the business and its chair, Alan McCarthy, will attest to this.

The voluntary **IAVI Compensation Fund** was founded 32 years ago and was the first such fund in Europe for the property profession. It provides protection for deposits on real property transactions paid to IAVI Member Firms in Ireland in a sum up to 15 times the Statutory High Court Auctioneer's Bond of €12,700 per Member Firm and 5 times that level per claim.

Since its foundation and up to the end of 2008 the IAVI Fund paid out a total of €172,000 compared to the €40,000,000 or so paid out by the Law Society's Fund to date. Claims are being dealt with by the IAVI at present which will lead to payment of a total sum in or around €150,000 due to the closure of a Member Firm in 2009. That is money that would not be available to customers and clients of the firm concerned but for the generous actions of the IAVI and its Member Firms.

The total claims for the Fund established for clients and customers of IAVI Member Firms, which handle the majority of property transactions in the State, therefore averaged around €10,000 per annum over a 32 year period. We have never had to claim on the insurance policy backing our Fund and all claims have been met from cash reserves.

That 32-year track record suggests that the cash value of €5,000,000 proposed in the Bill for the National Fund is totally excessive. IAVI Member Firms collectively contribute a total of around €20,000 to the IAVI's fund annually, the bulk of which pays our insurance premium.

We believe that an examination of the number of claims on the statutory High Court Auctioneers' Bonds over the years will also demonstrate that the record of Irish auctioneers in terms of

honesty with client funds stands very favourable comparison with other professions. Such an examination would, we believe, fully justify a substantial reduction in the figure proposed for the national fund.

For €5,000,000 to be taken from auctioneering practices for the National Compensation Fund alone over the next four years would cause serious problems for a business sector that is already badly damaged due to the economic downturn and lead to many closures and many more redundancies.

We recommend that the Fund level provided in the Bill should be amended from €5,000,000 to €2,000,000 (the level of insurance cover under the IAVI Fund – we reiterate that we have never had to call on this insurance cover), subject to ongoing review, and that the bulk of this should comprise insurance cover while the Fund is built up very gradually through cash contributions at a rate that reflects ongoing claim experience and the ability of the industry to meet the required cash contributions.

The Review Group acknowledged that estate agency fees in Ireland are low by international comparison. Unjustified demands on the already depleted reserves of auctioneering practices threaten their viability and ensure upward pressure on these competitive professional fees.

It must also be asked whether fees can continue to remain as low when the cost of running the PSRA, excluding the Compensation Fund, is estimated at €3,000,000 per annum. The Review Group suggested that the operation should not cost more than the current 'take' in licensing which, with 2,800 licences in existence, would have been much less than €1,000,000 in 2008.

That aim may be unrealistic, but the fact that the PSRA is to be funded in future by the industry should not permit the organisation to become top heavy in personnel and costs. A quango paid for by an industry is still a quango and **the Department must ensure that the scale and operation of the PSRA are kept within reasonable scales.** Regulation that is so costly as to put decent and properly qualified practitioners out of business is not in the consumer interest as it unreasonably curtails competition.

The new national compensation fund should provide proper protection for client monies but it would be unwise to extend the liability of the profession as a whole beyond client funds. We understand that a court case a year or two ago brought about a rethink on the scope of the proposed Fund. The Fund is intended to be modelled on that of the Law Society, which only pays out in respect of client funds and then only when the claimant's own solicitor receives them directly from the claimant and defaults. **The word 'dishonesty' in the Bill should therefore be changed to 'misappropriation of client funds entrusted to the licensee'.** We are happy that for the purpose of the Fund the term 'client' extends to anyone to whom a deposit is properly payable, whether client or customer.

The inclusion of **agricultural conacre or agistment licence renewals** in the requirement for the provision of letters of confirmation and an AMV would create major administrative difficulties for a sector that produces modest income to agents. It is just possible that, as these are 11-month licences rather than leases, the Bill may not cover them.

If, on clarification, it emerges that they are covered by the Bill as drafted, we suggest that a letter of confirmation and an AMV should not be required for the renewal of such licences where the same property service provider, licensor and licensee are involved. We would also suggest that the same exemption should apply to renewals of residential or commercial leases involving the same property service provider, landlord and tenant, where no marketing is undertaken.

A final but very important amendment that is needed is to change the definition of Advised Market Value in the Bill so that it accords with that of the **International Valuation Standards Council**, recognised throughout most developed economies and by the banking world, which happens to be identical to that in the Red Book of the RICS / SCS.

We recommend that the definition of **Advised Market Value** should therefore be amended to read:

"Market Value is defined as: The estimated amount for which a property should exchange on the date of valuation between a willing buyer and a willing seller in an arm's length transaction after proper marketing wherein the parties had each acted knowledgeably, prudently and without compulsion".

The term '**anxious**' contained in the existing draft is not normally used in valuation terminology and its inclusion could prove problematic. As a recognised international norm exists in this respect, it makes sense to adopt it; this is an opportunity for Irish law to reflect international best practice and it should not be missed.

As for the **10% range** in the Bill in relation to AMVs, we note that this mirrors the IAVI recommendation to the Review Group and we acknowledge the Department's appreciation of the difficulties involved. As mentioned at the meeting, certain markets (very strong or, as at present, very weak) present valuation problems and we must rely on the PSRA to use common sense in addressing the issue of AMV compliance.

Thank you for considering our further suggestions and we remain available to the Department for clarification or discussion as required.

Yours sincerely,



ALAN COOKE
Chief Executive