

# **New Zealand Stock and Station Agents' Association (NZSSA)**

## **Self-Regulation Process**

## Introduction and Summary

1. This paper proposes adoption of a self-regulation framework and processes to support NZSSA and its members to better ensure that client expectations of the members and their individual staff are met.
2. For the purposes of this proposal, industry self-regulation involves a group of industry participants agreeing to act in a prescribed way, according to a set of rules or principles. Participation by firms would be voluntary, but potentially could also be legally required.
3. Self-regulation is best achieved when the groups are wholly responsible for developing the self-regulatory instruments, monitoring compliance and ensuring enforcement, or alternatively they can work with government or quasi-government entities in a co-regulatory capacity. Self-regulatory schemes and tailing some degree of government involvement are common.
4. If designed effectively, self-regulation in our industry will likely have significant benefit in the following areas:
  - a. **Reputation** – self regulatory efforts can help businesses involved to be seen in a more favourable light by consumers, the general public and regulatory authorities. Participants may see benefits in collectively promoting trading standards to differentiate themselves from others in the industry, or to improve or enhance confidence in the industry as a whole. Consumers who are aware that certain participants within an industry are self-regulated often understand its benefits and entrust their business with those participants.
  - b. **Competition** – self regulatory arrangements can be used to develop and maintain common standards, provide level playing fields and facilitate the entry of newcomers and promote competition. On the other hand, those arrangements which favour incumbents, while beneficial to those concerned, can actually act to limit competition. Effective self-regulatory schemes enhance competition.
  - c. **Regulation** – self regulatory schemes have frequently been initiated in response to the threat of government regulation but in the case of this industry there are a number of participants who see significant benefit in self-regulation not only as an alternative to government regulation but as an opportunity to provide a reliable and effective regulatory framework for this industry. A self-regulatory framework will likely allow industry participants to accumulate practical experience in designing and complying with standards over time.
  - d. **Other** – self regulatory systems provide benefits to an industry to the extent that they often include training and resources that soon develop to a best practice platform which further enhances the functionality, transparency and overall openness of the industry.

## Advantages and challenges of self-regulation

5. Industry self-regulation can help to prevent harm to consumers and the environment and to foster improved market functioning in a number of ways. It can, for example, provide support for businesses and overseeing the implementation of all legal requirements within an industry. In our view, it can, and should, also go beyond legal requirements to address areas where market failures exist and no regulatory actions have been taken. The lack of a government response or regulatory environment across our industry means that self-regulation is likely to provide an enhanced environment for all participants. The livestock industry is no different to a number of other vendor channel focused industries in that in the main most participants operate at a very high ethical level, but to ensure that that standard is achieved right across the industry, a self-regulation framework is likely to be of significant advantage.
6. Advantages of self-regulation in the livestock industry include:
  - a. **Going beyond existing legal requirements** – proposed self-regulation in the livestock industry in New Zealand will be able to go beyond what is legally required, thereby contributing to improved consumer outcomes. Globally, self-regulation has been used in a number of instances to establish quality standards that apply to all participants and often go well beyond legal requirements. It is anticipated that a self-regulatory framework in the livestock industry of New Zealand will go above and beyond consumer and fair trading law obligations and set a high standard showing consumers clearly that members can be trusted and that all participants are operating to the highest commercial and ethical standards achievable.
  - b. **More flexibility** – often industry responses to new issues as they present through self-regulatory schemes can be adjusted far more swiftly and easily than government regulations, which can be a time-consuming, cumbersome process and may entail significant procedural hurdles. In this respect self-regulation seems to play a particularly important role in ensuring that as an industry there is the ability to respond to developments in a nimble and timely way.
  - c. **Filling regulatory gaps quickly** – the rapid change that businesses and consumers encounter in any market may require existing laws and regulations to be changed or updated frequently. The self-regulatory process can help establish more effective structures and openness of the market in the future well ahead of the speed at which government led regulation or legislation would achieve. A very successful self-regulatory environment will most likely enhance the opportunity for government to formulate supportive legislation with the confidence of a highly functioning industry driven regulatory framework.
  - d. **Higher technical expertise** – Those parties who participate on a daily basis within an industry have higher technical expertise than other parties. Accordingly, such participants are often better positioned to tailor rules and guidance for specific situations tailored to the needs of participants within that industry. In our view, this is particularly so within the livestock industry, wherein there are a number of issues that are of a technical nature to be considered, including livestock care and welfare, agency and sale contracts and health and safety and environmental considerations.

- e. **Lower cost** - many examples of self-regulation have shown to have been less costly and burdensome for businesses than comparable government regulation, regardless of the level of government involvement.
- f. **Stronger values and ethics** - although it can be argued that self-regulation is unlikely to be successful in the absence of a well rooted culture of business ethics, self-regulatory initiatives tend to nurture stronger business values and ethics. It would be expected over time that the New Zealand livestock industry under a self-regulatory framework would see an acceptance and commitment to an ethical level of all participants that was nonnegotiable. The overall experience for all consumers at that point is significantly enhanced.
- g. **Higher compliance levels** - regulations which are imposed by government might not command the full support of affected businesses which can translate into weak compliance. It is our view that the NAIT regime implemented in New Zealand has been an industry specific example where weak compliance has been an unexpected outcome from a regulatory structure imposed by government. We submit that compliance with self-regulatory mechanisms on the other hand can, and in some cases will be, stronger due to the benefit of buy in by industry members who may have helped design them and who may thus have a vested interest in their success. The degree of commitment engendered by industry control will also likely be beneficial for consumers, as it may in some cases encourage businesses to raise the bar and reach for high standards.
- h. **Enhance competition** - self-regulation will help to enhance competition, to the extent, for example, that it establishes norms that create more level playing fields and, by encouraging responsible business and participant behaviour, provides added incentives for the consumers to purchase from businesses which participate in the schemes. Small businesses can benefit from participation, to the extent that their reputations are enhanced. The livestock industry in New Zealand has a number of participants of varying sizes and it is likely that if a self-regulatory framework is adopted that competition will be enhanced due to the creation of a level playing field.
- i. **Conserving government resources and costs** - from the government perspective, industry self-regulation is likely to be more cost-effective since most of the regulatory costs will be borne by the livestock industry itself and the businesses participating in that industry rather than government. Enforcement and inspection costs would be saved and absorbed within the industry in a manner which is most likely to lead to significantly lower costs for government.

## Challenges

- 7. The success of industry self-regulation depends critically on the strength of the provisions and the extent to which businesses adhere to the schemes. For example, the global financial crisis of 2007 to 2008 demonstrated that industry self-regulation arrangements are not always successful. That crisis indicated clearly that self-regulation and initiatives which rely entirely on a voluntary approach to improve business behaviour have limitations. We believe that for the New Zealand's livestock industry to have an effective self-regulatory framework then the

strength of provisions and the obligations for business adherence will be critical. Clarity of objectives and leadership will be imperative for its success.

## Steps towards a self-regulatory environment

8. As a general principle, the features of regulatory schemes that would influence the degrees to which they may succeed include:
  - a. clarity and strength of objectives
  - b. conformity of schemes with government policy
  - c. legal basis
  - d. leadership
  - e. leveraging industry knowledge and rule setting
  - f. monitoring transparency and public accountability
  - g. well-established enforcement and sanctions
  - h. sophisticated dispute resolution and redress system
  - i. stakeholder participation and buy in
  - j. public awareness
  - k. government support and endorsement
9. Each of these areas will need specific focus and development but as a starting position we have prepared some thoughts as to the practical steps that will be required as follows below.
10. It is proposed that industry participants agree a code of practice and behavior (in greater detail than presently) and to form as a delegated leadership and regulation group a 3 – 4 person sub-group of the executive (with up to one suitable external expert) nominated from time to time by the executive, and empowered by members to receive and review complaints received against member agents or, where feasible, non-member agents, and to promote awareness of this offering to clients.
11. Any member of that sub-group with a clear personal/organisational interest in any complaint shall be excluded from review of that complaint. Clear terms of reference will be established and the basis on which the enforcement of the disciplinary nature of the self-regulatory environment would be clearly set out in a manner which was transparent and informative for all participants.
12. It is acknowledged that the NZSSA has no legislated powers in this regard, limited available penalties to apply, and that the initiative is intended to create an advisory and potentially advocating review group, which also has the power of referral to the full executive where cessation of membership of the association or referral to external legal options, is considered warranted.
13. Advice and advocacy may well be in relation to referral and/or support through existing legislated tribunals, courts, etc. One area that will need to be finalised with some care is what penalty regime would be adopted by the industry. Ultimately the penalty regime needs to be one that has some credibility and would likely have the effect of discouraging activities and behaviours that do not fit within industry standards.

## Background

14. We believe that the NZSSA would be an effective organisation to implement a self-governing regulatory framework for its agent members to comply with. Doing so would fit within the NZSSA's stated purposes and objectives.
15. The present 'Rules, Objectives and Eligibility for Membership' of the NZSSA include the following purposes:
  - a. Promote the interests of full time commercial livestock agents operating throughout New Zealand
  - b. Conduct itself in accordance with the law including such legislation as the Commerce Act
  - c. Provide members with a set of operating standards expected of them as a member of the association
  - d. Provide the public confidence that they can expect a minimum standard of performance in relation to representation and standard of service
  - e. Provide members with information to assist them to comply with key legislation
  - f. Provide guidelines to assist members comply with environmental issues.
16. Set out below is a proposed Code of Practice/Behaviour and Complaints Regime. It is subject to review from industry participants and any feedback that any interested parties may wish to provide. The purpose of these documents is to give an insight as to how the NZSSA proposes to self-regulate its agent members, and non-agent members (should circumstances permit).

## **Proposed Code of Practice/Behaviour Definitions**

- 'Agent' or 'Agency' refers here to the agent principal (i.e. NZSSA member), such that a breach of this code by the Agent's employed or contracted individual livestock agents or staff is deemed to be a breach by the Agent

### **Staff Compliance**

- Agencies must ensure that all of its employees and contracted livestock agents are contractually required to comply with a policy or code that mirrors the behaviours established by this code. Agencies to provide that non-compliance amounts to serious misconduct or termination of any livestock agent agreement

### **Take reasonable steps to safeguard health and safety**

- Agencies must ensure compliance with the Health and Safety at Work Act 2015

### **Standard of professional competence**

- Agencies must exercise skill, care, competence and diligence at all times when providing services to clients, and must be aware of the standards required by this Code of Conduct –
- Agencies must provide adequate training of all new entrants into the industry and have a complaint resolution process that is set up in a formal manner to deal with any complaints
- Details of any complaints and the resolution must be retained in a manner which can be accessed and audited at any time

### **Standards of professional conduct**

- Agencies must strive to enhance the consumer experience and confidence in the industry
- Agencies must comply with the fiduciary obligations to its client
- Agencies must act in good faith and deal fairly with all parties engaged in a transaction
- Agencies must not engage in any conduct likely to bring the livestock industry into disrepute
- Agencies must not mislead a client, nor provide false information, nor withhold information that should by law or in fairness be provided to a client
- Agencies shall not provide services to more than one client in relation to a transaction or related series of transactions if they are unable to comply, in respect of each such client, with the standards required by this Code of Conduct

### **Duties and Obligations**

- Agencies must ensure that this Code of Practice is communicated appropriately to clients, and made available to them on request
- Agencies must ensure adequate supervision of staff offering livestock agency services to clients

### **Client Care**

- Agencies must operate in the best interests of the client and act in accordance with the client's instructions unless to do so would be contrary to the law or good professional conduct
- Agencies must ensure that there is a process of disclosure of any interested parties and that transparency becomes paramount
- Agencies will look to establish a culture of comfortable compliance by all participants in the industry
- Agencies must not engage in any conduct that would put a prospective client, client, or customer under undue or unfair pressure
- Agencies must communicate regularly and in a timely manner, and keep the client well informed of matters relevant to the client's interest (unless instructed otherwise by the client)
- Agencies must not mislead potential buyers or sellers as to client price expectations
- Agencies should ensure that clients signing complex agreements are advised that they should, and are provided sufficient time to, seek independent legal advice where relevant
- Agencies must not impose conditions on a client in relation to their service to that client that are not reasonably necessary to protect the interests of the Agency
- When authorised by a client to incur expenses, Agencies must seek to obtain the best value for the client
- Agencies must ensure that fees and charges in relation to their service provided to a client are clear and understood

### **Conflicts of interest**

- Agencies must ensure that any parties to a livestock transaction contributing directly to recompense of the Agency are generally aware of all ways the agent is recompensed in relation to the deal, and that all legal requirements in respect to disclosure of commissions are complied with
- Agencies need to have an effective process for declarations of interest and disclosures to all parties of any relationships or interest in transactions that may in any way affect the parties' decisions

### **Confidentiality and Privacy**

- Agencies must not use information that is confidential and private to a client for the benefit of any other person or the agent, unless the use is consented to in writing by that client, or required to be disclosed by law

### **Valuations**

- A valuation of livestock, specifically paid for by a client, must reflect current market conditions and be provided in writing

### **Disclosure of Defects**

- Agencies are not required to discover hidden or underlying defects, but must disclose known and not clear to the buyer defects or issues to a potential buyer of livestock
- Agencies must ensure that at all times any information they hold in respect of livestock is disclosed to the buyer

### **Report breach of Code**

- If an Agency has reasonable grounds to believe that another agency has committed a significant breach of this Code of Conduct, he or she must report the matter to NZSSA.

### **Complaints Handling**

- Agencies must have processes in place to facilitate consideration and response to client complaints made against the Agent Business or the Agent, and to engage with NZSSA in relation to review of any client complaint referred to NZSSA in accordance with the NZSSA's Complaints Regime

## Schedule

### Proposed Complaints Regime for Breach of the Practice/Behaviour

- It is intended that the NZSSA complaints handling mechanism only be offered after resolution of a complaint with the individual Agent (NZSSA member) has failed to satisfy the complainant.
- It is anticipated that a mediation service would likely assist early resolution of a complaint and that resolution service could possibly be resourced by industry leaders identified as having both the experience and aptitude to lead a dispute resolution process between parties.
- As a general principle, the first response to a complaint should be a resolution directly with the entity involved but if that has failed then a mediated outcome may well be the next best resolution.
- A cascading structure is proposed as follows:
  - o Parties encouraged to engage directly in good faith and resolve complaint
  - o matter referred to industry resourced mediation process
  - o if mediation fails then matter referred to industry resourced dispute/standards hearing

### 1 Preamble

The processes undertaken in the consideration of complaints or the resolution of disputes will be in strict accordance with Rules determined by NZSSA. The rules of natural justice will be paramount in all processes. The rules of natural justice include the right:

- a. for a respondent to know the details of a complaint and the supporting evidence;
- b. to provide evidence in defense; and
- c. for an unbiased determination made by those who hear all the evidence.

### 2 Procedure

The following is the procedure for dealing with an alleged breach of the Code of Conduct:

#### *Lodging the Complaint*

2.1 A complaint, being an allegation of a breach of the Code of Conduct, may be made by any individual or entity concerning any person who is an NZSSA member or was a member at the time relevant to the complaint.

2.2 Placing such a complaint shall signify acceptance that the matter shall be determined in the manner prescribed in this Schedule, including the clauses dealing with publication of the findings of this consideration of the complaint. The complainant also specifically waives any right to take civil action against the NZSSA should he or she disagree with the process or findings of the NZSSA.

2.3 Nothing in this Schedule shall preclude the complainant or others taking civil or criminal proceedings against the member in question, and this process should not be seen as an alternative to doing so if appropriate.

2.4 The complaint must be made on the prescribed form (*to be developed*) setting out particulars of the alleged breach and attaching any documentation or other relevant details. The complaint shall be addressed to the NZSSA Chairman, or if it is in relation to the conduct of the Chairman or an agent or business that is associated the Chairman, to the Deputy Chairman. This person shall be the “Receiver” of the complaint.

#### *Receiving the Complaint*

2.5 The Chairman (or Deputy Chairman) may delegate to any member of the Executive Committee to act on his or her behalf as Receiver to discharge the remainder of his or her responsibilities in relation to the matter if he or she sees fit. For example, if there is a conflict of interest, or if he or she is unable to fulfill the Receiver’s requirements within the time required.

2.6 The Receiver must acknowledge receipt of the complaint in writing, and notify the member of the complaint in writing (attaching a copy of the complaint and all documentation provided with the complaint), including that the complaint has been referred to the Discipline and Professional Conduct Board who will hold a hearing into the complaint.

#### *Referral to Discipline and Professional Conduct Board*

2.7 The Receiver must refer the complaint to the Chair of the Discipline and Professional Conduct Board within 5 working days of receipt.

2.8 If the Chair of the Discipline and Professional Conduct Board is not available to complete the requirements in this Schedule in a timely manner the Chairman may authorise another member of the Executive Committee to Chair proceedings and discharge the duties of the Chair as outlined in this Schedule.

#### *Fivolous or Vexatious Complaints*

2.9 At any stage of proceedings if the Chair of the Discipline and Professional Conduct Board believes that the complaint is frivolous or vexatious they may immediately call for a vote of the Discipline and Professional Conduct Board as to whether it is indeed frivolous or vexatious. This vote may be conducted in any way prescribed by the Chair, including via email.

2.10 If the Discipline and Professional Conduct Board votes by a three quarters majority that the complaint is frivolous or vexatious it shall be immediately dismissed.

#### *Hearing of the Discipline and Professional Conduct Board*

2.11 The Chair of the Discipline and Professional Conduct Board shall forward a copy of the complaint and all supporting information to the members of the Discipline and Professional Conduct Board and arrange a hearing of the Board, which shall be between 3 and 6 weeks from the date the complaint is referred. The Chair of this Board may choose a hearing time outside this timeframe if it is necessary to ensure a fair hearing, however the hearing must be conducted in a timely fashion.

2.12 The quorum for the hearing shall be two thirds of the membership of the Discipline and Professional Conduct Board. The hearing may be held by teleconference or in person.

2.13 Hearings are confidential and the evidence provided during a hearing is not published, other than that to support a published verdict (see below).

2.14 The complainant will have the option of addressing the hearing of the Discipline and Professional Conduct Board in person (where the hearing is held in person) or by teleconference for the purpose of providing further verbal evidence. If they are to address the hearing they may only be present for the portion of the hearing set aside for that purpose.

2.15 The Discipline and Professional Conduct Board may call on any witnesses or other persons to provide verbal evidence to the hearing, but has no authority to compel. Any witness may opt to provide evidence by way of a signed statement. Any witness providing verbal evidence may only be present for the portion of the hearing set aside for that purpose.

2.16 In keeping with the principles of natural justice, the member alleged to have committed the breach will have the option of being present during all verbal evidence but may not address the complainant, witnesses, or the Board at that time.

2.17 The member alleged to have committed the breach will have the option of addressing the hearing of the Discipline and Professional Conduct Board in person (where the hearing is held in person) or by Teleconference for the purpose of providing verbal evidence. The member may also choose to provide evidence in writing in advance by signed statement. The complainant may equally opt not to do either and this shall not be construed as evidence of acceptance of the allegation of breach.

2.18 The member alleged to have committed the breach may choose to be represented.

#### *Outcome of Hearing*

2.19 The Discipline and Professional Conduct Board shall deliberate in private until such time that:

- a. The Board rules by a three quarters majority that a significant breach has occurred. In this case a breach shall be found proved and the finding, along with a detailed justification for the finding, shall be referred to the Executive Committee;
- b. The Board rules by a three quarters majority that a technical breach occurred, but finds that the breach is trivial or trifling and the matter is dismissed;
- c. The Board rules by a three quarters majority that no breach has occurred and the matter is dismissed;

If the Board cannot agree by a three quarters majority that a breach has occurred and the Chair determines that further deliberation would be ineffective. The matter is therefore found to be unproved and is dismissed.

2.20 The complainant and the member shall be informed of the outcome without delay.

#### *Penalty Imposed*

2.21 In the case of a breach, the Discipline and Professional Conduct Board shall agree a penalty consistent with both the gravity of the breach and previous penalties for similar breaches from the options provided in the NZSSA Rules. A report outlining the findings and penalty shall be forwarded to the Executive Committee without delay.

2.22 In the case of a breach, the Discipline and Professional Conduct Board shall solely decide the penalty, if any, from the remedies provided in the Rules. Subject to 2.25, the penalty is not subject to appeal.

2.23 The Discipline and Professional Conduct Board shall determine whether the existence, details, finding, complainant identity, and/or penalty shall be released publicly, and no other member or participant shall release in part or full any determination or detail related to the hearing or complaint other than that which this Board chooses to release.

2.24 If the hearing uncovers significant criminal or civil wrongdoing the Executive Committee may opt to refer the matter to the NZ Police or other law enforcement agency by way of a formal complaint, or commence other legal proceedings as it sees fit.

*Appealing the Determination of the Hearing*

2.25 An Appeal against any finding may be made by either the Complainant or Member concerned for any of the following reasons:

- a. If further evidence that was not previously available becomes available that is materially different to any considered during the hearing and which, on balance, could change the Board's decision;
- b. If the procedure outlined in this schedule was not adhered to, and the breach is more than trivial and may have materially changed the outcome of the hearing;
- c. A member of the Discipline and Professional Conduct Board had a significant undeclared Conflict of Interest which may have impacted upon his or her impartiality.

*2.26 Disagreeing with the determination or penalty shall not be grounds for appeal.*

2.27 Any appeal should be made to the original Receiver within 21 days of the determination of the Discipline and Professional Conduct Board. The Receiver will initially determine whether, on the balance of probability, the appeal meets the criteria outlined in 2.25 and if so, shall formally forward the appeal to the Executive Committee.

2.28 The Executive Committee shall consider the matters raised in the appeal and determine whether the appeal shall stand. If the appeal stands the Board may modify the determination or penalty as it sees fit.