

Act 1994 No. 20

**PROPERTY, STOCK AND BUSINESS AGENTS
(AMENDMENT) BILL 1994***

NEW SOUTH WALES



EXPLANATORY NOTE

(This Explanatory Note relates to this Bill as introduced into Parliament)

The object of this Bill is to amend the Property, Stock and Business Agents Act 1941 so as:

- to provide for interest on licensees' trust accounts to accrue at 25% (or after 2 years, a greater percentage determined by the Minister after consultation with the Treasurer) of an interest rate similarly determined on the whole of the funds held in those trust accounts
- to abolish the Real Estate Services Council Special Account established under section 36F of the Act and to provide for interest on licensees' trust accounts to be paid to the Real Estate Services Council Statutory Interest Account established under section 63B of the Act
- to enable licensees' trust accounts and certain other accounts to be kept with building societies as well as with banks
- to expand the purposes for which money held in the Statutory Interest Account may be applied
- to extend the period within which a person may make a claim for compensation from the Compensation Fund arising from a licensee's failure to account for money entrusted to the licensee
- to allow claims against the Compensation Fund for a failure to account by a licensee after his or her licence expires and before an application for restoration of the licence is finally dealt with
- to make other minor amendments.

Clause 1 specifies the short title of the proposed Act.

* Amended in committee—see table at end of volume.

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Clause 2 provides for the proposed Act to commence on a day or days to be fixed by proclamation.

Clause 3 gives effect to Schedules 1–4, which contain amendments to the Property, Stock and Business Agents Act 1941.

Clause 4 makes a consequential amendment to the Real Estate Services Council Act 1990.

SCHEDULE 1—AMENDMENTS RELATING TO TRUST ACCOUNTS ETC.

Prescribed financial institutions to pay trust account interest to the RESC Statutory Interest Account

Section 36 of the Act requires all licensees under the Act to hold clients' money in trust accounts established at a bank in New South Wales. Section 36D of the Act currently requires a licensee to deposit with the Real Estate Services Council (the Council) 25% of the amount that was the lowest balance in the licensee's (or, if the licensee is a member of a firm, the firm's) trust account on any day during the period of 12 months ending on the preceding 31 March. Section 36F of the Act currently requires the amounts deposited to be held in the Real Estate Services Council Special Account established under that section and section 36E requires the Council to hold those amounts on trust for the licensee or firm concerned and, pending repayment, to invest them either in an interest bearing bank account or with the Treasurer. Sections 36D–36F are to be replaced by a new scheme under which the financial institutions with which licensees keep trust accounts will become responsible for paying interest to the Council for crediting to the Statutory Interest Account.

Under the amended section 36, as well as being able to establish trust accounts at banks, licensees will be able to establish trust accounts at those building societies in which trustees are authorised to invest trust money. A licensee will also be required to notify a prescribed financial institution with which the licensee opens a trust account that the account is a trust account and to notify the Council if a trust account kept by the licensee with the institution is closed or becomes overdrawn.

Proposed section 36AA will require the Minister, after consultation with the Treasurer, to determine a trust account rate for each financial institution at which trust accounts are kept under section 36. For the first 2 years after the commencement of proposed section 36AB, interest on trust account balances is to be calculated at 25% of the trust account rate applicable to the institution. At the end of that period of 2 years, it will be possible under that section to change the percentage to some greater percentage determined by the Minister after consultation with the Treasurer.

Proposed section 36AC will require each financial institution at which licensees and licensees' firms keep their trust accounts, on the first business day after the end of each month, to calculate interest on daily balances held in those trust accounts and pay the amount calculated (free of the institution's transaction charges) to the Council for crediting to the Statutory Interest Account. Proposed section 36AD will require a prescribed financial institution that keeps trust accounts for licensees to make monthly reports to the Council specifying the number of trust accounts opened during the month and the amount of interest earned on all trust accounts kept with the institution during the month. Such an institution will also be required to inform the Council if any of those accounts has become overdrawn. Proposed section 36AE makes it clear that proposed sections 36AC and 36AD do not apply to separate trust accounts kept on the instructions

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of a client of a licensee or a firm of licensees for the exclusive benefit of the client or to trust accounts of a prescribed class. Proposed section 36AF will make it an offence for a prescribed financial institution to fail to comply with a requirement of proposed section 36AC or 36AD. (See Schedule 1 (1), (3)–(5), (7)–(15) and Schedule 4.)

RESC Administration Account and Statutory Interest Account

An amendment to section 25 of the Act will enable the Council, as an alternative to depositing the Administration Account money in a bank account, to deposit that money with a building society in which trustees are authorised to invest trust money. A similar amendment is made to section 63B in relation to the Statutory Interest Account. (See Schedule 1 (2) and (12) (b).)

Unclaimed trust money

An amendment to section 36C will provide for an annual remittance to the Consolidated Fund of unclaimed trust money paid to the Council by licensees. At present the money is paid into the Consolidated Fund when it is received from licensees. (See Schedule 1 (6).)

SCHEDULE 2—AMENDMENTS RELATING TO THE STATUTORY INTEREST ACCOUNT AND THE COMPENSATION FUND

Application of money in the RESC Statutory interest Account

Section 63D of the Act currently specifies the purposes for which money held in the Statutory Interest Account may be applied. Those purposes include supplementing the RESC Compensation Fund to meet deficiencies in the Fund, meeting costs incurred by organisations in providing educational meetings, lectures and courses of study for the Council and meeting certain administrative costs of the Council. Money held in the Account can also be used to meet part of the cost of administering the Residential Tenancies Tribunal and the Fair Trading Act 1987. Funds not immediately required for any of those purposes can be invested by the Council.

That section is to be replaced by a section which will enable money held in the Account to be applied for the purposes mentioned above and for any of the following additional purposes:

- to provide loans or grants to persons or organisations to enable them to provide facilities for the delivery of courses of study and other educational programs approved by the Council;
- to meet costs involved in providing courses of study and other educational programs in addition to those now organised by or for the Council;
- to meet the cost of providing public information and guidance programs (currently funded from the RESC Administration Account);
- to meet costs involved in establishing a co-regulation scheme for the conduct of real estate services;
- to meet costs involved in establishing a disciplinary tribunal or other body to deal with complaints relating to the conduct of licensees and in establishing a body to resolve disputes arising out of the provision of real estate services;
- to meet deficiencies occurring in the RESC Administration Account.

(See Schedule 2 (4).)

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The amendments relating to the RESC Administration Account made by items (1)–(3), (6) and (8) of Schedule 2 are consequential on the substitution of proposed section 63D.

Compensation Fund account

An amendment to section 66 of the Act (**Separate bank account**) will enable the Council, as an alternative to depositing the Compensation Fund money in a bank account, to deposit that money with a building society. (See Schedule 2 (5).)

Time limit for making compensation claims

Section 74 of the Act entitles a person who has entrusted money to a licensee to make a claim against the Real Estate Services Council Compensation Fund for a failure to account for that money. However, a claim is barred if not made within 6 months after the person becomes aware of the failure to account or within 2 years after the failure to account, whichever occurs first. An amendment to the section will increase the period of 6 months to 12 months. (See Schedule 2 (7) (a).) A further amendment will extend that period until 1 year of the termination of a tenancy agreement if the claim relates to the non-lodgment of a tenancy bond with the Rental Bond Board. (See Schedule 2 (7) (b).)

SCHEDULE 3—AMENDMENTS RELATING TO LICENCES

Schedule 3 (1) and (2) makes the following 2 changes relating to the restoration of licences that have expired:

- (a) an amendment to section 23A (**Restoration of licence by the General Manager**) to enable the late lodgment fee to be waived if the application for restoration is lodged within 7 days of the expiry of the licence;
- (b) an amendment to section 23C (**Effect of decision on application for restoration of licence**) to declare anything done after the expiry of a licence and before the dismissal of an application for restoration to have been done by a licensed person (at present such a declaration is made only if the application for restoration is successful). The declaration will enable claims against the Compensation Fund for a failure to account by a licensee during that period. The declaration does not remove the criminal liability of the person concerned for carrying on business without a licence during that period.

Schedule 3 (3) amends section 64A (**Definition of failure to account**) to make it clear that, if a failure to account occurs after a licensee ceases to be licensed, a claim against the Compensation Fund may still be made if the money concerned was entrusted to the person while the person was licensed or deemed to be licensed.

SCHEDULE 4—SAVINGS AND TRANSITIONAL AMENDMENTS

The Schedule amends Schedule 2 to the Act (**Savings and transitional amendments**):

- to enable savings and transitional regulations to be made; and
- to make transitional and savings provisions consequent on the enactment of the proposed Act.

One of the provisions will require the Council, on the repeal of section 36E (**Moneys deposited by licensee or firm with Council to be invested etc.**), to repay to the persons or firms concerned money deposited with the Council under the existing section

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36D. However, if the persons or firms who deposited the money no longer hold licences, the money is to be paid to the Treasurer for payment to the Consolidated Fund. Persons entitled to money paid to the Treasurer will be able to claim it from the Treasurer. As soon as practicable after the money deposited under existing section 36D has been repaid (or paid to the Treasurer), the RESC Special Account is to be closed.

Another provision will make it clear that a claim that is already barred under section 74 of the Act (**Application of fund**) will not be resurrected as a result of the amendments made to that section by Schedule 2 (7).
