

Passed by both Houses



New South Wales

Property, Stock and Business Agents Amendment Bill 2006

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I certify that this PUBLIC BILL, which originated in the LEGISLATIVE ASSEMBLY, has finally passed the LEGISLATIVE COUNCIL and the LEGISLATIVE ASSEMBLY of NEW SOUTH WALES.

*Clerk of the Legislative Assembly.
Legislative Assembly,
Sydney, , 2006*



New South Wales

Property, Stock and Business Agents Amendment Bill 2006

Act No , 2006

An Act to amend the *Property, Stock and Business Agents Act 2002* to make further provision with respect to licence disqualification, advertising, auction sales, trust accounts and penalties; and for other purposes.

I have examined this Bill, and find it to correspond in all respects with the Bill as finally passed by both Houses.

Chairman of Committees of the Legislative Assembly.

The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *Property, Stock and Business Agents Amendment Act 2006*.

2 Commencement

This Act commences on a day or days to be appointed by proclamation.

3 Amendment of Property, Stock and Business Agents Act 2002 No 66

The *Property, Stock and Business Agents Act 2002* is amended as set out in Schedule 1.

Schedule 1 Amendments

(Section 3)

[1] Section 14 Eligibility for licence or certificate of registration

Insert at the end of section 14 (3):

Note. The grounds of disqualification in section 16 (1A) do not disqualify a person from eligibility to hold a certificate of registration.

[2] Section 14 (4)

Insert after section 14 (3):

- (4) The requirement that at least one of the directors of a corporation holds a licence that a natural person is required to hold to carry on the business that the corporation carries on or proposes to carry on does not require a director to be accredited as an auctioneer under section 21 merely because the corporation carries on or proposes to carry on the business of an auctioneer.

[3] Section 16 Disqualified persons

Omit section 16 (1) (c)–(e).

[4] Section 16 (1) (h)

Omit the paragraph. Insert instead:

- (h) is the holder of a licence, permit or other authority that is suspended under legislation administered by the Minister or is disqualified from holding a licence, permit or other authority under legislation administered by the Minister, or

[5] Section 16 (1A)

Insert after section 16 (1):

- (1A) A person is also a disqualified person for the purposes of this Act (except for the purposes of eligibility to hold a certificate of registration) if the person:
- (a) is an undischarged bankrupt, or
 - (b) at any time in the last 3 years was an undischarged bankrupt, applied to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounded with his or her creditors or made an assignment of his or her remuneration for their benefit, or
 - (c) is, or was at any time in the last 3 years, a director or person concerned in the management of an externally-

administered body corporate (within the meaning of the Corporations Act) except in a case of the voluntary winding up of the body corporate, or

- (d) is a person:
- (i) who at any time in the last 3 years, was a director or person concerned in the management of a body corporate that, within 12 months after the person ceasing to be such a director or person, became an externally-administered body corporate (within the meaning of the Corporations Act) except in the case of a voluntary winding up of the body corporate, and
 - (ii) who failed (while a director or person concerned in the management of that body corporate) to take all reasonable steps to avoid the body corporate becoming an externally-administered body corporate.

[6] Section 16 (2A)–(2D)

Insert after section 16 (2):

- (2A) The Director-General may, in any case that the Director-General thinks it appropriate to do so, determine that a suspension or disqualification from holding a licence, permit or other authority under legislation administered by the Minister (as referred to in subsection (1) (h)) is to be ignored for the purposes of this section.
- (2B) The Director-General may exempt a person from the operation of subsection (1A) (a), (b) or (c) by:
- (a) certifying, in the case of exemption from subsection (1A) (a), that the Director-General is satisfied that the person took all reasonable steps to avoid the bankruptcy concerned, or
 - (b) certifying, in the case of exemption from subsection (1A) (b), that the Director-General is satisfied that the person took all reasonable steps to avoid the bankruptcy or other financial difficulties concerned, or
 - (c) certifying, in the case of exemption from subsection (1A) (c), that the Director-General is satisfied that the person took all reasonable steps (while a director or person concerned in the management of the body corporate) to avoid the body corporate becoming an externally-administered body corporate.

- (2C) Subsection (1A) (d) does not operate to make a person a disqualified person unless the Director-General has served a notice on the person giving the person the opportunity to make oral or written submissions to the Director-General within a period (not being less than 14 days) specified in the notice with respect to the grounds on which the person believes he or she took all reasonable steps to avoid the body corporate becoming an externally-administered body corporate and the Director-General is satisfied that the person failed to take all such steps.
- (2D) In determining for the purposes of subsection (2B) or (2C) what reasonable steps could have been taken by a person to avoid a particular outcome, the Director-General is to have regard to the steps that could have been taken by the person from the time that the financial difficulties that gave rise to the outcome first arose.

[7] Section 31 Each place of business to be in charge of licensee

Insert after section 31 (6):

- (7) A requirement of this section that the person employed as the person in charge of business at a place of business must be the holder of a licence that an individual is required to hold to carry on that business does not require the person to be accredited as an auctioneer under section 21 merely because the business includes the business of an auctioneer.

[8] Section 37 Rules of conduct for licensee's business

Omit the note to the section.

[9] Section 37 (2)

Insert at the end of section 37:

- (2) A licensee or registered person who without reasonable excuse contravenes a rule of conduct prescribed for the purposes of this section is guilty of an offence.

Maximum penalty:

- (a) 100 penalty units in the case of a corporation, or
(b) 50 penalty units in any other case.

[10] Sections 43–45

Insert “(other than a person whose disqualification is on a ground that does not disqualify the person from eligibility to hold a certificate of registration)” after “disqualified person” wherever occurring.

[11] Section 47 (1) (c)

Omit the paragraph. Insert instead:

- (c) the amount, value or nature of any benefit of which the agent is aware that a person to whom the agent has referred the client or a prospective buyer has received, receives, or expects to receive in connection with the sale, or for promoting the sale, or for providing a service in connection with the sale, of the land.

[12] Section 47 (2) (c)

Insert “at the time the agent refers the client or prospective buyer to a person for professional services associated with the sale or purchase of land and” after “acknowledged” in section 47 (2) (c).

[13] Section 47 (3)

Insert in alphabetical order:

prospective buyer means a person who there are reasonable grounds to believe is a potential or likely buyer of land (whether or not the person has made an offer to buy the land).

[14] Section 50 Advertisements to include information about licensee

Omit section 50 (2) and the penalty to section 50. Insert instead:

- (2) A licensee who has a relevant interest in the sale of real or personal property must not in the course of carrying on business as an agent on the sale publish or cause to be published an advertisement relating to or in connection with the proposed sale of the property unless the relevant interest is disclosed in the advertisement.
- (3) A licensee has a *relevant interest* in the sale of real or personal property if:
 - (a) the licensee has an interest in the property as an owner of the property, or
 - (b) the licensee is a corporation and a director of the corporation is an owner of the property, or
 - (c) the licensee is a director of a corporation and the corporation is an owner of the property.

Maximum penalty: 100 penalty units.

[15] **Part 3, Division 6**

Insert after Division 5 of Part 3:

Division 6 Unjust conduct by licensees

53A Interpretation

- (1) For the purposes of this Division, conduct of a licensee is unjust if it is conduct:
 - (a) that is dishonest or unfair, or
 - (b) that consists of anything done, or omitted to be done, in breach of contract, whether or not proceedings in respect of the breach have been brought, or
 - (c) that consists of the contravention of this Act or the regulations or any other enactment administered by the Minister, or
 - (d) that consists of the failure to comply with a condition or restriction to which the licence is subject or an order of the Tribunal applicable to the holder.
- (2) In this Division:

Tribunal means the Consumer, Trader and Tenancy Tribunal established by the *Consumer, Trader and Tenancy Tribunal Act 2001*.

53B Undertakings by licensee

- (1) Where it appears to the Director-General that a licensee has, in the course of carrying on business as a licensee, repeatedly engaged in unjust conduct, the Director-General may, with the consent of the Minister:
 - (a) request the licensee to execute a deed in terms approved by the Director-General whereby the licensee gives undertakings as to:
 - (i) the discontinuance of the unjust conduct, and
 - (ii) the licensee's future conduct, and
 - (iii) the action the licensee will take to rectify the consequences of the licensee's unjust conduct, or
 - (b) apply to the Tribunal for an order under section 53D.
- (2) Where the Director-General makes a request or application under subsection (1), it is to be presumed, unless the contrary is proved, that the Director-General does so with the consent of the Minister.

- (3) Where a licensee executes a deed under this Division and observes the undertakings given in the deed, the Director-General may not apply for an order under section 53D by reason of any conduct to which the undertakings relate.

53C Register of Undertakings

- (1) When a licensee executes a deed under this Division, the Director-General must:
 - (a) lodge a copy of the deed with the Registrar of the Tribunal, and
 - (b) give a copy of the deed to the licensee who executed it.
- (2) The Director-General must retain all deeds and register the deeds in a Register of Undertakings kept by the Director-General and containing the prescribed particulars.
- (3) The Register of Undertakings may, at any reasonable time, be inspected by any person free of charge.
- (4) A licensee must observe undertakings given by the licensee in a deed executed under this Division.
Maximum penalty: 100 penalty units.
- (5) A prosecution for an offence under subsection (4) may not be instituted except by the Director-General with the leave of the Tribunal given when making an order in accordance with section 53D.

53D Restraint of unjust conduct

- (1) Where, on the application of the Director-General, the Tribunal is satisfied after inquiry that a licensee has repeatedly engaged in unjust conduct, the Tribunal may order the licensee to refrain from engaging in unjust conduct in the course of carrying on business as a licensee and the licensee must comply with the order.
- (2) Where, on the application of the Director-General, the Tribunal is satisfied that a licensee has failed to observe an undertaking given by the licensee in a deed executed under this Division, the Tribunal may:
 - (a) make an order under subsection (1) against the licensee, and
 - (b) in addition, in the case of an undertaking to take action to rectify the consequences of the licensee's unjust conduct, make an order to observe that undertaking within a time specified by the Tribunal when making the order.

- (3) If the licensee is a body corporate and the Tribunal is satisfied that the unjust conduct or breach of undertaking concerned was engaged in with the consent or connivance of a person who, at the time of the conduct or breach, was a director of, or a person concerned in the management of, the body corporate, the Tribunal may, in addition to any other order it may make under this section, make an order prohibiting the person from consenting to, or conniving at, engagement in unjust conduct, or a breach of an undertaking under this Division, by the body corporate or any other body corporate of which the person is a director or in the management of which the person is concerned.
- (4) The person to whom an order under subsection (3) relates must comply with the order.
Maximum penalty: 100 penalty units.
- (5) An order under this section may be made subject to such conditions (whether as to the duration of the order or otherwise) as the Tribunal thinks fit, including conditions as to the future conduct of the licensee and conditions specifying the action to be taken by the licensee to rectify the consequences of the licensee's unjust conduct.

53E Variation etc of restraining order

The Tribunal may, on the application of the Director-General, vary or discharge an order made under this Division.

[16] Sections 66 and 66A

Omit section 66. Insert instead:

66 Prevention of dummy bidding

- (1) At a sale by auction of residential property or rural land:
 - (a) the seller must not make a bid, and
 - (b) a person must not make a bid on behalf of the seller unless the person is the auctioneer and makes only one bid on behalf of the seller, and
 - (c) a person must not procure another person to make a bid on behalf of the seller in contravention of this section.

Maximum penalty:

- (a) 500 penalty units in the case of a corporation, or
- (b) 250 penalty units in any other case.

- (2) For the purposes of this section, a bid can be found to have been made on behalf of a seller even though it is not made at the request of, or with the knowledge of, the seller.
- (3) Without limiting what constitutes the making of a bid on behalf of the seller, a bid made with the dominant purpose of benefiting the seller in making the bid constitutes the making of a bid on behalf of the seller.
- (4) An auctioneer must not sell by auction any residential property or rural land unless notice is given prior to the auction, in such manner and in such terms as may be prescribed by the regulations, of the material parts of this section.
Maximum penalty: 20 penalty units.
- (5) This section does not apply to the making of a bid by or on behalf of a seller in either of the following cases so long as the requirements of subsection (6) for bids by or on behalf of a seller as co-owner or as executor or administrator are complied with:
 - (a) the seller is a co-owner of the land (whether as a joint tenant or tenant in common) and the bid was made to enable the seller to purchase the interest of another co-owner in the land,
 - (b) the seller is the executor or administrator of the estate of a deceased owner of the land.
- (6) The requirements for bids by or on behalf of a seller as co-owner or as executor or administrator are as follows:
 - (a) the conditions under which the auction is conducted must permit the making of bids by or on behalf of a seller to purchase the interest of another co-owner in the land or to purchase as executor or administrator,
 - (b) the auctioneer must have announced at the auction, before the start of bidding, that bids to purchase the interest of a co-owner in the land or to purchase as executor or administrator may be made by or on behalf of the seller.

66A Offences by auctioneers

- (1) At a sale by auction of residential property or rural land, the auctioneer:
 - (a) must not acknowledge the making of a bid if the bid was not made, and
 - (b) must not accept a bid if the auctioneer knows that the bid was made by or on behalf of the seller in contravention of section 66, and

-
- (c) must not make more than one bid on behalf of the seller.
Maximum penalty: 250 penalty units.
- (2) An auctioneer at a sale by auction of residential property or rural land must not make a bid on behalf of the seller unless:
- (a) the conditions under which the auction is conducted permit the making of one bid by the auctioneer on behalf of the seller, and
 - (b) the auctioneer announced at the auction, before the start of bidding, that the auctioneer is permitted to make one bid on behalf of the seller, and
 - (c) immediately before, or in the process of, making the bid, the auctioneer announces that the bid is made on behalf of the seller or announces “vendor bid”.
- Maximum penalty: 250 penalty units.
- (3) Merely announcing the name of the person on whose behalf a bid is made (without stating that the person is the seller) is not sufficient to constitute announcing that the bid is made on behalf of the seller.

[17] Section 68 Bidders Record

Insert at the end of section 68 (5) (b):

- , and
- (c) requiring other information to be included in the Bidders Record.

[18] Section 69 Details to be established by proof of identity

Omit section 69 (1). Insert instead:

- (1) An agent must not enter a person’s name and address in a Bidders Record unless both the person’s name and their address details are established by the production to the agent of:
 - (a) one or more proofs of identity for the person, and
 - (b) in the case of the details of a person on whose behalf another person is to bid, a letter of authority to bid on the person’s behalf specifying the person’s name and address and the number or other identifier of one or more proofs of identity for that person.

Maximum penalty: 100 penalty units.

Note. Both name and address must be established by proof of identity but need not be established by the same proof of identity. For example, an Australian passport could be used to establish a person’s name and

another proof of identity allowed by subsection (2) used to establish the person's address.

[19] Part 5, Division 3, heading

Omit the heading to the Division. Insert instead:

Division 3 Representations as to selling price

[20] Section 76A

Insert after section 76:

76A Marketing statements about vendor bids when property passed in

- (1) When residential property or rural land is passed in at auction and the last bid accepted at the auction was a vendor bid, a real estate agent or stock and station agent, or an employee of such an agent, must not, by a statement made in the course of marketing the residential property or rural land, indicate the amount of the last bid accepted at the auction unless the statement also clearly indicates that the bid was a vendor bid.
Maximum penalty: 200 penalty units.
- (2) A statement is considered to be made by a person in the course of marketing residential property or rural land if the statement is made:
 - (a) in an advertisement in respect of the property or land that is published or caused to be published by the person, or
 - (b) to a person (orally or in writing) as a prospective purchaser of the property or land.
- (3) It is a defence to a prosecution for a contravention of this section if the defendant satisfies the court that the defendant did not know and had no reasonable cause to suspect that the bid concerned was a vendor bid.
- (4) Residential property or rural land is *passed in* at auction if the auction is stopped without the property or land being sold at the auction.
- (5) In this section:
vendor bid means a bid made by the auctioneer on behalf of the seller.

[21] Section 78 Collusive practices at auction sales

Omit the penalty at the end of subsections (1) and (2) wherever occurring.

Insert instead:

Maximum penalty:

- (a) 500 penalty units in the case of a corporation, or
- (b) 250 penalty units in any other case.

[22] Section 86 Trust money to be paid into trust account

Omit section 86 (3). Insert instead:

- (3) The name of a trust account and the description of the trust account in the books and records of the licensee and also on all cheques drawn on the trust account:
 - (a) must include the name of the licensee corporation, licensee or firm of licensees in whose name the trust account is kept, and
 - (b) must include the words "Trust Account", and
 - (c) may include, at the end of the account's name, a name or other matter to identify the person on whose behalf money in the account is held.

[23] Section 90 Interest earned on trust accounts to be paid to Statutory Interest Account

Omit section 90 (1). Insert instead:

- (1) Each authorised deposit-taking institution must:
 - (a) after the end of each named month, calculate interest on the daily balances of all money held during the month in trust accounts kept with the authorised deposit-taking institution (being trust accounts notified to the institution as trust accounts required by this Act) by applying to those balances the prescribed percentage of the trust account rate applicable to the institution for the purposes of this section, and
 - (b) before the end of the 7th business day of the next named month pay the amount of that interest to the Director-General for crediting to the Statutory Interest Account.

Maximum penalty: 100 penalty units.

[24] Section 91 Monthly returns by authorised deposit-taking institutions

Omit “in writing” from section 91 (1).

Insert instead “(in such manner and form as the Director-General may from time to time direct)”.

[25] Section 91 (2)

Omit “, by notice in writing, inform the Director-General”.

Insert instead “inform the Director-General (in such manner and form as the Director-General may from time to time direct)”.

[26] Section 91 (3)

Omit “provide a written report to the Director-General”.

Insert instead “provide a report to the Director-General (in such manner and form as the Director-General may from time to time direct)”.

[27] Section 91 (4) (c)

Insert “and form” after “manner”.

[28] Section 98 Disposal of unclaimed money in trust accounts

Insert “(less any of that money that has been paid from the Compensation Fund to the person entitled to the money)” after “that 31 December” in section 98 (5).

[29] Section 98 (6)

Omit the subsection.

[30] Section 99

Omit the section. Insert instead:

99 Repayment of unclaimed trust money

- (1) The Director-General must, on application by a person entitled to an amount of money paid under this Division into the Compensation Fund or the Consolidated Fund, pay that amount to the person out of the Compensation Fund.
- (2) When an amount is paid out of the Compensation Fund in respect of an amount that has been paid into the Consolidated Fund, the Treasurer must, on application by the Director-General, pay that amount to the Director-General out of the Consolidated Fund (which is appropriated accordingly) for payment into the Compensation Fund.

[31] Schedule 1 Savings and transitional provisions

Omit clauses 1 and 2. Insert instead:

Part 1 General

1 Regulations

- (1) The regulations may contain provisions of a savings or transitional nature consequent on the enactment of the following Acts:
this Act
Property, Stock and Business Agents Amendment Act 2006
- (2) Any such provision may, if the regulations so provide, take effect from the date of assent to the Act concerned or a later date.
- (3) To the extent to which any such provision takes effect from a date that is earlier than the date of its publication in the Gazette, the provision does not operate so as:
 - (a) to affect, in a manner prejudicial to any person (other than the State or an authority of the State), the rights of that person existing before the date of its publication, or
 - (b) to impose liabilities on any person (other than the State or an authority of the State) in respect of anything done or omitted to be done before the date of its publication.

Part 2 Provisions consequent on the enactment of this Act

2 Definition

In this Part:

repealed Act means the *Property, Stock and Business Agents Act 1941*.

[32] Schedule 1, Part 3

Insert at the end of the Schedule:

**Part 3 Provisions consequent on enactment of
Property, Stock and Business Agents
Amendment Act 2006**

19 Definition

In this Part:

2006 amending Act means the *Property, Stock and Business Agents Amendment Act 2006*.

20 Unjust conduct by licensees

Division 6 of Part 3 extends to conduct that occurred before the commencement of the Division.

21 Marketing statements about vendor bids

Section 76A extends to auctions conducted before the commencement of that section (but only in respect of statements made in the course of marketing the property after that commencement) and applies in respect of such an auction as if a reference in that section to a vendor bid included a reference to a bid made by or on behalf of the seller.

22 Collusive practices—increased penalties

The amendment of section 78 by the 2006 amending Act does not apply to a contravention of that section that occurred before the commencement of the amendment.

23 Naming of trust accounts

The amendment of section 86 by the 2006 amending Act extends to a trust account opened before the commencement of the amendment.