



New South Wales

Property, Stock and Business Agents Amendment Bill 2012

Explanatory note

Overview of Bill

The object of this Bill is to amend the *Property, Stock and Business Agents Act 2002* (*the Act*) as follows:

- (a) to provide for a court or tribunal to allow the recovery of agent's commission despite a minor non-compliance with requirements of the regulations as to the content of agency agreements,
- (b) to broaden the class of persons who will be qualified to act as a trust account auditor under the Act,
- (c) to remove the requirement that a licensee provide a statutory declaration when no money is held on trust by the licensee,
- (d) to limit the circumstances in which a trust account audit report is required to be provided to the Director-General,
- (e) to require a trust account audit report to be kept at the business premises of the licensee,
- (f) to allow the Director-General to order the random auditing of trust account records,

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- (g) to make it an offence for a trust account auditor to fail to report trust account discrepancies and breaches,
- (h) to require the opening of a trust account to be notified to the Director-General,
- (i) to repeal the current provisions about unclaimed trust account money (with the *Unclaimed Money Act 1995* to be amended so that that Act will apply to unclaimed trust account money),
- (j) to allow a certificate of registration holder to auction livestock under the supervision of an appropriately qualified licensee whether or not the licensee is the licensee in charge of the place of business where the certificate holder is employed,
- (k) to enact consequential savings and transitional provisions and to make miscellaneous minor amendments.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation, with the exception of the amendments concerning unclaimed trust account money (which commence on 1 July 2013).

Schedule 1 Amendment of Property, Stock and Business Agents Act 2002 No 66

Stock auctioneers

Schedule 1 [1] provides that the holder of a certificate of registration as a stock and station salesperson is authorised to auction livestock under the supervision of an appropriately qualified licensee whether or not the licensee is the licensee in charge of the place of business where the salesperson is employed. An existing exception allows a stock and station salesperson to auction livestock under the supervision of a licence holder and the amendment makes it clear that the supervising licensee does not have to be the licensee in charge of the place of business where the salesperson is employed.

Entitlement to commission

Schedule 1 [2]–[4] enable a court or tribunal to order that commission and expenses are recoverable by a licensee despite a failure to comply with the requirements of the regulations as to the content of agency agreements but only if the court or tribunal is satisfied that the failure is minor, the consumer has suffered no loss and it would be unjust not to allow recovery.

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Trust accounts

Schedule 1 [5] requires the Director-General to be notified of the opening of a trust account by requiring the licensee to give the Director-General a copy of the notice that is given to the authorised deposit-taking institution at which the account is opened. The amendment also requires the notification to be in a form approved by the Director-General. **Schedule 1 [6]** requires the notification given to the Director-General that a trust account has been closed to be in a form approved by the Director-General.

Schedule 1 [7] repeals the provisions relating to unclaimed money held in trust accounts. In future, the *Unclaimed Money Act 1995* will apply to unclaimed trust account money (pursuant to amendments to be made by Schedule 2 to the Bill).

Schedule 1 [12] repeals an existing provision that requires a licensee to provide the Director-General with a statutory declaration if the licensee does not hold money on trust during the licensee's audit period.

Trust account audits

Schedule 1 [8] and [9] limit the requirement to provide an auditor's report on a trust account audit to the Director-General so that the report will only have to be provided if the report is "qualified" because of a discovery by the auditor of a breach of the Act or the regulations, any discrepancy relating to the trust account or a failure to keep records in a manner that enables them to be properly audited.

Schedule 1 [10] extends the existing requirement that an auditor's report on a trust account audit be retained for 3 years by requiring that the report be kept at the licensee's registered office or in the possession, custody or control of a former licensee or other person who becomes responsible for a licensee's or former licensee's affairs.

Schedule 1 [11] provides for the random auditing of trust accounts by authorising the Director-General to appoint a qualified person to audit the trust account of a licensee at any time.

Schedule 1 [13] extends the list of persons who are qualified to audit trust accounts under the Act to include authorised audit companies and members of certain professional accounting bodies who hold a Public Practice Certificate or Certificate of Public Practice.

Schedule 1 [14] makes it an offence (maximum penalty 50 penalty units) for a trust account auditor to fail to report trust account discrepancies, breaches or record keeping irregularities or to fail to forward a copy of such a report to the Director-General.

Savings, transitional and miscellaneous amendments

Schedule 1 [15] makes a minor amendment to an offence provision to provide for a defence of reasonable excuse.

Schedule 1 [16] enables savings and transitional regulations to be made as a consequence of the enactment of the proposed Act.

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Schedule 1 [17] inserts savings and transitional provisions.

Schedule 2 Amendment of Unclaimed Money Act 1995 No 75

Schedule 2 provides for the *Unclaimed Money Act 1995* to apply to unclaimed money held in a trust account under the *Property, Stock and Business Agents Act 2002*.

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Property, Stock and Business Agents Amendment Bill 2012

No. , 2012

A Bill for

An Act to amend the *Property, Stock and Business Agents Act 2002* to make further provision in respect of agency agreements, trust accounts, unclaimed trust money and stock auctions; and for other purposes.

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Property, Stock and Business Agents Amendment Bill 2012

Clause 1

The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *Property, Stock and Business Agents Amendment Act 2012*.

2 Commencement

- (1) This Act commences on a day or days to be appointed by proclamation, except as provided by subsection (2).
- (2) Schedules 1 [7] and 2 commence on 1 July 2013.

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Schedule 1 Amendment of Property, Stock and Business Agents Act 2002 No 66

Schedule 1 Amendment of Property, Stock and Business Agents Act 2002 No 66

[1] Section 11 Registered salespersons and managers required to be employed and supervised by licensee

Omit section 11 (3) and (4). Insert instead:

- (3) The holder of a certificate of registration must not act as an auctioneer, except as permitted by subsection (4).
- (4) The holder of a certificate of registration as a stock and station salesperson may auction livestock if the holder conducts the auction:
 - (a) as an employee of the holder of a licence that allows the licensee to auction livestock, and
 - (b) under the immediate and direct supervision of the holder of a licence that allows the licensee to auction livestock (whether or not that licensee is the licensee in charge of the place of business at which the employee is employed).

[2] Section 55 No entitlement to commission or expenses without agency agreement

Insert at the end of section 55 (1):

Note. Section 55A allows a court or tribunal to order that commission and expenses are recoverable in certain circumstances despite subsection (1).

[3] Section 55 (4) and (5)

Omit the subsections.

[4] Section 55A

Insert after section 55:

55A Relief from disentitlement to commission and expenses

- (1) A court or tribunal before which relevant proceedings are taken may order that commission or expenses are wholly or partly recoverable by a licensee who would otherwise not be entitled to the commission or expenses (under section 55) because of:
 - (a) a failure by the licensee to serve a copy of the relevant agency agreement on the person within 48 hours after it was signed by or on behalf of the person, or
 - (b) a failure of the relevant agency agreement to comply with the requirements of the regulations.

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

Schedule 1

- (2) A court or tribunal is not to make such an order in circumstances of a failure to serve a copy of the agency agreement within the required time unless satisfied that:
 - (a) the failure was occasioned by inadvertence or other cause beyond the control of the licensee, and
 - (b) the commission or expenses that will be recoverable if the order is made are in all the circumstances fair and reasonable, and
 - (c) failure to make the order would be unjust.
- (3) A court or tribunal is not to make such an order in circumstances of a failure of the agency agreement to comply with the requirements of the regulations unless satisfied that:
 - (a) the failure is a minor failure, and
 - (b) no loss has been suffered as a result of the failure by the person for whom or on whose behalf the services concerned were performed, and
 - (c) failure to make the order would be unjust.
- (4) Proceedings are *relevant proceedings* if they are proceedings taken by a licensee for the recovery of commission or expenses from a person or proceedings on a consumer claim relating to commission or expenses (as referred to in section 36) in relation to which a licensee is a respondent.

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

Insert at the end of section 86 (4):

The notification must be in a form approved by the Director-General and the licensee must serve a copy of the notification on the Director-General within 14 days after the trust account is opened.

[6] Section 86 (5)

Insert at the end of the subsection:

The notification must be in a form approved by the Director-General.

[7] Part 7, Division 4 Unclaimed trust money

Omit the Division.

[8] Section 111 Requirement for audit

Omit section 111 (1) (b). Insert instead:

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Schedule 1 Amendment of Property, Stock and Business Agents Act 2002 No 66

- (b) if the auditor's report on the audit is a qualified report, lodge the report with the Director-General.

[9] Section 111 (1A)

Insert after section 111 (1):

- (1A) An auditor's report is a *qualified report* if it sets out any discovery by the auditor that any breach of this Act or the regulations has been committed, that there is any discrepancy relating to the trust account to which the audit relates or that the records or documents concerned are not kept in such a manner as to enable them to be properly audited.

[10] Section 111 (3)

Omit the subsection. Insert instead:

- (3) An auditor's report under this section must be kept for at least 3 years:
- (a) by the licensee at the licensee's registered office (while the licensee remains a licensee), or
 - (b) if the licensee ceases to be a licensee, by the former licensee in his or her possession, custody or control unless the former licensee authorises some other person to have possession, custody or control of the record, or
 - (c) by any other person who obtains possession, custody or control of the record whether as a result of being the personal representative of a deceased licensee or by transfer of the business of the licensee or otherwise.

[11] Section 112A

Insert after section 112:

112A Random audits

- (1) The Director-General may at any time appoint a person qualified to act as an auditor for the purposes of this Division to audit the records and documents relating to any money held in a trust account kept by a licensee and provide a report on the audit to the Director-General.
- (2) On production by the person of his or her instrument of appointment as an auditor for the purposes of this section, the auditor may require the licensee (or, in the absence of the licensee, an associate of the licensee) to do any one or more of the following things:

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

Schedule 1

- (a) produce to the auditor or any assistant of the auditor all records and documents relating to any money held in a trust account kept by the licensee and (in the case of records stored electronically) produce any such record in written form,
 - (b) give the auditor or any assistant of the auditor all information relating to the records required to be produced under this section,
 - (c) produce to the auditor or any assistant of the auditor all authorities and orders to financial institutions and other documents that may be reasonably required.
- (3) The licensee or associate is guilty of an offence if the licensee or associate, without reasonable excuse (proof of which lies on the licensee or associate):
- (a) refuses or fails to comply with a requirement under this section, or
 - (b) otherwise hinders, obstructs or delays an auditor in the exercise or performance of the auditor's functions under this section.

Maximum penalty: 50 penalty units.

[12] Section 113 Statutory declaration required when no trust money held or received

Omit the section.

[13] Section 115 Qualifications of auditors

Insert after section 115 (1) (a):

- (a1) is an authorised audit company within the meaning of the Corporations Act, or
- (a2) is a member of a professional accounting body within the meaning of the *Australian Securities and Investments Commission Act 2001* of the Commonwealth and holds a Public Practice Certificate or Certificate of Public Practice issued by the body, or

[14] Section 116 Duties of auditors

Insert at the end of section 116 (1):

Maximum penalty: 50 penalty units.

[15] Section 184 Powers of accounts examiner

Omit "without lawful justification or excuse" from section 184 (2).

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Schedule 1 Amendment of Property, Stock and Business Agents Act 2002 No 66

Insert instead “without reasonable excuse”.

[16] Schedule 1 Savings and transitional provisions

Insert at the end of clause 1 (1):

Property, Stock and Business Agents Amendment Act 2012

[17] Schedule 1

Insert at the end of the Schedule:

Part 4 Provisions consequent on enactment of Property, Stock and Business Agents Amendment Act 2012

24 Definition

In this Part:

2012 amending Act means the *Property, Stock and Business Agents Amendment Act 2012*.

25 Recovery of commission and expenses

The amendments made to section 55 by the 2012 amending Act and section 55A as inserted by that Act do not apply in respect of an agency agreement entered into before the commencement of section 55A.

26 Unclaimed money amendments

- (1) The amendments made by the 2012 amending Act to the *Unclaimed Money Act 1995* extend to money held in a trust account on 30 June 2013, subject to this clause.
- (2) Division 4 (Unclaimed trust money) of Part 7 of this Act continues to apply (despite its repeal) to and in respect of money held in a trust account by a person who became a former licensee, or the personal representative of a deceased licensee, before 1 July 2013.
- (3) Section 9C (Trust money held by former licensee or personal representative) of the *Unclaimed Money Act 1995* does not apply to or in respect of money held in a trust account by a person who became a former licensee, or the personal representative of a deceased licensee, before 1 July 2013.
- (4) Division 4 (Unclaimed trust money) of Part 7 of this Act continues to apply (despite its repeal) to and in respect of the following:

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

Schedule 1

- (a) an unclaimed money statement under that Division furnished (or required to have been furnished) to the Director-General before the repeal of that Division,
 - (b) any money referred to in (or required to be referred to in) any such unclaimed money statement,
 - (c) any money received by the Director-General under that Division and paid under that Division into the Compensation Fund or the Consolidated Fund before or after the repeal of that Division.
- (5) Without limiting subclause (4), section 99 (Repayment of unclaimed trust money) of this Act continues to apply (despite its repeal) to money paid under Division 4 of Part 7 into the Compensation Fund or the Consolidated Fund before or after the repeal of that Division.

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Schedule 2 Amendment of Unclaimed Money Act 1995 No 75

Schedule 2 Amendment of Unclaimed Money Act 1995 No 75

[1] Section 9 Certain money not unclaimed money

Omit section 9 (3). Insert instead:

- (3) Money is not unclaimed money under this Part if:
 - (a) the money is, or is of a class, prescribed by the regulations as exempt from the operation of this Part, or
 - (b) the money is held by an enterprise that is, or is of a class, prescribed by the regulations as exempt from the operation of this Part, or
 - (c) the amount of money in the account concerned does not exceed \$100.

[2] Part 2A

Insert after Part 2:

Part 2A Trust money under Property, Stock and Business Agents Act 2002

9A Definitions

In this Part, *licensee*, *former licensee* and *trust account* have the same meanings as in the *Property, Stock and Business Agents Act 2002*.

9B Unclaimed trust money held by licensee

- (1) Money that has been held by a licensee for more than 2 years in a trust account kept by the licensee is **unclaimed money** for the purposes of this Act.
- (2) A licensee who has held money for more than 2 years in a trust account kept by the licensee must make reasonable efforts:
 - (a) to identify and locate the owner of the money, and
 - (b) to ensure that the money is paid to the owner of the money.Maximum penalty: 50 penalty units.

Note. Unclaimed money is required to be paid to the Chief Commissioner after 30 June in each year. See section 10.

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Amendment of Unclaimed Money Act 1995 No 75

Schedule 2

9C Trust money held by former licensee or personal representative

- (1) Money held in a trust account by a former licensee or the personal representative of a deceased licensee is *unclaimed money* for the purposes of this Act but section 10 does not apply to the money.
- (2) A former licensee, or the personal representative of a deceased licensee, who holds unclaimed money must within the required time for compliance with this section:
 - (a) lodge with the Chief Commissioner a return relating to the unclaimed money in a form approved by the Chief Commissioner, and
 - (b) pay the amount of the unclaimed money to the Chief Commissioner.
- (3) The required time for compliance with this section is 3 months after the date on which the person ceased to be a licensee or became the personal representative of the deceased licensee (or such longer period as the Chief Commissioner may in a particular case allow).
- (4) The Chief Commissioner is to pay money received under this section into the Consolidated Fund.
- (5) A former licensee, or the personal representative of a deceased licensee, who fails to comply with this section is guilty of an offence and is liable:
 - (a) to a penalty not exceeding 50 penalty units, and
 - (b) to a further penalty not exceeding 5 penalty units for each day after the period within which it was required to comply during which the failure continues.

9D Regulations

Money is not unclaimed money under this Part if:

- (a) the money is, or is of a class, prescribed by the regulations as exempt from the operation of this Part, or
- (b) the money is held by an enterprise that is, or is of a class, prescribed by the regulations as exempt from the operation of this Part.

[3] Section 28 General power to make assessment

Omit “section 10 (1) or 13B (1)” from section 28 (6).

Insert instead “section 9C, 10 or 13B”.

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Schedule 2 Amendment of Unclaimed Money Act 1995 No 75

[4] Schedule 2 Savings, transitional and other provisions

Omit clause 1 (1). Insert instead:

- (1) The regulations may contain provisions of a savings or transitional nature consequent on the enactment of this Act and any Act that amends this Act.