

# Property and Stock Agents Act 2002 No 66

[2002-66]



New South Wales

## Status Information

### Currency of version

Historical version for 23 March 2020 to 24 March 2020 (accessed 23 May 2024 at 0:39)

Legislation on this site is usually updated within 3 working days after a change to the legislation.

### Provisions in force

The provisions displayed in this version of the legislation have all commenced.

### Notes—

- **Previously named**  
Property, Stock and Business Agents Act 2002
- **See also**  
*Real Estate Services Council Bill 2019* [Non-government Bill— the Hon M J Banasiak, MLC]  
*Better Regulation Legislation Amendment Bill 2020*  
*Better Regulation and Customer Service Legislation Amendment (Bushfire Relief) Bill 2020*
- **Editorial note**  
The Parliamentary Counsel's Office is progressively updating certain formatting styles in versions of NSW in force legislation published from 29 July 2019. For example, colons are being replaced by em-dashes (em-dashes). Text of the legislation is not affected.

This version has been updated.

### Authorisation

This version of the legislation is compiled and maintained in a database of legislation by the Parliamentary Counsel's Office and published on the NSW legislation website, and is certified as the form of that legislation that is correct under section 45C of the [Interpretation Act 1987](#).

File last modified 23 March 2020

# Property and Stock Agents Act 2002 No 66



New South Wales

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# Property and Stock Agents Act 2002 No 66



New South Wales

An Act to provide for the regulation of property and stock agents; to repeal the *Property, Stock and Business Agents Act 1941*; and for other purposes.

## Part 1 Preliminary

### 1 Name of Act

This Act is the *Property and Stock Agents Act 2002*.

### 2 Commencement

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

### 3 Definitions

(1) In this Act—

**agency agreement** means an agreement pursuant to which a licensee performs or agrees to perform services in the capacity of a licensee.

**agent** means—

- (a) a real estate agent, or
- (b) a stock and station agent, or
- (c) a strata managing agent.

**assistant agent** means—

- (a) an assistant real estate agent, or
- (b) an assistant stock and station agent, or
- (c) an assistant strata managing agent.

**assistant real estate agent** means a person (other than the holder of a real estate agent's licence) who, as an employee of a real estate agent or a corporation that carries on the business of a real estate agent—

- (a) exercises any real estate agent function, or
- (b) engages in any other activity that is prescribed by the regulations for the purposes of this definition.

**assistant stock and station agent** means a person (other than the holder of a stock and station agent's licence) who, as an employee of a stock and station agent or a corporation that carries on the business of a stock and station agent—

- (a) exercises any of the functions of a stock and station agent, or
- (b) engages in any other activity that is prescribed by the regulations for the purposes of this definition.

**assistant strata managing agent** means a person (other than the holder of a strata managing agent's licence) who, as an employee of a strata managing agent or a corporation that carries on the business of a strata managing agent—

- (a) exercises any of the functions of a strata managing agent, or
- (b) engages in any other activity that is prescribed by the regulations for the purposes of this definition.

**association** means a community association, precinct association or neighbourhood association constituted under section 25 of the [Community Land Development Act 1989](#).

**auction** means the sale of property by any means (including the Internet) whereby—

- (a) the highest, the lowest, or any bidder is the purchaser, or the first person who claims the property submitted for sale at a certain price named by the person acting as auctioneer is the purchaser, or
- (b) there is a competition for the purchase of the property in any way commonly known and understood to be by auction.

**auctioneer** means any person—

- (a) who, in the course of trade or business and at an auction (or a proposed auction), acts as an auctioneer or sells for reward (whether monetary or otherwise) any land or any livestock, or
- (b) who sells or offers for sale, or who attempts to sell, any land or any livestock by way of auction, or
- (c) who engages in any other activity that is prescribed for the purposes of this definition.

**authorised officer** has the meaning given in Part 13 (Enforcement).

**business agent functions**—see section 3A (2).

**business day** means a day other than a Saturday, Sunday, public holiday or bank holiday in New South Wales.

**certificate of registration** means a certificate of registration under this Act.

**class of licence** means a class 1 or a class 2 licence.

**Note—**

See sections 17 (1A) and 31. A class 1 licence is required for an individual to be a licensee in charge of a business.

**Compensation Fund** or **Fund** means the Property Services Compensation Fund established and maintained under this Act.

**Corporations Act** means the [Corporations Act 2001](#) of the Commonwealth.

**corresponding Act** means an Act of another State or a Territory that is declared by the regulations to be a corresponding Act for the purposes of this Act.

**Department** means the Department of Finance, Services and Innovation.

**disqualified person** has the meaning given by section 16.

**employee** includes any person employed whether on salary, wages, bonus, commission, fees, allowance or other remuneration and includes a director or member of the governing body of a corporation.

**former licensee** means a person who has been but has ceased to be a licensee.

**function** includes a power, authority or duty, and **exercise** a function includes perform a duty.

**individual** means a natural person and does not include a corporation.

**land** includes—

- (a) a lot within the meaning of the [Strata Schemes Development Act 2015](#), and
- (b) shares that, under a company title scheme, entitle their holder to the possession of premises.

**licence** means a licence under this Act.

**licensee** means the holder of a licence under this Act.

**licensee's records** has the meaning given in Part 8 (Records).

**livestock** includes horses, cattle, asses, mules, sheep, swine, camels, goats, alpacas, ostriches, emus and such other animals as may be prescribed by the regulations.

**livestock transaction** means the purchase, sale or other disposal of livestock, whether or not an auction is involved.

**money** includes an instrument for the payment of money in any case where the instrument may be paid into a bank or other authorised deposit-taking institution.

**money received for or on behalf of any person** includes money held for or on behalf of any person, whether originally received for or on the person's behalf or not.

**on-site residential property manager functions**—see section 3A (2).

**owners corporation** means an owners corporation constituted under the [Strata Schemes Management Act 2015](#).

**principal place of business** means, in relation to a licensee carrying on business at more than one place, the place of business specified in the application for the licence as the licensee's principal place of business.

**real estate agent** means a person (whether or not the person carries on any other business) who, for reward (whether monetary or otherwise), exercises real estate agent functions in the course of carrying on a business.

**real estate agent functions**—see section 3A (1).

**real estate sale or leasing functions**—see section 3A (2).

**real estate transaction** means the purchase, sale, exchange, lease, assignment or other disposal of land, whether or not an auction is involved.

**records** includes books, accounts and other documents.

**registered person** means the holder of a certificate of registration under this Act.

**regulated functions** means real estate agent functions or the functions of a stock and station agent or a strata managing agent.

**residential property** has the same meaning as in Division 8 of Part 4 of the [Conveyancing Act 1919](#).

**rural land** means land that is used or apparently intended to be used for gain or profit for grazing of livestock, dairying, poultry farming, viticulture, orcharding, beekeeping, horticulture, the growing of crops of any kind, vegetable growing or any other purpose declared by the regulations to be a rural purpose.

**Secretary** means—

- (a) the Commissioner for Fair Trading, Department of Finance, Services and Innovation, or



- (b) if there is no person employed as Commissioner for Fair Trading—the Secretary of the Department of Finance, Services and Innovation.

**Statutory Interest Account** means the Property Services Statutory Interest Account referred to in Part 11.

**stock and station agent** means a person (whether or not the person carries on any other business) who, for reward (whether monetary or otherwise), carries on business as an auctioneer of rural land or livestock or as an agent for—

- (a) doing (where the land concerned consists of rural land) any one or more of the things referred to in paragraphs (b)–(e) of the definition of **real estate sale or leasing functions** in section 3A, or
- (b) a livestock transaction, or
- (c) inducing or attempting to induce or negotiating with a view to inducing any person to enter into, or to make or accept an offer to enter into, a livestock transaction or a contract for a livestock transaction, or
- (d) providing agistment for livestock or collecting of fees for the agistment of livestock, or
- (e) any other activity that is prescribed by the regulations for the purposes of this definition.

**strata managing agent**—see section 3B.

**Tribunal** means the Civil and Administrative Tribunal.

**trust account** means a trust account required to be kept under this Act.

**Note—**

The [Interpretation Act 1987](#) contains definitions and other provisions that affect the interpretation and application of this Act.

- (2) (Repealed)
- (3) Where a person carries on business as a real estate agent and also carries on—
- (a) business as an agent for the collection of instalments of principal or interest payable under mortgages of land or under contracts for the sale on terms of land, or
- (b) business as an agent for the collection of amounts payable in relation to any premises to a company by a person who is the holder of shares in the company and who, by reason of the person's holding those shares, is entitled to possession of those premises, or

- (b1) business as an agent for the collection of instalments of principal or interest payable under bills of sale given in respect of businesses or professional practices or under contracts for the sale on terms of businesses or professional practices, or
- (c) the business of arranging for the erection of buildings for or on behalf of other persons,

a reference in this Act to any such person acting as, or carrying on the business of, a real estate agent includes a reference to that person carrying on business as an agent for the collection of those instalments or amounts or to that person carrying on the business of so arranging for the erection of buildings.

- (4) Where a person carries on business as a stock and station agent and also carries on business as an agent for the collection of instalments of principal or interest payable under mortgages of rural land or under contracts for the sale on terms of any such land, a reference in this Act to any such person acting as, or carrying on the business of, a stock and station agent includes a reference to that person carrying on business as an agent for the collection of those instalments.
- (5) Notes included in this Act do not form part of this Act.

### **3A Real estate agent functions**

- (1) In this Act, ***real estate agent functions*** means any of the following functions—

- (a) business agent functions,
- (b) on-site residential property manager functions,
- (c) real estate sale or leasing functions,

but does not include acting as an auctioneer or agent in respect of any parcel of rural land (unless the regulations otherwise provide) or any other function prescribed by the regulations.

- (2) For the purposes of this Act—

***business agent functions*** means—

- (a) selling, buying or exchanging or otherwise dealing with or disposing of businesses or professional practices, or any share or interest in or concerning or the goodwill of, or any stocks connected with, businesses or professional practices, or
- (b) negotiating for the sale, purchase or exchange or any other dealing with or disposition of businesses or professional practices, or any share or interest in or concerning or the goodwill of, or any stocks connected with, businesses or professional practices, or
- (c) any other function that is prescribed by the regulations for the purposes of this

definition.

***on-site residential property manager functions*** means—

- (a) acting as an agent for giving possession of residential premises under a lease, licence or other contract, or
- (b) acting as an agent for collecting bonds, deposits, rents, fees or other charges in connection with any such lease, licence or other contract, or
- (c) any other function that is prescribed by the regulations for the purposes of this definition.

***real estate sale or leasing functions*** means—

- (a) acting as an auctioneer of land, or
- (b) acting as agent for a real estate transaction, or
- (c) acting as agent for inducing or attempting to induce or negotiating with a view to inducing any person to enter into, or to make or accept an offer to enter into, a real estate transaction or a contract for a real estate transaction, or
- (d) acting as agent for the introduction, or arranging for the introduction, of a prospective purchaser, lessee or licensee of land to another licensed agent or to the owner, or the agent of the owner, of land, or
- (e) acting as agent collecting rents payable in respect of any lease of land and otherwise providing property management services in respect of the leasing of any land, or
- (f) any other function in connection with land that is prescribed by the regulations for the purposes of this definition.

**Note—**

This definition is not limited to the selling of land and extends to an agent acting on behalf of the buyer of land (a buyer's agent).

### **3B Strata managing agents**

- (1) A person is a ***strata managing agent*** for the purposes of this Act if the person (whether or not the person carries on any other business), for reward (whether monetary or otherwise), exercises—
  - (a) any function of an owners corporation, or
  - (b) any function of an association, or
  - (c) any other function that is prescribed by the regulations for the purposes of this

definition.

(2) Subsection (1) (a) does not apply to—

(a) a person who—

- (i) is the owner of a lot to which the strata scheme for which the owners corporation is constituted relates, or
- (ii) is the lessee of a lot to which the leasehold strata scheme for which the owners corporation is constituted relates, or
- (iii) is the secretary or treasurer of the strata committee of the owners corporation,

and who exercises or performs only functions of the owners corporation required, by the by-laws in force in respect of the strata scheme or leasehold strata scheme for which the owners corporation is constituted, to be exercised or performed by the secretary or treasurer of that strata committee or of the owners corporation, or

(b) a person who maintains or repairs any property that the owners corporation is required to maintain and keep in repair, or

(c) a person prescribed by the regulations.

(3) Subsection (1) (b) does not apply to—

(a) the proprietor of a lot within the scheme, or

(b) the secretary or treasurer of the association, or

(c) a person who is authorised by the management statement for the scheme to exercise the functions of the secretary or treasurer of the association, or

(d) a person who maintains or repairs any property that the association is required to maintain and keep in repair, or

(e) a person prescribed by the regulations.

#### **4 Regulations may exempt persons and activities from Act**

(1) The regulations may make provision for or with respect to exempting a specified person, or a person who is a member of a specified class of persons, from the operation of all or specified provisions of this Act in respect of any act or omission by the person in the person's capacity as agent—

(a) for a specified class of persons, or

(b) in respect of a specified class of activities, or

- (c) in respect of activities involving a specified class of property.
- (2) The regulations may make provision that is necessary or convenient in connection with an exemption under subsection (1), including provisions for or with respect to any of the following—
- (a) imposing liabilities on a person (not necessarily the agent concerned) in respect of pecuniary loss suffered by a person because of a failure by the agent to account for money or other valuable property entrusted to the agent or an employee of the agent in the course of activities to which an exemption under this section applies,
  - (b) requiring the disclosure of information to the Secretary in connection with the activities of a person pursuant to an exemption under this section,
  - (c) requiring the obtaining of insurance, including professional indemnity insurance and fidelity guarantee insurance, in connection with the activities of a person pursuant to an exemption under this section,
  - (d) requirements as to the holding of money on behalf of a party to a transaction in connection with which a person acts as agent pursuant to an exemption under this section,
  - (e) disclosures to be made by a person acting pursuant to an exemption under this section,
  - (f) regulating the payment of commission and other remuneration in connection with the activities of a person pursuant to an exemption under this section,
  - (g) the placing of limitations on the authority of a person to act as agent pursuant to an exemption under this section,
  - (h) the auditing of compliance with conditions and requirements imposed by the regulations under this section,
  - (i) modifying the operation of any provision of this Act in its application to the activities of a person pursuant to an exemption under this section,
  - (j) the payment of fees to the Secretary in connection with an exemption under this section.
- (3) The regulations under this section may also create offences punishable by a penalty not exceeding 100 penalty units for any contravention of the regulations under this section or conditions or requirements imposed by those regulations.
- (4) Nothing in this section affects the generality of section 230 (2) (g).

## 5 Exemptions

- (1) This Act does not require a licence to be held by, and does not require a certificate of registration to be held by any person in their capacity as employee of, any of the following—
- (a) a Minister of the Crown whether a Minister of the State of New South Wales or of the Commonwealth,
  - (b) any Government Department of the State of New South Wales or the Commonwealth (including any statutory corporation representing the Crown),
  - (c) a council within the meaning of the *Local Government Act 1993*,
  - (d) any public authority prescribed by the regulations,
  - (e) any officer or employee of the Crown or of any such Minister, department, corporation, council or authority in the exercise of his or her functions as such officer or employee,
  - (f) the NSW Trustee and Guardian or any executor, administrator, trustee, liquidator, official receiver, trustee in bankruptcy of a bankrupt's estate, trustee under a composition or scheme of arrangement or under a deed of arrangement or under a deed of assignment, or manager of an estate appointed under the *NSW Trustee and Guardian Act 2009*, in the exercise of functions as such,
  - (g) any person for the purposes of any sale made of Crown lands or other Crown property or for the purposes of any sale of any property made by virtue of any writ or process issued out of any Court or made in obedience to any process issued by any Court or judge or justice for the recovery of any fine, penalty or award, or under any rule, order or decree of any competent Court or made pursuant to the *Impounding Act 1993*,
  - (h) a receiver appointed under this Act, in the exercise of the receiver's functions under this Act,
  - (i) the New South Wales Land and Housing Corporation,
  - (j), (k) (Repealed)
  - (l) the Aboriginal Housing Office,
  - (m) a registered community housing provider within the meaning of the *Community Housing Providers National Law (NSW)*, or an organisation for the time being registered under Part 5 of the *Aboriginal Housing Act 1998*,
  - (n) a person or organisation, or a person or organisation of a class, prescribed by the regulations as not requiring a licence.

- (2) This Act does not prevent any person for the time being entitled to practise as an Australian legal practitioner from exercising any function that, had this Act not been enacted, the person might lawfully have exercised as an Australian legal practitioner.
- (3) An exemption under subsection (1) (f) that allows a person to carry on a business lawfully without a licence expires 3 months after the management of the business vests in the person.
- (4) This Act does not apply to a sale by auction made for the purposes of or in the course of a fundraising appeal within the meaning of the *Charitable Fundraising Act 1991* if the appeal is made, and the proceeds of the sale are applied, in accordance with that Act.
- (5) The following persons may exercise business agent functions without the need to hold a licence or certificate of registration—
  - (a) a person who holds an Australian financial services licence under the Corporations Act,
  - (b) a person who is an authorised representative of a financial services licensee within the meaning of Chapter 7 of the Corporations Act.

## **6 (Repealed)**

# **Part 2 Licences and certificates of registration**

## **Division 1 Requirement for licence or certificate of registration**

### **7 (Repealed)**

### **8 Agents required to be licensed**

- (1) An individual must not act as or carry on the business of (or advertise, notify or state that the individual acts as or carries on the business of, or is willing to act as or carry on the business of)—
  - (a) a real estate agent, unless the individual is the holder of a real estate agent's licence, or
  - (b) a stock and station agent, unless the individual is the holder of a stock and station agent's licence, or
  - (c) a strata managing agent, unless the person is the holder of a strata managing agent's licence.

Maximum penalty—100 penalty units.

- (2) An individual is not entitled to bring any proceeding in any court or tribunal to recover any commission, fee, gain or reward for any service performed by the individual—

- (a) as a real estate agent, unless the individual was the holder of a real estate agent's licence, or employed the holder of such a licence, at the time of performing the service, or
  - (b) as a stock and station agent, unless the individual was the holder of a stock and station agent's licence, or employed the holder of such a licence, at the time of performing the service, or
  - (c) as a strata managing agent, unless the individual was the holder of a strata managing agent's licence, or employed the holder of such a licence, at the time of performing the service.
- (3) This section applies to an individual whether or not the individual is a member of a partnership.
- (4) The fact that a particular activity is an activity for which more than one type of licence may be appropriate does not require the holding of more than one type of licence so long as at least one of the licences that is appropriate to the activity is held.
- (5) For the purposes of this section, an individual is not considered to carry on a business merely because the individual is a member of a partnership that carries on that business.
- (6) An agent who holds a licence may be known as a licensed agent.

## **9 Corporations require corporation licence**

- (1) A corporation must not act as or carry on the business of (or advertise, notify or state that the corporation acts as or carries on the business of or is willing to act as or carry on the business of) an agent unless the corporation holds a corporation licence.

Maximum penalty—200 penalty units.

- (2) A corporation is not entitled to bring any proceeding in any court to recover any commission, fee, gain or reward for any service performed by the corporation as an agent unless the corporation was the holder of a corporation licence at the time of performing the service.

## **10 Assistant agents require certificate of registration**

- (1) A person must not do any of the following things unless the person is the holder of a certificate of registration—
- (a) be or remain as an assistant agent in the employment of a person licensed (or required to be licensed) under this Act,
  - (b) represent, whether expressly or impliedly, that the person is an assistant agent,
  - (c) act as or exercise any of the functions of an assistant agent.



Maximum penalty—100 penalty units.

- (2) An employed licensee is not required to hold both a certificate of registration and a licence to allow the licensee lawfully to do anything that, in the absence of this section, the licensee could lawfully do as the holder of the licence.
- (3) An assistant agent who holds a certificate of registration may be known as a registered agent.

#### **10A Functions that can be exercised by holders of licences and certificates of registration**

- (1) The regulations may prescribe that specified regulated functions may be exercised—
  - (a) only by the holder of a licence or by the holder of a licence of a particular class, or
  - (b) only under the supervision (direct or otherwise) of the holder of a licence or of the holder of a licence of a particular class.
- (2) The regulations may provide that a reference to the holder of a licence in a provision of this Act is to be construed as a reference to the holder of a particular class of licence.
- (3) The authority granted by a licence or certificate of registration is subject to the regulations.

#### **11 Assistant agents must be employed and supervised by licensee**

- (1) The holder of a certificate of registration must not act as or exercise any of the functions of an assistant agent unless the person does so as an employee of the holder of a licence under this Act.
- (2) The holder of a certificate of registration must not exercise any of the functions of an assistant agent unless he or she does so under the supervision of a person who—
  - (a) is the licensee in charge of the place of business at which the employee is employed, and
  - (b) is the holder of a class 1 licence that allows the licensee to exercise that function without contravening this Act.

#### **Note—**

See Division 2 of Part 3 for requirements for a place at which a business is carried on under a licence to be in the charge of a licensee and for staff to be properly supervised.

- (3) The holder of a certificate of registration must not act as an auctioneer, except as permitted by subsection (4).
- (3A) A person carrying on business as an auctioneer must ensure that the holder of a certificate of registration does not act for or on behalf of the person as an auctioneer,

except as permitted by subsection (4).

- (4) The holder of a certificate of registration as an assistant stock and station agent may auction livestock if the holder conducts the auction—
- (a) as an employee of the holder of a stock and station agent's licence, 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 or is the employer of the employee).

Maximum penalty—50 penalty units.

#### **11A Person carrying on business of agent to ensure staff exercising regulated functions hold licence or certificate**

A person carrying on the business of an agent must not make use of the services of another person (a **service provider**) to exercise any regulated functions in the course of the business unless—

- (a) the person is the holder of a licence that authorises the regulated functions concerned to be exercised by the person, and
- (b) the service provider is the holder of a licence or a certificate of registration that authorises the service provider to exercise the regulated functions concerned, and
- (c) in the case of a service provider required to hold a certificate of registration to exercise the regulated functions concerned—the service provider is an employee of the person.

Maximum penalty—100 penalty units.

#### **12 Production of licence or certificate of registration**

A licensee or registered person must on request at the premises on which the licensee carries on business or exercises functions as a licensee or registered person produce his or her licence or certificate of registration to an authorised officer and permit the authorised officer to inspect the licence or certificate of registration.

Maximum penalty—20 penalty units.

#### **13 Transfer or lending of licence or certificate of registration prohibited**

- (1) The holder of a licence or certificate of registration must not transfer, let out, hire or lend the licence or certificate of registration to any other person or permit any other person to use the licence or certificate of registration.

Maximum penalty—100 penalty units.

- (2) A court that convicts a person for an offence under this section is to order the cancellation of the licence or certificate of registration concerned. The licence or certificate of registration is cancelled on the making of the order.

## **Division 2 Eligibility, qualifications and disqualification**

### **14 Eligibility for a licence or certificate of registration**

- (1) An individual is eligible to hold a licence only if the Secretary is satisfied that the individual—
- (a) is at least 18 years of age, and
  - (b) is a fit and proper person to hold a licence and each person with whom the individual is in partnership in connection with the business concerned is a fit and proper person to hold a licence, and
  - (c) has the qualifications required for the issue of the licence or class of licence, and
  - (d) is not a disqualified person, and
  - (e) has paid such part of any contribution or levy payable under Part 10 (Compensation Fund) as is due and payable on the granting of the licence.
- (2) A corporation is eligible to hold a corporation licence only if the Secretary is satisfied that—
- (a) the corporation is a fit and proper person to hold a licence, and
  - (b) each director of the corporation is a fit and proper person to hold a licence, and
  - (c) the corporation, and each officer (within the meaning of the Corporations Act) of the corporation, is not a disqualified person, and
  - (d) at least one of the directors of the 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, and
  - (e) the corporation has paid such part of any contribution or levy payable under Part 10 (Compensation Fund) as is due and payable on the granting of the licence.
- (3) A person is eligible to hold a certificate of registration only if the Secretary is satisfied that the person—
- (a) is an individual who is at least 16 years of age, and
  - (b) is a fit and proper person to hold a certificate of registration, and
  - (c) has the qualifications required for the issue of a certificate of registration of the type concerned, and

(d) is not a disqualified person.

**Note—**

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

(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.

**15 Qualifications for licence or certificate of registration**

- (1) The qualifications required for the issue of a licence or certificate of registration are such qualifications as the Minister may approve from time to time by order published on the NSW legislation website.
- (2) Without limiting the Minister's power to approve qualifications, the Minister may approve qualifications by reference to any one or more of the following—
  - (a) the completion of a course of study,
  - (b) the completion of a period of training in a particular activity,
  - (c) the attainment of a standard of competency in a particular activity,
  - (d) satisfaction of professional development requirements,
  - (e) specified working experience.
- (3) Qualifications may be approved for a limited range of activities specified in the approval, so as to enable a person who has those qualifications to be granted a licence or certificate of registration subject to conditions that limit the person to exercising the functions of licensee or certificate of registration holder in relation to that limited range of activities only.
- (4) A person does not have the qualifications required for the reissue or restoration of a licence or certificate of registration (as provided by section 26) if the person failed to comply with any condition of the licence or certificate of registration that required the holder to undertake professional development, continuing education or a course of study, unless the Secretary otherwise determines in a particular case.
- (5) Different qualifications may be approved for different classes of licence.

**16 Disqualified persons**

- (1) A person is a disqualified person for the purposes of this Act if the person—

- (a) has a conviction in New South Wales or elsewhere for an offence involving dishonesty that was recorded in the last 10 years, unless the Secretary has determined under subsection (2) that the offence should be ignored, or
- (b) has a conviction that was recorded in the last 5 years for an offence under section 13 (Lending of licence or certificate of registration prohibited) of this Act, unless the Secretary has determined under subsection (2) that the offence should be ignored, or
- (c)-(e) (Repealed)
- (f) is a mentally incapacitated person, or
- (g) is disqualified from holding a licence, certificate of registration or other authority under a corresponding Act or is the holder of such a licence, certificate of registration or other authority that is suspended, or
- (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
- (i) is in partnership with a person who is a disqualified person, or
- (j) is for the time being declared to be a disqualified person under Part 12 (Complaints and disciplinary action), or
- (k) is a corporation that is the subject of a winding up order or for which a controller or administrator has been appointed, or
- (l) has failed to pay a contribution or levy payable by the person under Part 10 (Compensation Fund) and the failure continues, or
- (m) has failed to pay an amount due as a debt to the Crown by way of recovery of an amount paid out of the Compensation Fund and the failure continues, or
- (n) has failed to pay any monetary penalty payable by the person under Part 12 (Complaints and disciplinary action) or has failed to comply with a direction given by the Secretary under that Part, and the failure continues, or
- (o) has failed to comply with the requirements of section 111 to have an audit of the records and documents relating to any trust money carried out within the required time, unless the Secretary determines that in the circumstances that failure should not disqualify the person, or
- (p) is in breach of any provision of this Act or the regulations that is prescribed by the regulations as a disqualifying breach.

(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, concerned in the management of, or a director 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 was, at any time in the last 3 years, concerned in the management of, or a director of, a body corporate that, within 12 months after the person ceasing to be such a person or director, 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 concerned in the management of, or a director of, that body corporate) to take all reasonable steps to avoid the body corporate becoming an externally-administered body corporate.

(2) The Secretary may determine that an offence committed by a person should be ignored for the purposes of this section because of the time that has passed since the offence was committed or because of the triviality of the acts or omissions giving rise to the offence.

(2A) The Secretary may determine that the factors listed in subsection (1) (h) or (k) should be ignored for the purposes of this section if, on the basis of information provided to the Secretary, the Secretary considers it is appropriate to do so.

(2B) The Secretary 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 Secretary 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 Secretary 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 Secretary is satisfied that the person took all reasonable steps (while concerned in the

management of, or a director 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 Secretary has served a notice on the person giving the person the opportunity to make oral or written submissions to the Secretary 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 Secretary 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 Secretary 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.

(3) (Repealed)

## **Division 3 Application and issue procedure**

### **17 Application of [Licensing and Registration \(Uniform Procedures\) Act 2002](#)**

(1) The Secretary may grant the following licences and certificates of registration for the purposes of this Act—

- (a) real estate agents' licences,
- (b) stock and station agents' licences,
- (c) strata managing agents' licences,
- (d) corporation licences,
- (e) certificates of registration as an assistant real estate agent,
- (f) certificates of registration as an assistant stock and station agent,
- (g) certificates of registration as an assistant strata managing agent.

(1A) A licence (other than a corporation licence) may be granted as a class 1 licence or a class 2 licence.

(2) Part 2 (other than section 10) of the [Licensing and Registration \(Uniform Procedures\) Act 2002](#) (**the applied Act**) applies to and in respect of a licence or certificate of registration, subject to the modifications and limitations prescribed by or under this Act.

(3) For the purpose of applying Part 2 of the applied Act to a licence or certificate of registration—

- (a) the Secretary is taken to be the licensing authority, and
  - (b) the licence or certificate of registration may be amended under section 7 of that Act, and
  - (c) the licence or certificate of registration may not be transferred under section 8 of that Act, and
  - (d) in respect of a licence—the references to 2 weeks, 4 weeks and 8 weeks in section 9 (1) (a), (b) and (c) of that Act are each to be read as references to 6 weeks, and
  - (d1) section 9 of that Act does not have effect in respect of a certificate of registration, and
  - (e) (Repealed)
  - (f) an application is not required to be advertised under section 15 of that Act, and
  - (g) section 21 (4) of that Act does not have effect, and
  - (h) the reference to 14 days in section 24 (1) of that Act (as to the period within which changed particulars must be notified) is to be read as a reference to 7 days.
- (4) Subject to this section, the regulations may make provision for or with respect to such matters concerning a licence or certificate of registration as are relevant to the operation of Part 2 of the applied Act.

#### **17A Application fees and Compensation Fund contributions**

- (1) An applicant for a licence or certificate of registration must make provision for the payment of an application fee of an amount prescribed by the regulations.
- (2) An applicant for a licence must also make provision for the payment of the contribution to the Compensation Fund required in relation to the application.

#### **18 (Repealed)**

#### **19 Certain applications to be refused**

An application must not be granted unless the applicant is eligible to be granted the licence or certificate of registration concerned (as provided by section 14).

#### **20 Conditions—general**

- (1) A licence or certificate of registration may be granted subject to conditions, including (but not limited to) conditions of the following kind—
  - (a) a condition prohibiting the holder from exercising functions under the licence or certificate of registration otherwise than as an employee of a licensee whose licence does not contain such a condition,



- (b) a condition requiring the holder to undertake or complete a specified course of studies within a specified period of time,
  - (c) a condition requiring the holder to undertake by way of professional development specified further education or training during the term of the licence or certificate of registration,
  - (d) a condition prohibiting the holder—
    - (i) from exercising specified functions, or
    - (ii) from exercising functions in relation to specified activities, or
    - (iii) from exercising functions other than specified functions, or
    - (iv) from exercising functions except in relation to specified activities.
- (2) A licence or certificate of registration is subject to the condition that the holder must comply with any continuing professional development requirements issued and notified to the holder by the Secretary from time to time.

## **21 Special condition requiring auctioneers to be accredited**

- (1) Every real estate agent's licence and stock and station agent's licence is subject to the condition that the holder of the licence must not act as an auctioneer unless the licensee is accredited as an auctioneer under this section.
- (2) The Secretary may accredit the holder of a real estate agent's licence or stock and station agent's licence as an auctioneer if the Secretary is satisfied that the holder has such qualifications in connection with the conduct of auctions and the functions of auctioneers as the Secretary may approve from time to time by order published on the NSW legislation website.
- (3) Without limiting the Secretary's power to approve qualifications, the Secretary may approve qualifications by reference to any one or more of the following—
  - (a) the completion of a course of study,
  - (b) the completion of a period of training in a particular activity,
  - (c) the attainment of a standard of competency in a particular activity.

## **22 Special condition requiring professional indemnity insurance**

- (1) The regulations may make provision for or with respect to requiring the holder of a licence to be insured under a policy of professional indemnity insurance in force with respect to the licensee or his or her employer. It is a condition of a licence that the holder of the licence be insured as required by any such regulations.

- (2) In particular, the regulations may require that the policy of insurance be a policy, or a policy of a kind, that is approved by the Minister for the time being by order published in the Gazette.
- (3) An order may provide that a policy is an approved policy if the policy complies with either or both of the following—
  - (a) the policy complies with the conditions set out in the order,
  - (b) the policy is described in the order by reference to the insurer and the number of the policy or is identified in the order by other specified particulars.

### **23, 24 (Repealed)**

### **25 Duration of licence**

- (1) An application for a licence or for renewal of a licence is to nominate one of the following terms of duration for the licence (the ***nominated term***)—
  - (a) 1 year,
  - (b) 3 years,
  - (c) 5 years.
- (2) The Secretary may grant or renew a licence for a shorter term than the nominated term if satisfied that it is in the public interest to do so.
- (3) If an application for renewal of a licence has been made but the application is not finally determined by the Secretary before the expiry of the licence, the licence (if not suspended or sooner cancelled) continues in force until the application is finally determined.
- (4) If a licence is granted or renewed for the nominated term or a shorter term than the nominated term, the Secretary is to refund to the applicant the difference between the fee for the nominated term and the fee for the term that was granted.
- (5) The suspension of a licence does not affect the term of the licence.
- (6) This section does not affect the term of any licence granted under this Act and in force immediately before the substitution of this section by the [Fair Trading Legislation Amendment \(Reform\) Act 2018](#).

### **25A Time period for restoration of licence**

- (1) An application for the restoration of a licence must be made—
  - (a) within 3 months of the expiry of the licence, or
  - (b) within the further period determined by the Secretary on the application of the

person seeking the restoration of the licence.

- (2) Without limiting subsection (1) (b), the Secretary may extend the period within which an application for the restoration of a licence may be made if the Secretary is satisfied that—
  - (a) in a case where the applicant failed to apply for renewal before the licence expired—the failure to apply for renewal of the licence before it expired was due to inadvertence, or
  - (b) it is just and equitable to restore the licence.
- (3) A licence that has been surrendered or cancelled must not be restored.
- (4) An application for the restoration of a licence must—
  - (a) be made in the approved form (if any), and
  - (b) be accompanied by the fee prescribed by the regulations, and
  - (c) nominate a term of duration for the licence.
- (5) A licence restored at any time is taken to have been restored from the day on which the licence expired.
- (6) Subject to this section, this Act applies to an application for the restoration of a licence in the same way as it applies to an application for a licence.

## **26 Effect of applying for restoration of expired licence**

- (1)–(5) (Repealed)
- (6) If an application for the restoration of an expired licence is duly made, anything done by the holder of the expired licence between its expiry and the determination of the application for restoration (whether the application is granted or refused) is taken to have been done as the holder of a licence, except for the purposes of sections 8 (1), 9 (1) and 10.

## **26A Duration of certificate of registration**

- (1) The term of duration for a certificate of registration is 4 years.
- (2) The Secretary may grant a certificate of registration for a term longer than 4 years if the Secretary is satisfied that exceptional circumstances exist, being exceptional circumstances prescribed by the regulations.
- (3) The suspension of a certificate of registration does not affect the term of the certificate.

## **26B Time period for application for further certificate of registration**

- (1) An application for a certificate of registration may not be made within 1 year of the expiry or cancellation of a certificate of registration previously held by the applicant.
- (2) A certificate of registration may not be renewed or restored.

## **27 Administrative review by NCAT**

A person may apply to the Tribunal for an administrative review under the [Administrative Decisions Review Act 1997](#) of any of the following decisions of the Secretary—

- (a) a decision refusing to grant a licence or certificate of registration to the person (including such a decision pursuant to an application for the reissue or restoration of a licence or certificate of registration),
- (b) a decision to impose a condition on a licence or certificate of registration of the person.

# **Part 3 General conduct of licensees and registered persons**

## **Division 1 Place and name of business**

### **28 Registered office and address**

- (1) A licensee must have a registered office within New South Wales.
- (2) A licensee who carries on the business of an agent pursuant to a licence or other authorisation under the laws of another State at an office (**the interstate office**) that is within 50 kilometres of New South Wales may have the licensee's registered office at the interstate office (even though it is not in New South Wales). The powers of an authorised officer under this Act may be exercised at the interstate office.
- (3) The address specified in an application for a licence as the address at which the applicant proposes to carry on business (or, in the case of a licensee carrying on business at more than one place, the address specified in the application as the licensee's principal place of business) is taken to be the registered office of the licensee.
- (4) Notice of any change in the location of the registered office must be lodged by the licensee with the Secretary within the time prescribed by the regulations.

Maximum penalty—50 penalty units.

### **29 Display of name at registered office**

- (1) A licensee must display legibly and conspicuously outside the licensee's registered office and any other place at which the licensee's business as a licensee is carried on—

- (a) the licensee's name and description as a licensee, and
  - (b) a description of the kind of licence or licences held by the licensee.
- (2) In addition, a licensee that is a corporation must display legibly and conspicuously—
- (a) outside the corporation's registered office, the name of the person in charge of the corporation's registered office, and
  - (b) outside any other place at which the business of the corporation is carried on, the name of the person in charge at that place.
- (3) A person must not display or exhibit outside or near the person's office, house or place of business any sign or other matter that indicates or implies that the office, house or place of business is that of a person licensed as a kind of agent under this Act unless the person is licensed as an agent of that kind.

Maximum penalty—50 penalty units.

### **30 Business names**

- (1) A licensee must not, either alone or together with other persons, carry on business as a licensee under a name or advertise or hold out that the licensee carries on business as a licensee under a name unless—
- (a) the name consists of the name of the licensee and the name of each other person, if any, with whom the licensee is carrying on, or advertising or holding out that the licensee is carrying on, business as a licensee, or
  - (b) the name is a business name registered under the [Business Names Registration Act 2011](#) of the Commonwealth in relation to the licensee and each other person, if any, with whom the licensee is carrying on, or advertising or holding out that the licensee is carrying on, business as a licensee.

Maximum penalty—50 penalty units.

- (2) The name of a licensee (other than a corporation) consists of the licensee's full name, or the licensee's surname (or family name) together with—
- (a) the licensee's other name or names, or
  - (b) the initial or initials of the licensee's other name or names, or
  - (c) a combination of one or more of the licensee's other name or names and the initial or initials of the licensee's remaining other name or names, or
  - (d) the other name or names by which the licensee is commonly known or the initial or initials by which the licensee is commonly known or any combination of one or more of those names or initials.

- (3) The name of a licensee that is a corporation consists of the corporate name of the corporation.
- (4) The Secretary may, by notice in writing to a licensee, direct that the licensee must not carry on business under a specified business name, being a name that—
  - (a) is the same as, or is a name closely resembling, the name under which a person who is a disqualified person or whose licence has been cancelled under or in pursuance of this Act was carrying on business immediately before the person became a disqualified person or the person's licence was cancelled, or
  - (b) implies or is capable of being construed as implying that the licensee is the successor in the business, or in any way interested or concerned in continuing the business as a licensee, of a person who is a disqualified person or whose licence has been cancelled under or in pursuance of this Act, or
  - (c) is, in the opinion of the Secretary and in the circumstances of any particular case, undesirable as being contrary to the public interest.
- (5) A licensee must not contravene a direction under subsection (4).

Maximum penalty—50 penalty units.

- (6) The provisions of this section are intended to operate as referred to in sections 12 (2) (e), 19 (5) and 20 (3) of the *Business Names Registration Act 2011* of the Commonwealth.

**Note—**

Section 12 (2) (e) of the *Business Names Registration Act 2011* of the Commonwealth (the **Commonwealth Act**) provides that the business names legislation referred to in that section is not intended to exclude or limit the concurrent operation of a law of a State that imposes obligations on an entity or class of entities that are in addition to obligations imposed under that Act.

Sections 19 (5) and 20 (3) of the Commonwealth Act also provide that an entity does not commit an offence under those sections concerning the inclusion or display of registered business names in written communications and at places of business if the inclusion, use or display of a business name in such a communication or at such a place would be contrary to a law of a State.

## **Division 2 Business practices and supervision**

### **31 Holder of class 1 licence to be in charge of business**

- (1) An individual who carries on business under a licence other than a class 1 licence must employ an individual (who holds a class 1 licence of a kind that would authorise the employed individual to carry on that business) to be in charge of that business.
- (2) A corporation that holds a corporation licence must employ an individual (who holds a class 1 licence of a kind that would authorise the individual to carry on that business) to be in charge of that business.

- (3) An individual or corporation that employs the holder of a class 1 licence in accordance with this section must notify the Secretary of the following within 5 business days—
  - (a) the name and licence number of the holder,
  - (b) the address of each place of business at which the holder will discharge the holder's duties as a licensee in charge of the business.
- (4) The holder of a class 1 licence who is employed in accordance with this section to be in charge of a business must not exercise functions or provide services on behalf of 2 or more licensees (whether corporations or individuals) unless those licensees are in partnership.
- (5) The Secretary may grant a person an exemption from a provision of this section. The exemption may be granted unconditionally or subject to conditions. The Secretary may at any time by notice in writing to a person granted an exemption revoke the exemption or vary the conditions of the exemption.
- (6) The regulations may specify the matters to be taken into account by the Secretary in considering whether to grant a person an exemption from a provision of this section.

Maximum penalty—

- (a) 200 penalty units in the case of a corporation, or
- (b) 100 penalty units in any other case.

### **32 Duty of licensee and person in charge to properly supervise business**

- (1) A licensee must properly supervise the business carried on by the licensee.
- (2) A licensee employed by another licensee (***the principal licensee***) as the person in charge of business at a place of business of the principal licensee must properly supervise the business of the principal licensee carried on at that place.
- (3) The requirement to properly supervise the conduct of business includes the following requirements—
  - (a) a requirement to properly supervise persons engaged in the business,
  - (b) a requirement to establish procedures designed to ensure that the provisions of this Act and any other laws relevant to the conduct of that business are complied with,
  - (c) a requirement to monitor the conduct of business in a manner that will ensure as far as practicable that those procedures are complied with.
- (4) The Secretary may from time to time issue and notify to licensees guidelines as to what constitutes the proper supervision of the business of a licensee. A failure to

comply with the requirements of any such guidelines in connection with the supervision of a business constitutes a failure to properly supervise the business.

- (5) A reference in this section to a person who is engaged in a business carried on by a licensee is a reference to a person—
- (a) who is engaged in the business as an employee of the licensee, or
  - (b) who is engaged by the licensee, other than as an employee of the licensee, to provide services in the course of the business, or
  - (c) whose services are provided to the licensee in the course of the business, other than as an employee of the licensee, under an arrangement entered into by the licensee with another person.

Maximum penalty—

- (a) 200 penalty units in the case of a corporation, or
- (b) 100 penalty units in any other case.

### **33 Licensee not to share commission with certain persons**

- (1) A licensee must not enter into an arrangement with or act in conjunction with a person that the licensee knows to be an unlicensed person (other than an employee in the licensee's business as a licensee) whereby the unlicensed person is entitled to a share of the commission, fee, gain or reward payable to the licensee in respect of any transaction by or with him or her as a licensee or generally.

Maximum penalty—

- (a) 100 penalty units in the case of a corporation, or
  - (b) 50 penalty units in any other case.
- (2) In this section—

***unlicensed person*** means a person who is not licensed under this Act or a corresponding Act.

### **34 Non-commercial subagency agreements to be in writing**

- (1) An agreement between licensees to share any commission, fee, gain or reward paid or payable to a licensee in respect of any services performed by him or her as a licensee is unenforceable unless the agreement is in writing, is signed by the licensees and contains such terms (if any) as may be prescribed by the regulations.
- (2) Any provision in, or applying to, such an agreement and purporting to exclude, modify or restrict the operation of the terms (if any) required by this section to be contained in the agreement has no force or effect.



- (3) A licensee who enters into an agreement a provision of which is unenforceable because of this section is guilty of an offence.

Maximum penalty—50 penalty units.

- (4) This section does not apply to—

- (a) an agreement between licensees who are in partnership with one another or in the relationship of employer and employee with one another, or
- (b) an agreement, transaction, circumstance or person prescribed by the regulations as exempt from this section or an agreement, transaction, circumstance or person of a class or description prescribed by the regulations as exempt from this section, or
- (c) an agreement in respect of services relating to commercial land, being land used or intended to be used solely or principally for commercial, business or industrial purposes, but not including land used or intended to be used solely or principally for agricultural or pastoral purposes.

### 35 Franchising agreements

- (1) A licensee who enters into a franchising agreement in connection with the conduct of the licensee's business as licensee must give notice of the agreement to the Secretary. The notice must be in the form approved by the Secretary and must be given within 30 days after the agreement is entered into.

Maximum penalty—100 penalty units.

- (2) The franchisor under a franchising agreement must notify the Secretary in writing within 7 days after becoming aware of any failure to account by a licensee who is a party to the franchising agreement.

Maximum penalty—100 penalty units.

- (3) In this section—

**failure to account** has the same meaning as in Part 9 (Management and receivership).

**franchising agreement** means an agreement whereby a licensee is authorised to carry on business under any name in consideration of any other person entitled to carry on business under that name receiving any consideration whether by way of a share in the profits of the licensee's business or otherwise.

### 36 Review of commission and fees

- (1) An action or other proceedings cannot be commenced by a licensee for the recovery of remuneration or any sum as reimbursement for expenses until the expiration of 28

days after a statement of claim has been served personally or by post on the person to be charged with the remuneration or expenses.

- (2) The statement of claim must be in writing, set out the amount claimed and contain details of the services performed by the licensee in respect of which the remuneration or expenses are claimed.
- (3) If money has been paid to or is or has been retained by a licensee (out of money received by or paid to the licensee) in respect of any transaction by or with the licensee as a licensee and has been so paid or retained as remuneration or as reimbursement for expenses in connection with the transaction, the person paying the money or the person who would be entitled to the money had the money not been retained, may require the licensee to furnish the person with an itemised account of the transaction in accordance with the regulations.
- (3A) A requirement by a person under subsection (3) must be in writing.
- (4) A person who is served with a statement of claim under this section or is provided with an itemised account of a transaction as provided by this section may apply to the Tribunal for the determination of a consumer claim within the meaning of Part 6A of the *Fair Trading Act 1987* in relation to—
  - (a) the entitlement of the licensee to the whole or any part of the amount specified in the statement of claim or the itemised account, or
  - (b) whether the whole or any part of the amount is reasonable,or both.
- (5) For the purpose of the application of Part 6A of the *Fair Trading Act 1987* to that person, a reference in that Part to a **consumer** is taken to include a reference to that person.
- (6) The Tribunal has jurisdiction to hear and determine any such consumer claim despite—
  - (a) the terms or conditions of any agreement or contract entered into between the licensee and the applicant, and
  - (b) the amount being more or less than the maximum amount (if any) of remuneration to which a licensee is entitled under this Act.
- (7) This section does not limit Part 6A of the *Fair Trading Act 1987*.
- (8) In this section—

**expenses** means expenses or charges incurred in connection with services performed by a licensee in his or her capacity as a licensee.

**remuneration** means remuneration by way of commission, fee, gain or reward for services performed by a licensee in his or her capacity as a licensee.

### **37 Rules of conduct for licensee's business**

- (1) The regulations may prescribe rules of conduct to be observed in the course of the carrying on of business or the exercise of functions under a licence or certificate of registration.
- (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.

### **38 Undertakings by licensees and registered persons**

The Secretary may accept a written undertaking from the holder of a licence or certificate of registration as to the manner in which the holder will exercise functions under the licence or certificate of registration.

**Note—**

Part 12 provides that a breach of such an undertaking is grounds for taking disciplinary action against a person.

### **39 Duty of licensee to notify defalcation**

- (1) A licensee must notify the Secretary as soon as practicable after becoming aware of any failure to account by the licensee.

Maximum penalty—50 penalty units.

- (2) In this section—

**failure to account** has the same meaning as in Part 9 (Management and receivership).

### **40 Industry association to report defalcation**

A body engaged in the provision of services to agents as an industry association or similar undertaking must notify the Secretary in writing within 7 days after becoming aware of any failure to account by a licensee.

Maximum penalty—100 penalty units.

## **Division 3 Employees and others**

#### **40A Interpretation—persons engaged by licensees**

Without limiting the circumstances in which a person is to be regarded, for the purposes of this Division, as being engaged by a licensee to exercise regulatory functions in the course of the business conducted by the licensee, a person is taken to be so engaged if—

- (a) the services of the person are provided to the licensee under an arrangement entered into by the licensee with another person, and
- (b) the services are or include exercising regulated functions in the course of the business.

#### **41 Liability of licensee for acts of employees**

A licensee who employs a person at any place of business of the licensee is responsible, in tort and in contract, for anything done or not done by the person—

- (a) within the scope of the employee's authority, or
- (b) for the benefit, or the purported or intended benefit, of the licensee or the licensee's business.

#### **42 Licensee to keep records of persons employed as assistant agents**

- (1) A licensee must make and keep a record of the name and residential address of each employee that the licensee employs as an assistant agent.
- (2) (Repealed)
- (3) The licensee must keep the record in the form of a register of employees and that register must be kept at the place of business of the licensee at which the employee is employed or at such other place as the Secretary may approve.

Maximum penalty—50 penalty units.

#### **43 Duty of licensee not to engage certain persons**

- (1) A licensee must not employ a person in any capacity in connection with the carrying on of the business conducted by the licensee, or engage a person to exercise any regulated functions in the course of the business, if the person—
  - (a) is a disqualified person (other than a person whose disqualification is on a ground that does not disqualify the person from eligibility to hold a certificate of registration), or
  - (b) has had his or her licence or certificate of registration suspended or cancelled under this Act (unless a licence or certificate of registration has subsequently been granted to the person and is not suspended or cancelled), or
  - (c) has had an application for a licence or certificate of registration refused on the

ground that the person was not a fit and proper person to hold a licence or certificate of registration (unless a licence or certificate of registration has subsequently been granted to the person and is not suspended or cancelled).

Maximum penalty—50 penalty units.

- (2) It is a defence to a prosecution for an offence under this section if the licensee establishes that the licensee did not know, and could not reasonably be expected to have known after diligent inquiry, that the person was a person whose employment or engagement by the licensee was prohibited by this section.

#### **44 Duty of licensee to notify disqualification of employees and others**

A licensee must notify the Secretary in writing within 7 days after becoming aware that any of the following persons has become a disqualified person—

- (a) a person employed by the licensee (other than a person whose disqualification is on a ground that does not disqualify the person from eligibility to hold a certificate of registration),
- (b) a person engaged by the licensee, other than as an employee of the licensee, to exercise regulated functions in the course of the business conducted by the licensee.

Maximum penalty—50 penalty units.

#### **45 Employees and others required to notify disqualification**

A person must notify a licensee within 7 days after the person becomes a disqualified person if the person is—

- (a) employed by the licensee (except where the person's disqualification is on a ground that does not disqualify the person from eligibility to hold a certificate of registration), or
- (b) engaged by the licensee, other than as an employee of the licensee, to exercise regulated functions in the course of the business conducted by the licensee.

Maximum penalty—50 penalty units.

### **Division 4 Conflicts of interest**

#### **46 Financial and investment advice by real estate agents**

- (1) The regulations may make provision for or with respect to requiring a real estate agent who provides financial or investment advice to a person in connection with the sale or purchase of land to provide to the person specified information or warnings.
- (2) A real estate agent who fails to comply with a requirement of the regulations under this section is guilty of an offence.

Maximum penalty—200 penalty units.

#### **47 Duty of disclosure to client and prospective buyer of land**

- (1) A buyer's or seller's agent acting on the sale or purchase of land must disclose the following to the person for whom the agent is acting (**the client**) and (in addition, in the case of the seller's agent) any prospective buyer of the land—
- (a) any relationship, and the nature of the relationship (whether personal or commercial), the agent has with anyone to whom the agent refers the client or a prospective buyer for professional services associated with the sale or purchase,
  - (b) whether the agent derives or expects to derive any consideration, whether monetary or otherwise, from a person to whom the agent has referred the client or a prospective buyer and, if so, the amount or value of the consideration,
  - (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.

#### **Note—**

The following are examples of relationships for the purposes of subsection (1) (a)—

- (a) a family relationship,
- (b) a business relationship, other than a casual business relationship,
- (c) a fiduciary relationship,
- (d) a relationship in which 1 person is accustomed, or obliged, to act in accordance with the directions, instructions, or wishes of the other.

The following are examples for the purposes of subsection (1) (c) of persons who may receive a benefit—

- (a) seller,
- (b) finance broker,
- (c) financial adviser,
- (d) financier,
- (e) property valuer,
- (f) Australian legal practitioner,
- (g) real estate agent.

Maximum penalty—200 penalty units.

- (2) Disclosure to a person is effective for the purposes of subsection (1) only if—

- (a) it is given to the person in a form approved by the Secretary, and
- (b) it is acknowledged by the person in writing on the form, and
- (c) it is given and acknowledged 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 before a contract for the sale of the residential property is entered into.

(3) In this section—

**benefit** means monetary or other benefit.

**buyer's agent** means—

- (a) a real estate agent acting for a buyer of land, or
- (b) an assistant real estate agent acting for that real estate agent.

**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).

**seller's agent** means—

- (a) a real estate agent acting for the vendor of land, or
- (b) an assistant real estate agent acting for that real estate agent.

#### **48 Duty not to act for both buyer and seller of land**

- (1) A licensee must not act in his or her capacity as licensee on behalf of both the buyer and the seller of land at the same time.
- (2) A licensee must not enter into agency agreements in respect of the purchase or sale of land if the performance of services by the licensee under the agreements will or can result in the licensee acting in his or her capacity as licensee on behalf of both the buyer and the seller of the land at the same time.

Maximum penalty—

- (a) 200 penalty units in the case of a corporation, or
- (b) 100 penalty units in any other case.

#### **49 Restrictions on licensee obtaining beneficial interest in property**

- (1) A real estate agent who is retained by a person (**the client**) as an agent for the sale of property must not obtain or be in any way concerned in obtaining a beneficial interest in the property.

Maximum penalty—200 penalty units or imprisonment for 2 years, or both.

- (2) An assistant real estate agent employed by the real estate agent must not obtain or be in any way concerned in obtaining a beneficial interest in the property.
- Maximum penalty—200 penalty units or imprisonment for 2 years, or both.
- (3) A person does not contravene this section by obtaining a beneficial interest in property if—
- (a) before the person obtains the interest, the client consents in writing in a form approved by the Secretary to the person obtaining the interest, and
  - (b) the person acts fairly and reasonably in relation to the obtaining of the interest, and
  - (c) no commission or other reward is payable to the person in relation to the transaction by which the interest is obtained, unless the client consents in writing in a form approved by the Secretary to the commission or other reward being paid.
- (4) Without limiting this section, a person is considered to obtain a beneficial interest in property if—
- (a) the person or a close relative of the person obtains a beneficial interest in the property, or
  - (b) a corporation having not less than 100 members and of which the person or a close relative of the person is a member, or a subsidiary of such a corporation, obtains a beneficial interest in the property, or
  - (c) a corporation of which the person or a close relative of the person is an executive officer obtains a beneficial interest in the property, or
  - (d) the trustee of a discretionary trust of which the person or a close relative of the person is a beneficiary obtains a beneficial interest in the property, or
  - (e) a member of a firm or partnership of which the person or a close relative of the person is also a member obtains a beneficial interest in the property, or
  - (f) the person or a close relative of the person has, directly or indirectly, a right to participate in the income or profits of a business carried on for profit or gain and another person carrying on that business obtains a beneficial interest in the property.
- (5) Without limiting this section, each of the following is considered to constitute the obtaining of a beneficial interest in property—
- (a) purchasing property,
  - (b) obtaining an option to purchase property,



(c) being granted a general power of appointment in respect of property.

(6) In this section—

**close relative** of a person means—

- (a) a spouse of the person, or
- (b) an existing or former de facto partner, or
- (c) a child, grandchild, sibling, parent or grandparent of the person, whether derived through paragraph (a) or (b) or otherwise, or
- (d) any other person who has a relationship with the person that is prescribed by the regulations as constituting the relationship of close relative for the purposes of this section.

**Note—**

“De facto partner” is defined in section 21C of the [Interpretation Act 1987](#).

**property** includes an interest in property.

## **Division 5 Advertisements and representations**

### **50 Advertisements to include information about licensee**

- (1) A licensee must not publish (in a newspaper or otherwise) an advertisement relating to or in connection with the licensee’s business unless the advertisement includes the following—
  - (a) if the licensee is an individual carrying on business in the licensee’s own name and is not a member of a partnership—the licensee’s name,
  - (b) if the licensee is an individual carrying on business under a business name registered under any Act relating to the registration of business names—either the licensee’s name or that business name,
  - (c) if the licensee carries on business as a member of a partnership—either the licensee’s name or the name of the partnership, or the name under which the partnership is registered under any Act relating to the registration of business names,
  - (d) if the licensee is a corporation and the corporation is carrying on business in its own name—the name of the corporation,
  - (e) if the licensee is a corporation and the corporation is carrying on business under a business name registered under any Act relating to the registration of business names—either its own name or that business name.

- (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.

#### **51 (Repealed)**

#### **52 Misrepresentation by licensee or registered person**

- (1) A person (the **agent**) who is exercising or performing any function as a licensee or registered person must not induce any other person to enter into any contract or arrangement by—
  - (a) any statement, representation or promise that is false, misleading or deceptive (whether to the knowledge of the agent or not), or
  - (b) any failure to disclose a material fact of a kind prescribed by the regulations (whether intended or not) that the agent knows or ought reasonably to know.

Maximum penalty—200 penalty units.

- (2) Without limiting the generality of subsection (1), a statement, representation or promise is taken to be false, misleading or deceptive if it is of such a nature that it would reasonably tend to lead to a belief in the existence of a state of affairs that does not in fact exist, whether or not the statement, representation or promise indicates that the state of affairs does exist.
- (3) It is a sufficient defence to a prosecution for an offence under this section if the defendant proves that the defendant did not know, and had no reasonable cause to suspect, that the statement, representation or promise was false, misleading or deceptive.

#### **53 Damages for misrepresentation or concealment**

No term or provision of any agreement (whether entered into before or after the commencement of this section) for the sale and purchase of land or any interest in land operates to prevent the purchaser from claiming or being awarded damages or any other

relief in respect of any misrepresentation or concealment in connection with the sale and purchase of the land or interest.

## **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) (Repealed)

### **53B Undertakings by licensee**

- (1) Where it appears to the Secretary that a licensee has, in the course of carrying on business as a licensee, repeatedly engaged in unjust conduct, the Secretary may, with the consent of the Minister—
  - (a) request the licensee to execute a deed in terms approved by the Secretary 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 Secretary makes a request or application under subsection (1), it is to be presumed, unless the contrary is proved, that the Secretary 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 Secretary 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 Secretary must—
  - (a) lodge a copy of the deed with the principal registrar of the Tribunal, and
  - (b) give a copy of the deed to the licensee who executed it.
- (2) The Secretary must retain all deeds and register the deeds in a Register of Undertakings kept by the Secretary 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 Secretary 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 Secretary, 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 Secretary, 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 Secretary, vary or discharge an order made under this Division.

## **Division 7 Gifts**

### **53F Licensees and certificate holders not to receive certain gifts or benefits**

- (1) The holder of a licence or a certificate of registration must not request or accept a gift or other benefit for the holder or for some other person in circumstances that may reasonably be considered to give rise to a conflict of interest.

Maximum penalty—20 penalty units.

- (2) This section does not apply to the following—

- (a) anything provided by the employer of the holder,
- (b) anything provided in accordance with the terms of an agency agreement or from a client as a gift in gratitude for services provided under an agency agreement,
- (c) anything of a kind prescribed by the regulations for the purposes of this section,
- (d) anything that has a value that is less than an amount prescribed by the regulations for the purposes of this section.

- (3) This section does not apply to the requesting or accepting of a gift or other benefit by a strata managing agent (within the meaning of the *Strata Schemes Management Act 2015*) in connection with the provision of services as a strata managing agent or the exercise of functions as a strata managing agent.

#### **Note—**

See section 57 of the *Strata Schemes Management Act 2015* for an offence relating to the requesting or accepting of gifts by strata managing agents.

- (4) In this section—

**gift** has the same meaning as it has in Part 6 of the *Election Funding, Expenditure and Disclosures Act 1981*.

## Part 4 Agency agreements

### Division 1 Requirements for agency agreements

#### 54 Definitions

In this Division—

**commission** means remuneration by way of commission, fee, gain or reward for services performed by a licensee in the capacity of licensee.

**expenses** means any sum or reimbursement for expenses or charges incurred in connection with services performed by a licensee in the capacity of licensee.

#### 55 No entitlement to commission or expenses without agency agreement

- (1) A licensee is not entitled to any commission or expenses from a person for or in connection with services performed by the licensee in the capacity of licensee for or on behalf of the person unless—
  - (a) the services were performed pursuant to an agreement in writing (an **agency agreement**) signed by or on behalf of—
    - (i) the person, and
    - (ii) the licensee, and
  - (b) the agency agreement complies with any applicable requirements of the regulations, and
  - (c) a copy of the agency agreement signed by or on behalf of the licensee was served by the licensee on that person within 48 hours after the agreement was signed by or on behalf of the person.

#### Note—

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

- (2) The regulations may make provision for or with respect to regulating the form of agency agreements and the terms, conditions and other provisions that an agency agreement must or must not contain. Without limiting this subsection, the regulations may prescribe one or more standard forms of agency agreement.
- (3) Without limiting the means by which a copy of the agency agreement may be served on a person, it may be served by electronic means or by such other means as the regulations may allow.
- (4), (5) (Repealed)

### **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.
- (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.

### **56 Approved guide to be provided before agency agreement for residential property signed**

- (1) A real estate agent must not enter into an agency agreement with a person for the sale of residential property unless the agent has provided the person with a copy of the approved guide not more than 1 month before the agreement is signed by or on behalf of the person.

Maximum penalty—40 penalty units.

(2) In this section—

**approved guide** means a guide with respect to the sale of residential property approved by the Secretary from time to time for the purposes of this section.

(3) A contravention of this section does not affect the validity of the agency agreement.

#### **57 Agency agreement must disclose rebates, discounts and commissions**

(1) A licensee is not entitled to any expenses from a person for or in connection with services performed by the licensee in the capacity of licensee for or on behalf of the person in connection with a real estate transaction unless the agency agreement pursuant to which the licensee performs those services contains a statement—

(a) identifying the source of all rebates, discounts or commissions that the licensee will or may receive in respect of those expenses, and

(b) specifying the estimated amount of those rebates, discounts or commissions (to the extent that the amount can reasonably be estimated).

(2) This section does not apply in respect of a real estate transaction relating to commercial land, being land used or intended to be used solely or principally for commercial, business or industrial purposes, but not including land used or intended to be used solely or principally for agricultural or pastoral purposes.

#### **58 Prohibition against listing residential or rural land subject to sole or exclusive agency**

(1) A licensee must not enter into an agency agreement with a person in respect of the sale or purchase of residential property or rural land by the person if—

(a) the agreement provides for an entitlement to commission in respect of services to be provided at a time when the property or land is or is to be the subject of a sole agency agreement or exclusive agency agreement with another licensee for the provision of those services, and

(b) the licensee knows or has reasonable cause to suspect that the person has entered into that sole agency agreement or exclusive agency agreement.

(2) A licensee must not solicit or encourage a person to enter into an agency agreement with the licensee if the licensee is prohibited from entering into the agreement by this section.

Maximum penalty—

(a) 200 penalty units in the case of a corporation, or

(b) 100 penalty units in any other case.

(3) A licensee is not entitled to any commission or expenses from a person for or in



connection with services performed by the licensee pursuant to an agency agreement entered into by the licensee in contravention of this section.

(4) In this section—

**commission** includes fee, gain and reward.

**exclusive agency agreement** means an agency agreement under which an agent agrees to act for the seller or buyer (**the client**) on the sale or purchase of property and that provides for the agent to be entitled to commission on the happening of an event whether or not the agent is the effective cause of the happening of the event and whether or not the client is the effective cause of the happening of the event.

**sole agency agreement** means an agency agreement under which an agent agrees to act for the seller or buyer (**the client**) on the sale or purchase of property and that provides for the agent to be entitled to commission on the happening of an event (whether or not the agent is the effective cause of the happening of the event) unless the client is the effective cause of the happening of the event.

## **Division 2 Cooling-off period for residential or rural agency agreements**

### **59 Cooling-off period for residential or rural agency agreements**

- (1) There is to be a cooling-off period for every agency agreement in respect of the sale of residential property or rural land.
- (2) The cooling-off period commences when the agency agreement is signed and ends at 5 pm on the next day that is a business day or a Saturday.
- (3) An agency agreement is **signed** when it is signed by or on behalf of the person (**the client**) for whom services are to be performed under the agreement. If there is more than one client, the agreement is signed when the last client to sign signs the agreement.
- (4) The cooling-off period may be extended by a provision of the agency agreement, or by the agent in writing before the end of the cooling-off period.
- (5) There is no cooling-off period if—
  - (a) at least 1 business day before the client signs the agency agreement the agent provides the client with a copy of the proposed agency agreement together with (in the case of an agreement that relates to residential land) a copy of a consumer guide approved by the Secretary from time to time for the purposes of this section, and
  - (b) before the client signs the agency agreement the client signs a form of waiver of cooling-off period in a form approved by the Secretary by order published in the

Gazette.

#### **60 Agency agreement can be rescinded during cooling-off period**

- (1) The client can rescind an agency agreement by serving a notice of rescission on the agent under the agreement during the cooling-off period for the agreement.
- (2) To be effective, the notice of rescission must—
  - (a) be in writing addressed to the agent and be to the effect that the client rescinds the agreement, and
  - (b) be signed by the client or the client's Australian legal practitioner or, if there is more than one client, by each client or their respective Australian legal practitioners.
  - (c) (Repealed)
- (3) (Repealed)

#### **61 Effect of rescission**

- (1) On service of a notice of rescission, the agency agreement is taken to be rescinded from the time it was entered into.
- (2) Neither the agent nor the client is liable to pay any sum for commission, damages, costs or expenses for or in connection with the agency agreement or its rescission.
- (3) The agent must refund to the client any money paid to the agent under a rescinded agency agreement.

#### **62 No contracting out**

A provision of an agency agreement or any other agreement or arrangement is void to the extent that it would (but for this section) have the effect of excluding, modifying or restricting the operation of this Division.

### **Part 5 Residential property and rural land sales**

#### **Division 1 Contract for sale of residential property**

##### **63 Proposed contract for sale of residential property**

- (1) In this section—

***purchaser*** includes a grantee of an option.
- (2) A real estate agent must not offer residential property for sale unless the required documents are all available for inspection at the real estate agent's registered office by a prospective purchaser or agent for a prospective purchaser at all times at which

an offer to purchase the property may be made (or at such other place or at such other times as may be prescribed by the regulations).

- (3) A real estate agent is considered to offer residential property for sale when the agent, expressly or by implication—
  - (a) indicates that residential property is for sale or is to be auctioned at any future time, or
  - (b) offers to sell residential property, or
  - (c) invites an offer to purchase residential property, or
  - (d) indicates that a person may be willing to grant an option to purchase residential property.
- (4) The **required documents** for the purposes of this section are—
  - (a) a copy of the proposed contract for the sale of the property (excluding particulars of the purchaser and purchase price), and
  - (b) the documents required by section 52A of the [Conveyancing Act 1919](#) to be attached to the contract before signature by the purchaser, and
  - (c) in the case of an option to purchase residential property—a copy of the proposed option document (excluding particulars of the purchaser and consideration for the option).
- (5) Without limiting this section, a real estate agent is taken to indicate that residential property is for sale if the real estate agent does any of the following or causes or permits any of the following to be done—
  - (a) advertises or promotes the property in any way that, in the circumstances, may reasonably be taken to indicate that the property is or may be for sale,
  - (b) places a sign on or near the property that, in the circumstances, may reasonably be taken to indicate that the property is or may be for sale,
  - (c) advertises or in any way gives notice that the property is to be auctioned at any future time,
  - (d) places on display particulars or a description of, or a photograph, drawing or other representation of, the property in or on any premises, vehicle or place where the real estate agent conducts business as a real estate agent,
  - (e) shows the property to a prospective purchaser or gives the address of the property to a prospective purchaser.
- (6) This section does not apply to anything done by a real estate agent when acting on

behalf of a prospective purchaser of residential property.

(7) The regulations may create exceptions to this section.

Maximum penalty—100 penalty units.

#### **64 Contracts for sale of residential property**

(1) A real estate agent may do any of the following—

- (a) fill up a proposed contract for the sale of residential property, by inserting details of the purchaser's name, address and description, the name and address of the Australian legal practitioner acting for the purchaser, the purchase price and the date,
- (b) insert in or delete from a contract for the sale of residential property any description of any furnishings or chattels to be included in the sale of the property,
- (c) participate in the exchange or making of contracts for the sale of residential property.

(2) If a prospective party to a proposed contract for the sale of residential property for whom a real estate agent acts in relation to the exchange or making of the contract notifies the real estate agent, or it is apparent from the proposed contract, that an Australian legal practitioner is or will be acting for the party, the real estate agent may not participate in the exchange or making of the contract unless expressly authorised to do so by the party or the Australian legal practitioner. A contract is not invalid merely because of the failure of a real estate agent to comply with this subsection.

(3) A real estate agent who exercises any function pursuant to this section on behalf of any person who is a party or a prospective party to any contract or proposed contract is liable to compensate that person for any loss, damage or expense suffered or incurred by that person as a result of any negligent act or omission, or any unauthorised action, of the real estate agent in the exercise of that function.

(4) A real estate agent may not charge a fee for anything authorised to be done under this section.

(5) This section does not affect the existence or nature of any other functions or responsibilities of licensees that exist or may exist apart from this section.

(6) In this section—

**Australian legal practitioner** includes a licensee under the [Conveyancers Licensing Act 2003](#).

#### **65 Procedure following rescission**

(1) If a contract for the sale of residential property or an option for the purchase of

residential property is rescinded under Division 8 or 9 of Part 4 of the *Conveyancing Act 1919*, a real estate agent who holds money paid by the purchaser by way of deposit under or in relation to the contract or the proposed contract attached to the option is authorised to deal with that money as provided by this section.

- (2) The real estate agent is authorised to pay to the vendor so much of the money as does not exceed the amount (if any) forfeited under section 66V or 66ZE of that Act, and receipt by the real estate agent of the original or a copy of an effective notice of rescission served by the purchaser under section 66U or 66ZD of that Act is sufficient authority for the real estate agent to make the payment to the vendor.
- (3) The regulations may make provision for or with respect to authorising the real estate agent to pay to the purchaser the balance of the money.
- (4) In this section—

**deposit** includes any amount paid by the purchaser in relation to the contract or the proposed contract attached to the option or on account of the purchase price of residential property.

**purchaser** includes a prospective purchaser and a grantee or prospective grantee of an option.

## **Division 2 Bidding at auction of residential property or rural land**

### **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.

### **67 Bids may only be taken from registered bidders**

- (1) The auctioneer at a sale by auction of residential property or rural land must not take a bid from a person unless—
- (a) the relevant details of the person have been entered before the bid is taken in a Bidders Record made in respect of the auction in accordance with section 68, and the auctioneer is in possession of that record when the bid is taken, and
- (b) the person is identified at the auction by the person displaying an identifying number allocated to the person for the purposes of the auction and recorded in the Bidders Record as the identifying number allocated to the person.

Maximum penalty—100 penalty units.

- (2) An auctioneer who refuses to take a bid from a person because of this section does not incur a liability to any person as a result of that refusal.
- (3) The taking of a bid in contravention of this section does not affect the validity of the bid (or its taking or acceptance) and the bid (and its taking or acceptance) are as valid for all purposes as if this section had not been enacted.

### **68 Bidders Record**

- (1) Before residential property or rural land is offered for sale by auction, a record (the **Bidders Record**) must be made of the persons who will be entitled to bid at the auction and there must be entered in the Bidders Record in respect of each of those persons—
- (a) the relevant details of the person, and
- (b) the identifying number allocated to the person for the purposes of identifying the person at the auction, and
- (c) such other information as the regulations may require.
- (2) The relevant details of a person are—

- (a) the person's name and address and the number or other identifier of proof of identity for that person, and
  - (b) in addition, in the case of a person bidding on behalf of another person, the name and address of that other person and the number or other identifier of proof of identity for that other person.
- (3) A real estate agent or stock and station agent engaged to act in respect of the sale of residential property or rural land by auction must make the Bidders Record required by this section for the auction unless some other agent engaged to act in respect of the sale or acting for or on behalf of the auctioneer has made the Bidders Record for the auction.
- (4) An agent is to keep a Bidders Record made by the agent for at least 3 years and is to keep all the Bidders Records made by the agent together, in the form of a Register of Bidders Records.
- (5) The regulations may make provision for or with respect to—
- (a) conferring an entitlement on a seller of residential property to inspect the Bidders Record for the sale of the property, and
  - (b) the manner and form in which a Bidders Record is to be made and kept, and
  - (c) requiring other information to be included in the Bidders Record.

Maximum penalty—100 penalty units.

#### **69 Details to be established by proof of identity**

- (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.

- (2) The only proof of identity that may be used for a person for the purposes of an entry



in a Bidders Record is—

- (a) a motor vehicle driver's licence issued in Australia that displays a photograph of the person, or
  - (b) an Australian passport, or
  - (c) such other proof of identity as may be prescribed by the regulations.
- (3) An agent must not enter the relevant details of a person in a Bidders Record if the agent knows or has reasonable cause to suspect that the details are false in a material particular.

Maximum penalty—100 penalty units.

#### **70 Confidentiality of Bidders Record**

- (1) An agent who makes a Bidders Record, and any auctioneer to whom the contents of a Bidders Record are disclosed under this Division, must not—
- (a) divulge any information that the Bidders Record contains except as authorised or required by this Division, and
  - (b) must not use the Bidders Record or the information that it contains for any purpose not authorised by this Division.

Maximum penalty—100 penalty units.

- (2) This section does not prevent the divulging of information to an authorised officer in accordance with a requirement imposed by or under this Act.

#### **71 Approved consumer education guide for bidders at auctions**

- (1) The Secretary may from time to time approve a consumer education guide for prospective bidders at an auction of residential property or rural land.
- (2) A real estate agent or stock and station agent engaged to act in respect of the sale by auction of residential property or rural land must take all reasonable steps to ensure that a person who bids at the auction has been provided before the auction with a copy of the consumer education guide currently approved under this section.

Maximum penalty—40 penalty units.

### **Division 3 Representations as to selling price**

#### **72 Definitions**

- (1) In this Division—

**agency agreement** for the sale of residential property, includes an agency

agreement for the sale of residential property by auction.

**estimated selling price** for a residential property, means the price or price range specified, under section 72A, in the agency agreement for the sale of the property as the agent's estimate of the likely selling price of the property.

**publish** an advertisement means—

- (a) insert the advertisement in any newspaper, periodical publication or other publication, or
  - (b) publicly exhibit the advertisement in, on, over or under any building, vehicle or place (whether or not a public place and whether on land or water), or in the air in view of persons being or passing in or on any street or public place, or
  - (c) include the advertisement in any document gratuitously sent or delivered to any person or thrown or left on premises occupied by any person, or
  - (d) broadcast the advertisement by radio or television, or
  - (e) disseminate the advertisement by a website, email or other electronic communication.
- (2) For the purposes of this Division, a price is less than an estimated selling price that is expressed as a price range if it is lower than the lowest price in the range.
- (3) For the purposes of this Division, a statement is made in the course of marketing a residential property if the statement is made—
- (a) in an advertisement, or in arranging an advertisement, in respect of the property that is published or caused to be published by the agent, or
  - (b) to any person (orally or in writing) in connection with the proposed sale of the property.
- (4) A reference in this Division to a person who is engaged by a real estate agent or stock and station agent is a reference to a person who is—
- (a) an employee of the agent, or
  - (b) engaged by the agent, other than as an employee of the agent, to provide services in the course of the business carried on by the agent, or
  - (c) a person whose services are provided, other than as an employee of the agent, in the course of the business carried on by the agent under an arrangement entered into by the agent with another person.

### **72A Estimated selling price in agency agreement for sale of residential property**

- (1) A real estate agent must not enter into an agency agreement with a person for the sale of residential property unless the agreement includes the agent's estimate of the likely selling price of the property.
- (2) A real estate agent's estimate of the likely selling price of a property may be expressed as a price range, but only if the highest price in the price range exceeds the lowest price by not more than 10 per cent of the lowest price.
- (3) A real estate agent must ensure that the estimated selling price of a residential property is, and remains, a reasonable estimate of the likely selling price of the property.
- (4) A real estate agent must ensure that the estimated selling price is revised if it ceases to be a reasonable estimate of the likely selling price of a property, by—
  - (a) notifying the other party to the agency agreement, in writing, of the revised estimated selling price, and
  - (b) amending the agency agreement.
- (5) A real estate agent must, before or when specifying an estimated selling price or revising an estimated selling price, provide the seller or prospective seller of the property with evidence of the reasonableness of the estimated selling price.
- (6) A real estate agent who fails to comply with subsection (1), (3), (4) or (5) is guilty of an offence.

Maximum penalty—200 penalty units.

### **73 Underquoting in advertisements for residential property**

- (1) A real estate agent must not publish or cause to be published an advertisement in relation to the sale of a residential property that indicates or suggests a selling price for the property that is less than the estimated selling price for the property.  
Maximum penalty—200 penalty units.
- (2) A real estate agent must not publish or cause to be published an advertisement in relation to the sale of a residential property that includes the phrase "offers above" or "offers over" (or similar symbols or words in any language) a specified selling price or price range.  
Maximum penalty—200 penalty units.
- (3) A real estate agent must, as soon as practicable after revising the estimated selling price for a residential property, take all reasonable steps to amend or retract any advertisement published in relation to the property that includes an advertised selling

price for the property that is less than the revised estimated selling price.

Maximum penalty—200 penalty units.

### **73A Underquoting in representations by real estate agents**

- (1) A real estate agent or any person engaged by a real estate agent must not, in the course of marketing a residential property, make any statement to any person that indicates or suggests that the property may be sold for a price that is less than the estimated selling price for the property.
  - (1A) A real estate agent must ensure that any person engaged by the real estate agent does not, in the course of marketing a residential property, make any statement to any person that indicates or suggests that the property may be sold for a price that is less than the estimated selling price for the property.
  - (1B) It is a defence to a prosecution for an offence under subsection (1A) if the real estate agent establishes that the real estate agent took all reasonable precautions against committing the offence.
- (2) In addition to any penalty that it imposes under this section, a court may order that a person found guilty of an offence under this section is to pay to the credit of the Compensation Fund the whole or any part of any fees or commission paid to the real estate agent, or the person engaged by the real estate agent, in relation to the sale of the property concerned.

Maximum penalty—200 penalty units.

### **73B Real estate agents to keep records of quotes**

- (1) A real estate agent who makes a statement in the course of marketing a residential property to a buyer, prospective buyer, seller or prospective seller that the property is likely to be sold for a specified price or within a specified price range, must make a written record of the statement in accordance with subsection (2).
  - (1A) A real estate agent must ensure that any person engaged by the real estate agent who makes a statement, in the course of marketing a residential property, of a kind referred to in subsection (1) makes a written record in accordance with subsection (2).
  - (1B) It is a defence to a prosecution for an offence under subsection (1A) if the real estate agent establishes that the real estate agent took all reasonable precautions against committing the offence.
- (2) The record of the statement must—
  - (a) contain the address of the property concerned, the price or price range, the date and time of the representation and any other information that is prescribed by the regulations for the purposes of this section, and

(b) be kept at the real estate agent's principal place of business for at least 3 years.

Maximum penalty—200 penalty units.

**74 Requirement to substantiate selling price estimates—residential property**

(1) The Secretary may by notice in writing to a real estate agent require the agent to provide evidence of the reasonableness of any estimate of the selling price of residential property made by the agent in a statement—

(a) orally or in writing to a seller or prospective seller of the property, or

(b) in an advertisement in respect of the property that is published or caused to be published by the agent, or

(c) orally or in writing to a person as a prospective purchaser of the property.

(2) A real estate agent who fails to comply with a notice under this section within the period for compliance specified in the notice is guilty of an offence.

Maximum penalty—200 penalty units.

**75, 76 (Repealed)**

**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 a person engaged by 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.

## **Part 6 Auctions—general**

### **77 Prescribed auction conditions**

- (1) The regulations may prescribe conditions that are to be applicable to or in respect of the sale by auction of land or livestock.
- (2) The regulations may make provision for or with respect to requiring the notification at a sale by auction of land or livestock of any conditions that are applicable to the sale.

### **78 Collusive practices at auction sales**

- (1) A person must not, in relation to the sale by auction of any land or livestock, by a collusive practice induce or attempt to induce any other person—
  - (a) to abstain from bidding generally, or
  - (b) to abstain from bidding for any particular lot, or
  - (c) to bid to a limited extent only, or
  - (d) to do any other act or thing that might in any way prevent or tend to prevent free and open competition.

Maximum penalty—

- (a) 500 penalty units in the case of a corporation, or
  - (b) 250 penalty units in any other case.
- (2) A person must not as a result of a collusive practice, at a sale by auction of any land or livestock—
    - (a) abstain or agree to abstain from bidding generally, or
    - (b) abstain or agree to abstain from bidding for any particular lot, or
    - (c) bid or agree to bid to a limited extent only, or
    - (d) do or agree to do any other act or thing that might in any way prevent or tend to prevent free and open competition.

Maximum penalty—

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

- (3) An auctioneer must not sell by auction any land or livestock 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.

- (4) In this section—

***collusive practice*** means a promise, express or implied, made by a person that if the person is the successful bidder at auction for land or livestock—

- (a) the person will give the person to whom the promise is made the right to elect to take over as purchaser through the auctioneer all or any of the land or livestock at the auction price, or
- (b) the ownership of all or any of the land or livestock will be determined by tossing or the drawing of lots or any other method.

#### **79 False entry in auction record**

- (1) An auctioneer and an employee of an auctioneer must not knowingly enter in any record kept or required to be kept by the auctioneer as the purchaser of any land or livestock sold by auction any name other than the name of the actual successful bidder for the land or livestock.

Maximum penalty for a first offence: In the case of a corporation, 50 penalty units or, in the case of an individual, 20 penalty units.

Maximum penalty for a second or subsequent offence: In the case of a corporation, 100 penalty units or, in the case of an individual, 50 penalty units.

- (2) Any auctioneer who employs any person, being a person who enters, in any record required to be kept by the auctioneer, as the purchaser of any land or livestock sold by auction any name other than the name of the actual successful bidder for the land or livestock, is guilty of an offence unless the auctioneer establishes that the auctioneer did not know that a name other than the name of the actual successful bidder was entered.

Maximum penalty for a first offence: In the case of a corporation, 50 penalty units or, in the case of an individual, 20 penalty units.

Maximum penalty for a second or subsequent offence: In the case of a corporation, 100 penalty units or, in the case of an individual, 50 penalty units.

- (3) If the actual successful bidder at a sale by auction of any land or livestock, as soon as practicable after the auctioneer conducting the sale has indicated the actual successful bidder but not in any case later than the day of the sale, informs the auctioneer that the bidder bid on behalf of another person and informs the auctioneer

of the name of that person, the auctioneer or employee is not guilty of an offence under this section by reason of the name of that other person being entered in a record as purchaser of the land or livestock.

#### **80 Misrepresentation as to quality etc**

An auctioneer must not knowingly misrepresent, or cause or permit to be misrepresented, the value, composition, structure, character or quality, or the origin of manufacture, of any land or livestock put up for sale at a sale by auction conducted by the auctioneer.

Maximum penalty—50 penalty units.

#### **81 Restrictions on bidding by or on behalf of seller or auctioneer of livestock**

- (1) A sale by auction of livestock may be notified in the conditions of sale to be subject to the right by the seller or by any person on behalf of the seller or auctioneer to make 1 bid or such other number of bids as may be prescribed by the regulations.
- (2) At a sale by auction of livestock—
  - (a) the seller or any person on behalf of the seller or auctioneer must not bid unless the right to bid has been notified in the conditions of sale, and
  - (b) the seller or any person on behalf of the seller or auctioneer must not make more than the number of bids notified in the conditions of sale, and
  - (c) the auctioneer must not take from the seller or any person on behalf of the seller or auctioneer any bid knowing that the bid is in contravention of this section.

Maximum penalty—50 penalty units.

#### **82 Contracting out of prescribed terms and conditions of auction sales**

- (1) Any provision in, or applying to, an agreement for the sale of property by auction and purporting to exclude, modify or restrict (otherwise than in accordance with this or any other Act) the operation of any conditions prescribed as being applicable to or in respect of the sale by auction of that property or property of that class or description is void.
- (2) A person must not notify or cause to be notified in the conditions of sale by auction of any property any provision purporting to exclude, modify or restrict any conditions prescribed as applicable to or in respect of the sale by auction of that property or property of that class or description.

Maximum penalty—50 penalty units.

- (3) In this section—

***property*** means land or livestock.



### **83 Successful bidder at auction to supply information**

- (1) The actual successful bidder at a sale by auction of any land or livestock must, as soon as practicable after the auctioneer conducting the sale has indicated the actual successful bidder but not in any case later than the day of the sale, supply to the auctioneer or an employee of the auctioneer—
  - (a) the bidder's name if the bidder bid on his or her own behalf, or
  - (b) the name of the person on whose behalf the bidder bid if the bidder bid on behalf of another person.

Maximum penalty—20 penalty units.

- (2) An auctioneer must not sell by auction any land or livestock unless notice is given, 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.

### **84 Livestock auctions—"comeback" prohibited**

- (1) An auctioneer must not, at an auction for the sale of livestock, sell by auction any lot for a price lower than any price bid in relation to the sale of that lot.
- (2) For the purposes of this section, a price is bid if it is called by a prospective purchaser or is attributed to a prospective purchaser by the auctioneer as being the amount of a bid, and is not withdrawn by the prospective purchaser prior to the sale of that lot.

## **Part 7 Trust accounts**

### **Division 1 Preliminary**

#### **85 Interpretation**

- (1) In this Part—

**trust money** means money received for or on behalf of any person by a licensee in connection with the licensee's business as a licensee.

- (2) A reference in this Part to a licensee includes a reference to a person who has ceased to be a licensee and to the personal representative of a licensee who has died, and in the application of this Part to—
  - (a) a person who has ceased to be a licensee, a reference to moneys received for or on behalf of a person by a licensee is to be read as a reference to moneys received by that person for or on behalf of any other person in connection with his or her business as a licensee, and

- (b) the personal representative of a licensee who has died, a reference to moneys received for or on behalf of a person by a licensee is to be read as a reference to moneys received by that licensee or personal representative for or on behalf of a person in connection with the business carried on by that licensee.

## **Division 2 Payment of trust money into trust account**

### **86 Trust money to be paid into trust account**

- (1) Money received for or on behalf of any person by a licensee in connection with the licensee's business as a licensee—
  - (a) is to be held by the licensee or (if the licensee is employed by a corporation) by the corporation, exclusively for that person, and
  - (b) is to be paid to the person or disbursed as the person directs, and
  - (c) until so paid or disbursed is to be paid into and retained in a trust account (whether general or separate) at an authorised deposit-taking institution in New South Wales and approved by the Secretary for the purposes of this Part.
- (2) If the licence is held by a corporation, the trust account is to be in the name of the corporation and in any other case is to be in the name of the licensee or of the firm of licensees of which the licensee is a member.
- (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.
- (4) When opening a trust account at an authorised deposit-taking institution for the purpose of complying with this section, the licensee concerned must ensure that the authorised deposit-taking institution is notified in writing that the account is a trust account required by this Act. The notification must be in a form approved by the Secretary and the licensee must serve a copy of the notification on the Secretary within 14 days after the trust account is opened.
- (5) A licensee must, within 14 days after closing a trust account, notify the Secretary in writing of the closure. The notification must be in a form approved by the Secretary.
- (6) Subsections (4) and (5) do not apply in respect of—
  - (a) a separate trust account kept on the instructions of a client of a licensee or firm of

licensees for the exclusive benefit of the client, or

(b) a separate trust account opened by a licensee for the exclusive benefit of both the vendor and the purchaser of land.

(7) A licensee must also comply with any additional requirements relating to trust accounts prescribed by the regulations.

Maximum penalty—100 penalty units.

### **87 Approval of authorised deposit-taking institutions**

(1) The Secretary may approve an authorised deposit-taking institution for the purposes of this Part and may revoke any such approval by notice in writing to the authorised deposit-taking institution.

(2) The Secretary is not to approve an authorised deposit-taking institution for the purposes of this Part unless satisfied that the institution is able to discharge the obligations of an authorised deposit-taking institution under this Part.

### **88 Trust money not available to pay licensee's debts**

(1) Trust money is not available for the payment of the debts of the licensee to any other creditor of the licensee, or liable to be attached or taken in execution under the order or process of any court at the instance of any other creditor of the licensee.

(2) This section does not take away or affect any just claim or lien that any licensee may have against or upon trust money.

### **89 Licensee to notify trust account becoming overdrawn**

A licensee must, within 5 days after becoming aware that a trust account of the licensee has become overdrawn, notify the Secretary in writing of—

(a) the name and number of the account, and

(b) the amount by which the account is overdrawn, and

(c) the reason for the account becoming overdrawn.

Maximum penalty—100 penalty units.

### **90 Interest earned on trust accounts to be paid to Statutory Interest Account**

(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 Secretary for crediting to the Statutory Interest Account.

Maximum penalty—100 penalty units.

- (2) The Minister is required to determine from time to time for the purposes of this section, after consultation with the Treasurer, a trust account rate for each authorised deposit-taking institution. The rate may be a fixed or variable rate and is to be determined by reference to an interest rate that applies in the short term money market. The same rate may be determined for some or all authorised deposit-taking institutions.
- (3) As soon as practicable after determining a trust account rate for an authorised deposit-taking institution, the Minister must inform the authorised deposit-taking institution of the rate by notice in writing and publish a notice of the rate in the Gazette.
- (4) The **prescribed percentage** for the purposes of this section is 60 per cent or such other percentage as the Minister may, from time to time, determine after consultation with the Treasurer and notify by order published in the Gazette. Different prescribed percentages may be determined in respect of different classes of trust account.
- (5) An authorised deposit-taking institution must not deduct transaction or other charges, other than statutory charges (such as a tax), from the balances referred to in subsection (1) or from an amount of interest calculated under that subsection.
- (6) The Secretary may, by proceedings brought in a court of competent jurisdiction, recover as a debt an amount due and payable to the Secretary under this section.
- (7) This section does not apply to a trust account of a class of trust accounts prescribed by the regulations as exempt from this section.

### **Division 3 Responsibilities of authorised deposit-taking financial institutions**

#### **91 Monthly returns by authorised deposit-taking institutions**

- (1) Within 14 days after the end of each named month, an authorised deposit-taking institution must notify the Secretary (in such manner and form as the Secretary may from time to time direct) of the following matters with respect to the trust accounts that are opened with the institution under this Part during the month—
  - (a) the number of those trust accounts that were opened with the institution during the month,

- (b) the names of the licensees who opened those accounts,
- (c) the names and numbers of those accounts and the addresses of the branches of that institution at which those accounts are kept.

Maximum penalty—100 penalty units.

- (2) Within 14 days after the end of each named month, an authorised deposit-taking institution must inform the Secretary (in such manner and form as the Secretary may from time to time direct) of the following if a trust account kept with it under this Part was closed during the month—

- (a) the name and number of the account,
- (b) the date on which the account was closed.

Maximum penalty—100 penalty units.

- (3) Within 14 days of the end of each named month, an authorised deposit taking institution must provide a report to the Secretary (in such manner and form as the Secretary may from time to time direct), certified as correct by the institution, containing the following information in relation to trust accounts kept by it under this Part during the month—

- (a) the name of the institution and its branch number or its BSB number,
- (b) the period to which the report relates,
- (c) the name of each account,
- (d) the number of each account,
- (e) the end of month balance for each account (including any nil or overdrawn balances),
- (f) the interest earned on each account during the month,
- (g) the interest rate applied to calculate the interest earned on each account during the month,
- (h) the total amount of interest that the institution paid under this Part to the Secretary during the month in respect of the accounts for crediting to the Statutory Interest Account.

Maximum penalty—100 penalty units.

- (4) The regulations may make provision for or with respect to the following—
  - (a) requiring authorised deposit-taking institutions to provide the Secretary with such information relating to all or any trust accounts as is specified or described in the

regulations,

- (b) authorising the Secretary to require an authorised deposit-taking institution to provide the Secretary with such information relating to trust accounts identified by the Secretary as is specified or described by the Secretary,
- (c) any associated matter, including the manner and form in which, and the time within which, any such information is to be provided to the Secretary,
- (d) excepting a specified class or classes of trust account from the operation of this section or specified provisions of this section.

## **92 Overdrawn trust accounts**

When an authorised deposit-taking institution becomes aware that a trust account kept with it under this Part is overdrawn, the institution must as soon as practicable (and in any case within 5 business days) after becoming so aware inform the Secretary of the following by notice in writing—

- (a) the name and business address of the licensee concerned,
- (b) the name and number of the account,
- (c) the date on which the account became overdrawn,
- (d) the amount by which the account is overdrawn.

Maximum penalty—100 penalty units.

## **93 Dishonoured cheques**

Within 5 business days of an authorised deposit-taking institution becoming aware that a cheque drawn on a trust account kept with it under this Part has been dishonoured, the institution must, by notice in writing, inform the Secretary of the following—

- (a) the name and business address of the licensee concerned,
- (b) the name and number of the account,
- (c) the amount of the dishonour,
- (d) the date on which the cheque was dishonoured.

Maximum penalty—100 penalty units.

## **94 Annual certification by auditor**

Not later than 31 May in each year, an authorised deposit-taking institution approved for the purposes of this Part must provide to the Secretary a certificate given by a registered company auditor (within the meaning of the Corporations Act) certifying as to the

following—

- (a) that the institution has complied with the requirements of this Part in relation to trust accounts kept by it under this Part during the 12 month period ending on 30 April immediately preceding that 31 May,
- (b) the total amount of interest that the institution paid under this Part to the Secretary during that 12 month period in respect of those trust accounts for crediting to the Statutory Interest Account.

Maximum penalty—100 penalty units.

## **95 Protection of authorised deposit-taking institutions from liability**

- (1) An authorised deposit-taking institution—
  - (a) does not incur liability, and is not obliged to make inquiries, in relation to any transaction concerning an account of a licensee kept with the institution or with some other financial institution, and
  - (b) is, in relation to any such transaction, taken not to have any knowledge of a right of any person to money credited to such an account,unless it would incur such a liability, be obliged to make such inquiries or be taken to have that knowledge in relation to an account kept with it in respect of a person absolutely entitled to the money held in that account.
- (2) This section does not relieve an authorised deposit-taking institution from any liability or obligation that it would have apart from this Act.
- (3) An authorised deposit-taking institution at which a licensee keeps an account for clients' money does not, as regards any liability that the licensee has to the institution (other than a liability relating to that account), have a right to any of the money held in that account, whether by way of set-off, counterclaim, charge or otherwise.

## **Division 4**

### **96-99 (Repealed)**

## **Division 5 Information about trust accounts or transactions**

### **100 Secretary may require information**

- (1) The Secretary may by notice in writing served on a licensee require the licensee to furnish to the Secretary in the manner required by the notice a statement in writing setting out full particulars as to any of the following—
  - (a) the name of the trust account on which the licensee operates in accordance with this Act, the name of the authorised deposit-taking institution at which the account

is current, the balance of the money standing to the credit of the account as at a date specified in the notice, and particulars of all cheques drawn on the account as at such date and not presented and duly paid,

(b) any money paid by any person to the licensee or received by the licensee for or on behalf of any person in connection with the licensee's business as a licensee and, if not still held by the licensee, the manner and time of its disbursement,

(c) any transaction by or with the licensee as a licensee.

(2) The licensee must comply with a notice under this section within 7 days after it is served on the licensee.

(3) A notice under this section cannot relate to any transaction by or with the licensee more than 3 years before the notice is served on the licensee.

#### **101 Person concerned in transaction may request itemised account**

(1) A person directly concerned in any transaction by or with a licensee in connection with the licensee's business as a licensee may request the licensee in writing to render to the person in the manner prescribed by the regulations an itemised account of the transaction.

(2) The licensee must comply with the request within 14 days after the request is served on the licensee.

(3) A person may not request an itemised account of a transaction that took place more than 6 months before the making of the request.

#### **102 Offence**

(1) A licensee must not fail without reasonable excuse (proof of which lies on the licensee) to comply with a requirement under this Division.

(2) A licensee must not, in purported compliance with a requirement under this Division, furnish information that the licensee knows is false or misleading in a material particular.

Maximum penalty—100 penalty units.

### **Part 8 Records**

#### **Division 1 Keeping and inspection of records**

##### **103 Licensee's records**

(1) In this Act—

***licensee's records*** means—



- (a) records required to be kept by a licensee by or under this Act that are in the possession, custody or control of the licensee, and
  - (b) records and documents in the possession, custody or control of a licensee that relate to any account (whether or not a trust account) kept by the licensee in connection with the licensee's business as a licensee or to any transaction by or with the licensee in connection with the licensee's business as a licensee.
- (2) If records or documents that were licensee's records are in the possession, custody or control of a person as a former licensee, as the personal representative of a deceased licensee, or as a result of the transfer of the business of the licensee or otherwise, those records or documents are still **licensee's records** for the purposes of this Division.
- (3) An account on which a strata managing agent operates for or on behalf of an owners corporation or an association is taken to be an account kept by the agent in connection with his or her business as a licensee.
- (4) This Part extends to records in the possession, custody or control of a person even when the records are located outside the State.

#### **104 Licensee to make and keep certain records**

- (1) A licensee must make the following records—
- (a) a record containing full particulars of all transactions by or with the licensee in connection with his or her business as a licensee,
  - (b) such other records relating to the licensee's business as a licensee as may be required by the regulations.
- (2) A record required by this section must be kept for at least 3 years after it is made.
- (3) The record must be kept—
- (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.
- (4) The regulations may make provision for the manner and form in which a record required by this section is to be kept.

- (5) An entry in a record made under this section and kept at the registered office of a licensee is presumed, unless the contrary is proved, to have been made by or with the authority of the licensee.
- (6) A person who contravenes a provision of this section is guilty of an offence.  
Maximum penalty—50 penalty units.

### **105 Inspection of licensee's records**

- (1) A licensee's records are at all reasonable times open to inspection by an authorised officer.
- (2) An authorised officer may require a person who has possession, custody or control of a licensee's records—
  - (a) to produce the licensee's records for inspection,
  - (b) to furnish all authorities and orders to financial institutions as may be reasonably required of the person.
- (3) If a licensee is absent from an office or place of business of the licensee, any employee or agent of the licensee for the time being having the apparent control or charge of the office or place of business is taken to have possession, custody or control of the licensee's records at that office or place of business.
- (4) An authorised officer may take copies of or extracts from, or make notes from, any licensee's records produced to the authorised officer under this section and for that purpose may take temporary possession of those records.

### **106 Inspection of records of financial institutions**

- (1) An authorised officer may serve on an authorised deposit-taking institution with which a licensee has deposited any money in any account (whether the licensee's own account or a general or separate trust account) a notice, in a form approved by the Secretary and signed by the authorised officer—
  - (a) certifying as to the reason for serving the notice, as provided by this section, and
  - (b) requiring the authorised deposit-taking institution to produce to the authorised officer for inspection the records of the institution relating to the account.
- (2) Each of the following is a reason for serving a notice under this section—
  - (a) the licensee cannot be located,
  - (b) the licensee has left the State,
  - (c) the licensee or any other person required to do so has failed to furnish any authority or order on the institution in accordance with a requirement under this

Division,

- (d) the licensee has ceased to be a licensee,
  - (e) the licensee has contravened a provision of Part 7 (Trust accounts).
- (3) An authorised officer may take copies of or extracts from, or make notes from, any records produced to the authorised officer under this section and for that purpose may take temporary possession of those records.

#### **107 Power to require production of licensee's records**

- (1) An authorised officer may give a written notice to a licensee or to another person that the officer reasonably believes has possession, custody or control of the licensee's records requiring the licensee or person to produce the licensee's records specified in the notice at the time and place specified in the notice.
- (2) An authorised officer may inspect any record produced in response to a notice under this section and may take copies of or extracts from, or make notes from, any such record.
- (3) A licensee does not contravene a provision of this Act if the licensee was unable to comply with the provision because an authorised officer retained possession of a record or document under this section.

#### **108 Power to take possession of records to be used as evidence**

- (1) An authorised officer to whom any record is produced under this Part may take possession of the record if the authorised officer considers it necessary to do so for the purpose of obtaining evidence or protecting evidence from destruction.
- (2) If an authorised officer takes possession of any record under this section, the record may be retained by the officer until the completion of any proceedings (including proceedings on appeal) in which the record may be evidence.
- (3) The person from whom the record was taken must be provided, within a reasonable time after the record is taken, with a copy of the record certified by an authorised officer as a true copy.
- (4) A copy of a record provided under this section is, as evidence, of equal validity to the record of which it is certified to be a copy.

#### **109 Additional requirements for strata managing agents**

- (1) A strata managing agent must keep a copy of the following instruments—
  - (a) an instrument of appointment appointing the agent as strata managing agent,
  - and

(b) an instrument of delegation delegating to the agent any powers, authorities, duties or functions of an owners corporation or an association.

(2) A copy of an instrument of appointment or delegation kept under this section is a licensee's record for the purposes of this Part.

(3) (Repealed)

### **110 Offence**

(1) A person must not—

(a) wilfully delay or obstruct an authorised officer in the exercise of the authorised officer's functions under this Division, or

(b) fail to comply with a requirement under this Division to produce a record or document in the person's possession, custody, or control, or

(c) fail to comply with a requirement under this Division to furnish any authority or order reasonably required of the person under this Division, or

(d) in purported compliance with a requirement under this Division produce a document or record knowing it to be false or misleading in a material particular.

Maximum penalty—100 penalty units.

(2) A court that convicts a person of an offence under this section may, in addition to any penalty imposed, order the person to produce the records in respect of which the offence occurred to the Secretary or an authorised officer within such time as the court specifies in the order.

(3) A person who fails to produce a record in accordance with an order of a court made under this section is guilty of an offence punishable by a penalty not exceeding 10 penalty units in respect of each day that the failure continues.

## **Division 2 Audit of licensee's records**

### **111 Requirement for audit**

(1) A person who is a licensee, a former licensee or the personal representative of a licensee must, within 3 months after the end of the audit period applicable to the person, cause the records and documents relating to any money held during that period in a trust account kept by the person in accordance with this Act to be audited by a person qualified to act as an auditor for the purposes of this Division.

(1A) (Repealed)

(2) The Secretary may in a particular case or class of cases by order in writing extend the period of 3 months under subsection (1).

- (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 report, or
  - (c) by any other person who obtains possession, custody or control of the report whether as a result of being the personal representative of a licensee or by transfer of the business of the licensee or otherwise.

(4) (Repealed)

Maximum penalty—

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

#### **112 Audit period**

- (1) The audit period applicable to a person is the year ending on 30 June or such other period as the Secretary may fix in respect of the person under this section.
- (2) The Secretary may by order in writing served on a person fix some other period as the audit period applicable to the person.
- (3) Such an order may be made on the application of the person or on the Secretary's own initiative.
- (4) Such an order may be made with such limitations as to time or circumstances, and subject to such conditions, as the Secretary considers appropriate.

#### **112A Random audits**

- (1) The Secretary 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 Secretary.
- (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—
  - (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.

- (4) In this section, **associate** of a licensee has the same meaning as in Division 3 of Part 10.

### **113 (Repealed)**

### **114 Audit obligations of partners**

If the provisions of this Division are complied with by any one of the licensees in a partnership of licensees in relation to the audit of the records and documents of the partnership, each of those partners is taken to have complied with those provisions.

### **115 Qualifications of auditors**

- (1) A person is qualified to act as an auditor for the purposes of this Division if the person—
- (a) is a registered company auditor within the meaning of the Corporations Act, or
  - (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
  - (b) is a person who has been nominated by the person whose records and documents are to be audited and who has been approved by the Secretary by order in writing.
- (2) Such a person is not qualified to act as an auditor for the purposes of this Division if the person—
- (a) has been, at any time within 2 years before the last day of the period in respect of

which the audit is to be made, or is—

- (i) an employee or partner of the person whose records or documents are to be audited, or
  - (ii) engaged in the business carried on by the person whose records or documents are to be audited, other than as an auditor for the purposes of this Division, or
- (b) is a licensee, or a shareholder in a corporation that is a licensee and that has not more than twenty shareholders.
- (3) A reference in this section to a person engaged in a business carried on by another person (a **regulated person**) is a reference to a person—
- (a) who is engaged by the regulated person, other than as an employee of the regulated person, to provide services in the course of the business conducted by the regulated person, or
  - (b) whose services are or have been provided to the regulated person in the course of the business carried on by the regulated person, other than as an employee of the regulated person, under an arrangement entered into by the regulated person with another person.

#### **116 Duties of auditors**

- (1) An auditor appointed to make an audit for the purposes of this Division must provide a copy of the report on the audit to the Secretary—
- (a) in the form and way approved by the Secretary (if any), and
  - (b) within 14 days after providing the report to the licensee.
- (1A) If the auditor discovers any of the following in the course of making the audit, the auditor must fully set out the facts discovered in the report—
- (a) a contravention of this Act or the regulations has been committed,
  - (b) a discrepancy relating to the trust money to which the audit relates,
  - (c) the records or documents concerned are not kept in such a way as to enable them to be properly audited.
- (2) An auditor, or an assistant of an auditor, appointed to make an audit for the purposes of this Division must not communicate any matter which may come to the auditor's knowledge in the course of the audit to any person except—
- (a) in the course of the auditor's duties as an auditor or assistant of an auditor, or
  - (b) in accordance with this section, or

(c) in the like circumstances and to the like extent as an employee of the Department is permitted under this Act to publish that information.

- (3) An auditor's report under this Division (including under this section) relating to documents or records of any person, and any statutory declaration lodged with the Secretary under this Division, are available from the Secretary for inspection by an auditor appointed to carry out for the purposes of this Division any subsequent audit of the records or documents of that person.
- (4) An auditor must not fail without reasonable excuse (proof of which lies on the auditor) to comply with a requirement under this section.

Maximum penalty—50 penalty units.

### **Division 3 Freezing of accounts**

#### **117 Definitions**

In this Division—

**account** means—

- (a) a trust account in a licensee's name with a financial institution, or
- (b) an account in a licensee's name or in which a licensee has an interest with a financial institution, or
- (c) another account to which trust money is deposited.

**financial institution** includes an approved deposit-taking institution.

**holder** of an account means the licensee or other person authorised to operate on the account.

**licensee** includes a former licensee and the personal representative of a deceased licensee.

**trust money** means money received for or on behalf of any person by a licensee (whether or not the money is deposited in a trust account required to be kept by a licensee).

#### **118 Secretary may freeze licensee's accounts in particular cases**

- (1) A direction under this Division may be given when it appears to the Secretary that any of the following persons has, or may have, stolen, misappropriated or misapplied trust money—
- (a) a licensee,
- (b) the person in charge of a licensee's business at a place,



- (c) an employee of a licensee,
  - (d) any other person connected or formerly connected with a licensee.
- (2) The Secretary may by direction in writing direct that—
- (a) if a claim has been made against the Fund concerning the trust money, all or part of the amount to the credit of a specified account be paid to the Secretary, or
  - (b) an amount must not be drawn from a specified account other than with the Secretary's written approval, or
  - (c) a specified account may be operated only under specified conditions.
- (3) The direction must be given to each holder of the account and the financial institution at which the account is kept, and must identify the account to which it relates.
- (4) Any amount paid to the Secretary pursuant to such a direction must be paid into the Fund.

### **119 Financial institution must comply with direction**

- (1) A financial institution to which a direction under this Division is given (whether or not the direction has been given to anyone else) must not, while the direction is in force—
- (a) pay a cheque or other instrument drawn on the account concerned unless the cheque or instrument is also signed by the Secretary or a person authorised by the Secretary for the purposes of this section, or
  - (b) give effect to another transaction on the account that is not authorised because of the direction.

Maximum penalty—500 penalty units.

- (2) The signature of the Secretary or authorised person on a cheque or other instrument is sufficient evidence of the Secretary's approval to draw an amount from the account to honour the cheque or other instrument.
- (3) A manager or principal officer in charge of an office or branch of the financial institution where an account is kept, or another officer of the financial institution, must not knowingly permit a contravention of this section by the financial institution.

Maximum penalty—100 penalty units or imprisonment for 12 months, or both.

- (4) A person to whom a direction is given does not incur a civil liability to another person by reason only of complying with the direction.

### **120 Account not to be operated unless Secretary allows**

After a direction under this Division has been given to the holder of an account, the holder

must not (while the direction remains in force) sign a cheque or other instrument drawn on the account unless the cheque or other instrument has first been signed by the Secretary or a person authorised by the Secretary to sign the cheque or instrument.

Maximum penalty—100 penalty units or imprisonment for 12 months, or both.

### **121 Secretary may operate account**

- (1) The Secretary or a person authorised in writing by the Secretary (an **authorised person**) may operate on an account that is the subject of a direction under this Division if the holder of the account refuses to operate the account.
- (2) A statutory declaration made by the Secretary or authorised person to the effect that the account holder is refusing to operate on the account is sufficient evidence to the licensee's financial institution of that fact.

### **122 Withdrawal of direction**

- (1) A direction remains in force until it is withdrawn.
- (2) The Secretary may withdraw a direction under this Division at any time.
- (3) When a direction is withdrawn, the Secretary is to give all persons who were given the direction a notice that the direction has been withdrawn. Failure to give notice does not affect the withdrawal of the direction.

## **Part 9 Management and receivership**

### **Division 1 Preliminary**

#### **123 Definitions**

In this Part—

**associate**, in relation to a licensee, has the meaning given to it by section 124.

**expenses**, in relation to management, means—

- (a) the remuneration payable to the manager, or
- (b) the expenses incurred in the course of the management or receivership, or
- (c) the costs of legal proceedings involved in the management or receivership, or
- (d) any reimbursement of the manager or receiver under this Part.

**failure to account** has the meaning given to it by section 125.

**licensee** includes—

- (a) a firm of licensees, and

- (b) a former licensee, and
- (c) in relation to anything done or omitted by a licensee—a deceased licensee and a deceased former licensee, and
- (d) except in relation to anything done or omitted by a licensee—the personal representative of a deceased licensee or a deceased former licensee.

**Operating Account** means the Department of Fair Trading Operating Account or a departmental account prescribed by the regulations for the purposes of this definition.

**property**, in relation to a licensee, means—

- (a) money or other property received by the licensee on behalf of another person in the conduct of the licensee's business, or
- (b) interest, dividends, income, profits or other property derived from or acquired with money or other property referred to in paragraph (a), or
- (c) documents and records of any description relating to anything referred to in paragraph (a) or (b) or to the licensee's business, or
- (d) any means by which any records referred to in paragraph (c) that are not written may be reproduced in writing,

and, in relation to a licensee whose business is under management, includes any property of the business.

**receivable property** means property of a licensee or an associate of a licensee that is the subject of an order appointing a receiver, and includes property that, but for its having being taken, paid or transferred unlawfully or in breach of trust, would be receivable property.

**receiver** means a receiver appointed by the Supreme Court under this Part.

**relevant associate** means a licensee's associate of whose property a receiver has been appointed under this Part.

**relevant licensee** means a licensee of whose property a receiver has been appointed.

#### **124 Associates of a licensee**

- (1) In this Part, a reference to a licensee's associate is a reference to—
  - (a) a partner of the licensee, or
  - (b) an employee or agent of the licensee, or
  - (c) a corporation, or a member of a corporation, partnership, syndicate or joint venture, in which the licensee or a person referred to in paragraph (a), (b) or (d)

has a beneficial interest, or

- (d) a person who bears a prescribed relationship to the licensee or to a person referred to in paragraphs (a)–(c), or
  - (e) a corporation that (if a person referred to in paragraphs (b)–(d) is a corporation) is a subsidiary of the person within the meaning of the Corporations Act, or
  - (f) a person declared by the regulations to be an associate of the licensee or belonging to a class of persons so declared.
- (2) For the purposes of subsection (1) (d), a person bears a prescribed relationship to a licensee or other person if the relationship is that of—
- (a) a spouse, or
  - (b) an existing or former de facto partner, or
  - (c) a child, grandchild, sibling, parent or grandparent, whether derived through paragraph (a) or (b) or otherwise, or
  - (d) a kind prescribed by the regulations for the purposes of this section.

### **125 Failure to account**

- (1) In this Part, **failure to account** means a failure by a licensee to account for, pay or deliver money or other valuable property—
- (a) that has been received by or entrusted to the licensee, or an associate of the licensee, in the course of the carrying on of the licensee's business, and
  - (b) that is, in the case of money or other valuable property received by or entrusted to an associate of the licensee, under the direct or indirect control of the licensee, being a failure that arises from an act or omission of the licensee or associate.
- (2) The reference in the definition of **failure to account** in subsection (1) to money or other valuable property received by or entrusted to a licensee includes a reference to money or other valuable property that is received by or entrusted to the licensee as trustee, agent, bailee or stakeholder, or in any other capacity.

## **Division 2 Management**

### **126 Appointment of manager**

- (1) The Secretary may appoint a manager for a licensee's business in any of the following cases if the Secretary is of the opinion that it is necessary to make the appointment in order to protect the interests of other persons—
- (a) the licensee has made a request to the Secretary for the appointment of a

manager, or

- (b) the licensee's licence has been cancelled or is under suspension, or
  - (c) the Secretary is of the opinion that there has been, or that there may have been, a failure to account by the licensee, or
  - (d) the Secretary is of the opinion that a person is unable to obtain payment or delivery of property held by the licensee because the licensee—
    - (i) is mentally or physically infirm, or
    - (ii) is bankrupt, has applied to take the benefit of any law for the relief of bankrupt or insolvent debtors, has compounded with his or her creditors or has made an assignment of his or her remuneration for their benefit, or
    - (iii) is an inmate within the meaning of the *Crimes (Administration of Sentences) Act 1999*, or
    - (iv) has died, or
    - (v) has abandoned his or her business.
- (2) In the case of a business that is conducted by 2 or more licensees in partnership, a reference in subsection (1) to a licensee is to be read as a reference to all of the licensees in the partnership.
- (3) The terms of appointment of a manager must specify the remuneration to which the manager is to be entitled in connection with the management of the business for which the manager is appointed.

### **127 Qualifications for appointment as manager**

A person is not eligible to be appointed as the manager of a licensee's business unless the person is a licensee or has such other qualifications or experience as the Secretary considers appropriate in a particular case.

### **128 Powers of manager**

- (1) The manager of a licensee's business may, subject to the terms of his or her appointment—
- (a) carry out work on behalf of the existing clients of the business, and
  - (b) accept instructions from, and carry out work on behalf of, new clients, and
  - (c) dispose of, and otherwise deal with, any property in relation to the business, and
  - (c1) wind up the affairs of the business, and

- (d) exercise any right in the nature of a lien over property held by the manager on behalf of the clients of the business, and
- (e) incur such expenses as are reasonably related to the conduct or winding up of the business, and
- (f) do all such things as are ancillary to the exercise of the powers referred to in paragraphs (a)-(e),

as if he or she were the licensee to whom the business belongs.

- (2) The manager of a licensee's business may not exercise any of the functions conferred by this section in relation to the affairs of a client of the business unless the client's consent has been obtained to the manager's exercise of those functions.

### **129 Management continues under receivership**

- (1) The manager of a licensee's business may continue to exercise his or her functions under this Division even if a receiver is appointed under Division 3 in respect of the licensee's property.
- (2) The manager of a licensee's business for which a receiver is appointed must comply with any lawful direction given by the receiver in connection with the conduct of the business.

### **130 Acts of manager taken to be acts of licensee**

- (1) An act done by the manager of a licensee's business is, for the purposes of any proceedings or transaction that relies on that act, taken to have been done by the licensee.
- (2) Nothing in this section subjects a licensee to any personal liability in relation to any act done by the manager of the licensee's business.

### **131 Manager may be reimbursed for damages**

- (1) The Secretary may reimburse a manager for any damages and costs recovered against the manager, or an employee or agent of the manager, for anything done or omitted to be done in good faith in the purported exercise of a function under this Act.
- (2) Reimbursement under this section is to be by way of payment from the Operating Account.
- (3) Neither the manager of a licensee's business nor the Secretary is liable for any loss incurred by the licensee as a consequence of any act or omission of the manager or the Secretary in the conduct of the business if the act or omission was done or omitted in good faith and in the purported exercise of a function under this Act.

### **132 Payment of expenses of management**

- (1) So much of the expenses of the management of a licensee's business as have not otherwise been paid to the manager out of the receipts of the business are to be paid to the manager by the Secretary from the Operating Account.
- (2) An amount paid under this section is recoverable by the Secretary as a debt owed by the relevant licensee.

### **133 Manager to report to Secretary**

- (1) The manager of a licensee's business must report to the Secretary on the management of the business. A report must be made at such times as the Secretary directs and be in accordance with any directions given by the Secretary.
- (2) A report is to include such information as the Secretary directs.
- (3) On the conclusion of the management of a licensee's business, the manager must, when giving the Secretary his or her final report, lodge with the Secretary all the manager's records that relate to the management.

### **134 Trust money**

- (1) Part 8 (Records) applies to the accounts kept by a manager in the same way as it applies to the accounts kept by a licensee.
- (2) The trust accounts and controlled money accounts of a business under management are to be maintained separately from the trust accounts and controlled money accounts of any other business under management.

### **135 Office accounts**

The regulations may make provision with respect to—

- (a) the accounts that are to be kept in relation to the income accrued, and the expenses incurred, by the manager of a licensee's business in connection with the conduct of the business, and
- (b) the purposes for which money in any such account may be expended.

### **136 Termination of management**

When a licensee's business ceases to be under management, any money held by the manager in connection with the business (after reimbursement of any money paid out of the Operating Account in connection with the management of the business and after payment of the expenses of the management of the business) becomes the property of the licensee.

### **137 Obstruction of managers**

A person must not hinder, obstruct or delay a manager in the exercise of his or her functions under this Division.

Maximum penalty—100 penalty units.

## **Division 3 Receivership**

### **138 Supreme Court may appoint receiver**

- (1) The Supreme Court may, on the application of the Secretary, appoint a receiver of all or any of the property of a licensee and may make the appointment whether or not the licensee has been notified of the application or is a party to the proceedings.
- (2) Such an application may be made by the Secretary only if—
  - (a) the licensee has made a request to the Secretary for the appointment of a receiver, or
  - (b) the licensee's licence has been suspended or cancelled, or
  - (c) the Secretary is of the opinion that there has been, or that there may have been, a failure to account by the licensee, or
  - (d) the Secretary is of the opinion that a person is unable to obtain payment or delivery of property held by the licensee because the licensee—
    - (i) is mentally or physically infirm, or
    - (ii) is bankrupt, has applied to take the benefit of any law for the relief of bankrupt or insolvent debtors, has compounded with his or her creditors or has made an assignment of his or her remuneration for their benefit, or
    - (iii) is an inmate within the meaning of the *Crimes (Administration of Sentences) Act 1999*, or
    - (iv) has died, or
    - (v) has abandoned his or her business,

and the Secretary is of the opinion that it is necessary for the application to be made in order to protect the interests of other persons.

- (3) Nothing in this Division prevents a manager of a licensee's business from being appointed as a receiver of the licensee's property.
- (4) The Secretary may publicly notify the appointment of a receiver of all or any property of a licensee.



- (5) The Supreme Court is not to require the Secretary or any other person, as a condition of granting an application under this section, to give any undertaking as to damages or costs.

**139 Receivership may extend to property of licensee's associate**

If, on the application of a receiver, the Supreme Court is satisfied that all or any of the property of a licensee's associate should be declared to be receivable property, the Court may appoint the receiver to be the receiver of all or any of that property.

**140 Court to be closed**

- (1) Before commencing to hear an application for the appointment of a receiver, the Supreme Court may order from the precincts of the Court any person who is not—
- (a) an officer of the Court, or
  - (b) a party, a legal representative of a party or a clerk of such a legal representative, or
  - (c) a member of the same firm of licensees as the respondent, or
  - (d) a person who is in the course of giving evidence, or
  - (e) an authorised officer, or
  - (f) a person permitted by the Court to be present in the interests of justice.
- (2) The Supreme Court may, whether or not at the instance of a party, prohibit the publication of any report relating to the evidence or other proceedings or of any order made on the hearing of an application for the appointment of a receiver.

**141 Order to be served**

- (1) On the appointment of a receiver, the Secretary is to cause a copy of the order of appointment to be served on—
- (a) the relevant licensee or relevant associate, and
  - (b) any other person on whom the Supreme Court directs a copy of the order to be served.
- (2) The Supreme Court may give directions as to the manner of service and may dispense with service if it thinks fit.

**142 Receiver may take possession of property**

- (1) A receiver may take possession of receivable property of the relevant licensee or relevant associate.

- (2) A person in possession, or having control, of receivable property must permit the receiver to take possession of the property if required by the receiver to do so.
- (3) If a person fails to comply with such a requirement, the Supreme Court may, on the application of the receiver, order the person to deliver the property to the receiver.
- (4) If, on the application of a receiver, the Supreme Court is satisfied that such an order has not been complied with, the Court—
  - (a) may order the seizure of any receivable property located on premises specified in the order, and
  - (b) may make such further order in the matter as it thinks fit.
- (5) An order under subsection (4) (a) authorises—
  - (a) any police officer, or
  - (b) the receiver, or a person authorised by the receiver, together with any police officer, to enter the premises specified in the order and to search for, seize and remove any property that appears to be receivable property.
- (6) An application by a receiver under subsection (3) may be made—
  - (a) in the case of property in the possession, or under the control, of the relevant licensee or relevant associate—in the name of the receiver, or
  - (b) in any other case—in the name of the relevant licensee or relevant associate.
- (7) A receiver must, as soon as possible, return property seized under this section if it transpires that it is not receivable property.

### **143 Information about receivable property**

- (1) A person who has information relating to receivable property, or property that a receiver believes on reasonable grounds to be receivable property, must give the information to the receiver if required by the receiver to do so.

Maximum penalty—100 penalty units.
- (2) A licensee who has any such information may not refuse to comply with such a requirement merely because the information was obtained in confidence from a client or former client of the licensee.
- (3) A person who complies with a requirement under this section is not, merely because of that compliance, subject to any liability, claim or demand.
- (4) Information given to a receiver under this section is not admissible as evidence in any legal proceedings, other than—

- (a) proceedings taken by a receiver for the recovery of receivable property, or
- (b) proceedings taken under this Part, or
- (c) proceedings taken under Part 7 (Trust accounts) against a licensee—
  - (i) if the information was given to the receiver otherwise than by the licensee, or
  - (ii) if the information was given to the receiver by the licensee and is given in evidence in those proceedings with the licensee's consent.

#### **144 Stop order on account**

- (1) A receiver who believes on reasonable grounds that money held in an account with an authorised deposit-taking institution is receivable property may serve on the institution concerned an order (in this section referred to as a stop order) prohibiting operations on the account by any person other than the receiver or a person authorised by the receiver.
- (2) A stop order may be served by leaving it with the manager, accountant or other person appearing to be in charge at the branch of the authorised deposit-taking institution at which the account is kept, but has no effect unless there is annexed to it a copy of the order appointing the receiver.
- (3) An authorised deposit-taking institution served with a stop order—
  - (a) must permit the receiver, or a person authorised by the receiver, to operate on the account to which the order relates, and
  - (b) must not permit any withdrawal from the account otherwise than by, or by the authority of, the receiver.
- (4) A receiver may transfer money from an account the subject of a stop order to another account with the authorised deposit-taking institution in the name of the receiver to be dealt with as receivable property.
- (5) The authorised deposit-taking institution has the same obligations and protections—
  - (a) in relation to an account the subject of a stop order, and
  - (b) in relation to an account to which money in such an account is transferred, as if the receiver were the relevant licensee or relevant associate.

#### **145 Improper dealing with property**

A person must not, with intent to defeat the purposes of this Division—

- (a) operate on an account at an authorised deposit-taking institution, or

- (b) destroy or conceal receivable property or property that is likely to become receivable property, or
- (c) destroy or conceal any document that identifies or indicates the location of receivable property or property that is likely to become receivable property, or
- (d) move receivable property, or property that is likely to become receivable property, from one place to another, or
- (e) deliver possession of receivable property, or property that is likely to become receivable property, to another person, or
- (f) deliver control of receivable property, or property that is likely to become receivable property, to another person.

Maximum penalty—100 penalty units.

#### **146 Recovery of compensation for disposal of receivable property**

- (1) If receivable property has at any time been taken by, or paid or transferred to, a person unlawfully or in breach of trust in circumstances in which—
  - (a) the person knew or believed at the time that the taking, payment or transfer was unlawful or in breach of trust, or
  - (b) there was no consideration for the taking, payment or transfer, or
  - (c) there was inadequate consideration for the taking, payment or transfer, or
  - (d) the person became indebted or otherwise liable to the relevant licensee or relevant associate, or to a client of the licensee, as a result of the taking, payment or transfer,

the receiver may recover from the person, as a debt, the amount taken, paid or transferred, the amount of the inadequacy, the amount of the debt or the value of the property taken or transferred, as appropriate.

- (2) A person from whom an amount is recovered under subsection (1) is not liable to any other person in respect of the amount.
- (3) If receivable property has at any time been paid or transferred unlawfully or in breach of trust to, or for the benefit of, a person in respect of a cause of action the person claims to have against another person, the receiver—
  - (a) may recover from the person as a debt the amount of the payment or the value of the property, or
  - (b) to the extent to which the full amount or value is not recovered from the person under paragraph (a)—may take such proceedings in relation to the claimed cause

of action as the person could have taken.

- (4) If a receiver takes proceedings under subsection (3) (b) in relation to a cause of action claimed by a person, the receiver may not later take proceedings under subsection (3) (a) to recover property paid or transferred to the person in respect of the same cause of action.
- (5) If receivable property is used unlawfully or in breach of trust to discharge a debt or liability of a person, the receiver may recover from the person as a debt the amount that was required for the discharge of the debt or liability, reduced by the value of any consideration provided by the person for the discharge.
- (6) Recovery proceedings under this section may be taken in the name of the receiver or in the name of any other person who, had the receiver not been appointed, would have been entitled to take the proceedings.

#### **147 Receiver may give certificate**

- (1) A receiver, or a person authorised by the Secretary, may give a certificate as to any one or more of the following—
  - (a) the receipt of property by a licensee or a licensee's associate, the nature and value of the property received, the date of its receipt by the licensee or associate and the identity of the person from whom it was received,
  - (b) the taking or transfer of property, the nature and value of the property, the date of its taking or transfer and the identity of the person by whom it was taken or to whom it was transferred,
  - (c) the payment of money, the amount of money paid, the date of the payment and the identity of the person who received the payment,
  - (d) the entries made in the records of a licensee or a licensee's associate and the truth or falsity of the entries,
  - (e) the use of property unlawfully or in breach of trust.
- (2) A certificate under this section is admissible in any proceedings taken by a receiver under this Division and is evidence of the matters specified in the certificate.

#### **148 Receiver taken to be beneficially entitled to property**

- (1) Proceedings taken under this Division in the name of a receiver in relation to any property may be so taken as if the receiver were beneficially entitled to the property.
- (2) If receivable property has been taken by, or paid or transferred to, a person or otherwise used unlawfully or in breach of trust, a receiver may take proceedings in the name of the receiver as if the receiver were beneficially entitled to the property at the

time the property was so taken, paid, transferred or used.

#### **149 Receiver may deal with property**

- (1) A receiver may deal with receivable property in any manner in which the relevant licensee or relevant associate could, had the receiver not been appointed, have dealt with it.
- (2) A receiver must, as soon as possible after receiving receivable property, vest the property in the person on whose behalf it was held by the relevant licensee or relevant associate.

#### **150 Other powers of receiver**

- (1) A receiver may—
  - (a) prove, grant, claim or draw a dividend in respect of a debt that is receivable property, and
  - (b) take proceedings to recover damages for a tort committed in relation to receivable property, and
  - (c) give a receipt for money that is receivable property, and
  - (d) employ a person to advise or act in relation to receivable property, in the name of the receiver or in the name of the relevant licensee or relevant associate.
- (2) A receipt given to a person under subsection (1) (c) discharges the person from any responsibility to see to the application of the money for which the receipt was given.
- (3) A receiver is not, in the exercise of his or her functions as a receiver, a personal representative of a deceased licensee.

#### **151 Notice to claim receivable property**

- (1) A receiver may give notice to—
  - (a) the relevant licensee or relevant associate, or
  - (b) any other person,that any claim the licensee, associate or other person has to receivable property must be submitted to the receiver within 1 month after the giving of the notice or within such longer period as is stated in the notice.
- (2) A claim submitted in response to such a notice must state—
  - (a) full particulars of the property, and
  - (b) the grounds of the claim.

- (3) A receiver may disregard a claim made by a licensee, a licensee's associate or any other person who has been given a notice under this section if the claim is not made in accordance with the notice.
- (4) The relevant licensee or relevant associate is not entitled—
  - (a) to enforce a claim to receivable property, or
  - (b) except against a client—to the benefit of a lien against a document that is receivable property, unless all other enforceable claims against the property have been satisfied and the expenses of the receivership paid.

### **152 Lien on receivable property**

- (1) If a licensee claims a lien on receivable property for an amount in respect of remuneration, the receiver may serve on the licensee a written notice requiring the licensee to provide to the receiver, within a specified period of not less than 1 month—
  - (a) particulars sufficient to identify the property, and
  - (b) a detailed itemised account relating to the amount in respect of which each lien is claimed.
- (2) If the licensee requests the receiver in writing to allow access to such records as may be reasonably necessary to enable the preparation of the itemised account, the time allowed for providing the itemised account does not begin to run until access to those records is provided.
- (3) If a requirement of a notice under this section is not complied with, the receiver may disregard the claim in dealing with the property claimed to be subject to a lien.
- (4) In this section—

**remuneration** means remuneration by way of commission, fee, gain or reward for services performed by a licensee in his or her capacity as a licensee and includes any sum as reimbursement for expenses or charges incurred in connection with services performed by a licensee in his or her capacity as a licensee.

### **153 Examination by receiver**

- (1) The Supreme Court may, on the application of a receiver, make such order as it thinks fit for the examination by the receiver of a licensee or other person in relation to receivable property.
- (2) On an examination under this section—
  - (a) the licensee or other person may be represented by an Australian legal practitioner, and

(b) the Supreme Court may put, or allow to be put, to the licensee or other person such questions as it thinks fit.

- (3) The licensee or other person may be examined on oath or affirmation.
- (4) The licensee or other person is compellable to answer all questions asked in the course of the examination, including any question to which an objection is made on the ground that the answer would tend to incriminate the licensee or other person.
- (5) An answer given by a licensee or other person to a question to which such an objection is made is not admissible in any criminal proceedings other than proceedings relating to the falsity of the answer.

#### **154 Property not dealt with by receiver**

- (1) If receivable property under the control of the receiver has not been dealt with in accordance with this Division, the receiver must cause notice of that fact to be given to the Secretary and—
  - (a) if the Secretary so requires within 1 month after the notice is given—must transfer and deliver the property to the Secretary, or
  - (b) if no such requirement is made—must transfer and deliver the property to the relevant licensee or relevant associate.
- (2) If property other than money is transferred or delivered to the Secretary under this section, the Secretary—
  - (a) must deal with it as the Supreme Court directs, and
  - (b) if the property is sold—must treat the proceeds as money paid to the Secretary under this section.
- (3) The Secretary must apply money paid to the Secretary under this section—
  - (a) firstly—towards the satisfaction of wholly or partly unsatisfied claims against the relevant licensee, and
  - (b) secondly—in payment of the expenses of the receivership.
- (4) Any money paid to the Secretary under this section that is surplus to the requirements of this section must be paid to the relevant licensee or relevant associate.

#### **155 Investment of money by receiver**

- (1) A receiver may invest receivable property in any manner in which trustees are authorised by the *Trustee Act 1925* to invest trust funds.



- (2) Income received from an investment under this section, and any profit made on the sale of such an investment, is receivable property.

**156 Receiver may be reimbursed for damages**

- (1) The Secretary may reimburse a receiver for any damages or costs recovered against the receiver, or an employee or agent of the receiver, for anything done or omitted to be done in good faith in the purported exercise of the receiver's functions.
- (2) Reimbursement under this section is to be by way of payment from the Operating Account.

**157 Payment of expenses of receivership**

- (1) So much of the expenses of receivership as have not otherwise been paid to the receiver are to be paid to the receiver by the Secretary from the Operating Account.
- (2) An amount paid under this section may be recovered by the Secretary from the relevant licensee as a debt.
- (3) If the Secretary and a receiver fail to agree on the remuneration to be paid to the receiver, the Supreme Court may, on the application of the Secretary or the receiver, determine the amount to be paid.
- (4) The Supreme Court, on the application of the relevant licensee—
  - (a) may re-open any agreement between the Secretary and a receiver for remuneration of the receiver, and
  - (b) may determine the amount to be paid.

**158 Supreme Court may review expenses of receivership**

- (1) If, on the application of the relevant licensee, the Supreme Court is satisfied that the expenses of the receivership are excessive, the Supreme Court may order the taking of accounts between the Secretary and the receiver.
- (2) After the taking of accounts, the Supreme Court—
  - (a) may relieve the relevant licensee from payment of any amount in excess of that determined by the Supreme Court to be fairly payable, or
  - (b) if the receiver has been paid, or allowed on account, an amount that includes such an excess—may order the receiver to repay the excess.

**159 Receivable property not to be attached**

The receivable property of a relevant licensee or relevant associate is not liable to be taken in execution of any judgment, order or other process of any court or tribunal.

**160 Applications for directions by receiver, licensee etc**

- (1) A receiver, a licensee or a licensee's associate who holds receivable property, or a person who claims receivable property so held, may apply to the Supreme Court for directions as to the performance of the receiver's functions.
- (2) On an application under this section, the Supreme Court may give such directions as it thinks fit.

**161 Supreme Court may give general directions to receiver**

- (1) The Supreme Court—
  - (a) may authorise a receiver to do such things in the exercise of the receiver's functions as the Supreme Court considers appropriate, and
  - (b) may give directions for the exercise of any such authority.
- (2) A receiver must exercise any authority so conferred in accordance with any direction so given.

**162 Receiver to report to Supreme Court and Secretary**

- (1) A receiver must, at such times and in respect of such periods as the Supreme Court directs, submit reports on the receivership to the Supreme Court and the Secretary.
- (2) A report is to deal with such matters as the Supreme Court directs and with such other matters as the receiver considers appropriate to include in the report.
- (3) On the conclusion of a receivership, the receiver must lodge with the Supreme Court all of the receiver's records that relate to the receivership.
- (4) Unless the Supreme Court orders their destruction, records lodged under this section are to remain in the custody of the Court.

**163 Termination of appointment of receiver**

- (1) The Supreme Court—
  - (a) may terminate the appointment of a receiver, and
  - (b) may, if it thinks fit, appoint a new receiver either immediately or at any time within the next 14 days.
- (2) The former receiver must transfer or deliver the receivable property—
  - (a) if a new receiver is appointed—to the new receiver in accordance with any directions given by the Supreme Court, or
  - (b) if a new receiver is not appointed and if the relevant licensee or relevant associate

so requires by notice in writing served on the receiver—to the licensee or associate.

Maximum penalty—50 penalty units.

- (3) The receivable property must, in accordance with any directions given by the Supreme Court, be transferred or delivered as soon as possible after the former receiver's appointment is terminated.
- (4) A former receiver is not required to comply with the requirements of this section unless—
  - (a) the expenses of the receivership have been paid to the Secretary, or
  - (b) the Secretary otherwise directs in relation to those expenses.
- (5) Subject to any direction given by the Supreme Court, a former receiver may transfer or deliver receivable property to the relevant licensee or relevant associate without having been given a notice under subsection (2) (b).

#### **164 Obstruction of receivers**

A person must not hinder, obstruct or delay a receiver in the exercise of his or her functions under this Division.

Maximum penalty—100 penalty units.

## **Part 10 Compensation Fund**

### **Division 1 Establishment and management**

#### **165 Compensation Fund**

The Secretary is to cause to be established and maintained in the accounting records of the Department a fund, called the Property Services Compensation Fund.

#### **166 Money payable to Compensation Fund**

The Compensation Fund is to consist of—

- (a) any amounts paid by licensees by way of levy under this Act, and
- (b) any amounts required or permitted to be paid to the credit of the Compensation Fund, whether by this Act or any other Act, and
- (c) any amounts payable to the Compensation Fund from the Statutory Interest Account, and
- (d) income from the investment of the Compensation Fund.

### **167 Application of money in Compensation Fund**

- (1) Money in the Compensation Fund may be applied for any purpose for which it is required or permitted to be applied by or under this or any other Act.
- (2) The Secretary may apply money held in the Compensation Fund (in such order as the Secretary decides) for all or any of the following purposes—
  - (a) satisfying claims (including costs) established against the Compensation Fund in accordance with this or any other Act,
  - (b) meeting legal expenses incurred by the Secretary in connection with claims against the Compensation Fund,
  - (c) meeting expenses incurred by the Secretary in or in relation to appearances before a court or tribunal with respect to licences under this Act or the *Conveyancers Licensing Act 2003*,
  - (d) meeting the costs of administering the Compensation Fund,
  - (e) investing in schemes that relate to the provision of residential accommodation or, subject to such terms and conditions as may be prescribed by the regulations, in loans to authorised deposit-taking institutions.
- (3) The Treasurer may determine whether any such money is to be invested in any such scheme or loan and the amount to be invested in a scheme or loan.

## **Division 2 Contributions and levies**

### **168 Contributions**

- (1) A contribution to the Compensation Fund is to be paid by an applicant for a licence at the time the application is made.
- (2) The amount of the contribution is the amount prescribed by the regulations. The regulations may prescribe different amounts of contributions for different kinds of licences.
- (3) The regulations may provide for a single contribution to be paid if a person applies for more than one kind of licence.
- (4) Contributions under this section are in addition to any fees and levies payable under this Act.
- (5) If a licence is not granted pursuant to an application, any contribution to the Compensation Fund paid by the applicant is to be refunded.

## 169 Levies

- (1) If the Secretary is at any time of the opinion that the Compensation Fund is likely to be insufficient to meet the liabilities to which it is subject, the Secretary may, with the approval of the Minister, impose a levy on each licensee.
- (2) A levy is payable to the Secretary at the time, and in the manner, fixed by the Secretary.
- (3) The Secretary may, in any special case, allow time for the payment of the whole or part of any levy.
- (4) If, after being given the notice prescribed by the regulations, a licensee fails to pay a levy in accordance with this section, the Secretary may suspend the licence held by the licensee while the failure continues.

## Division 3 Claims

### 170 Definitions

In this Division—

**associate** of a licensee means—

- (a) an employee or agent of the licensee, or
- (b) a person who has the apparent control or charge for the time being of the business of the licensee or of any office at which that business is carried on.

**failure to account** has the meaning given in section 171.

**pecuniary loss** from a failure to account includes—

- (a) all costs (including the legal costs and disbursements of making and proving a claim), charges and expenses that a claimant has suffered or incurred as a direct consequence of the failure to account, and
- (b) all interest on money or other valuable property that a claimant would have received but for the failure to account for the money or other property, with that interest calculated to the date on which the Secretary determines the claimant's claim or a judgment is recovered against the Secretary in relation to the Compensation Fund in respect of that money or other property.

### 171 Meaning of “failure to account”

- (1) In this Division, a reference to a failure to account is a reference to a failure by a licensee to account for money or other valuable property entrusted to the licensee or an associate of the licensee in the course of the carrying on of the licensee's business as a licensee.

- (2) This Division applies only to a failure to account that arises from an act or omission of the licensee or associate.
- (3) For the purposes of this Division, it does not matter that the failure to account occurred after the licensee ceased to be licensed, if the money or other valuable property concerned was entrusted to the licensee (or an associate of the licensee) before the licensee ceased to be licensed.
- (4) This Division applies whether the failure to account, or the act or omission, took place before or after the commencement of this Division.
- (5) For the purposes of this Division, a licensee's business includes acting as a selling agent for a home in a residential community under the *Residential (Land Lease) Communities Act 2013*.

#### **172 Division applies when person reasonably believed to be a licensee**

- (1) This Division extends to a case where a person entrusts money or other valuable property to another person reasonably believing that the other person is a licensee or an associate of a licensee and that the money or other valuable property is entrusted in the course of the carrying on of the other person's business as licensee.
- (2) In such a case, the person believed to be a licensee is taken to be a licensee for the purposes of the operation of this Division and the money or other valuable property is taken to have been entrusted in the course of the carrying on of the licensee's business as licensee.

#### **173 Claims against Compensation Fund**

- (1) The Compensation Fund is held, and is to be applied, for the purpose of compensating persons who suffer pecuniary loss because of a failure to account.
- (2) A person who claims to have suffered a pecuniary loss because of a failure to account may make a claim against the Compensation Fund, but only if the claim is made in writing to the Secretary within—
  - (a) a period of 12 months after the person has become aware of the failure to account, or
  - (b) a period of 2 years after the date of the failure to account,whichever period ends first.
- (3) However, a claim caused by a failure of a licensee (or an employee or agent of a licensee) to lodge a rental bond with the Rental Bond Board may also be made at any time within one year after the termination of the tenancy agreement.
- (4) A licensee does not have a claim against the Compensation Fund in respect of a

pecuniary loss suffered in connection with the licensee's business as a licensee because of a failure to account.

- (5) Subject to this section, the Secretary may receive and allow, in whole or in part, any claim against the Compensation Fund at any time after the relevant failure to account arose.
- (6) The Secretary may disallow any claim, in whole or in part, in appropriate cases. In particular the Secretary may disallow a claim to the extent that pecuniary loss was suffered as a result of a failure to mitigate loss or was occasioned by unreasonable delay in making a claim.

#### **174 Legal proceedings**

- (1) A person cannot, without the leave of the Secretary, commence any proceedings in relation to the Compensation Fund unless the person has made a claim and the Secretary has disallowed the person's claim.
- (2) A person cannot recover from the Compensation Fund by way of any such proceedings an amount greater than the amount of pecuniary loss suffered by the person, after deducting from the total amount of the pecuniary loss—
  - (a) the amount or value of all money or other benefits received or recovered from any source (other than the Compensation Fund) in reduction of the pecuniary loss, and
  - (b) any such amount or value that, in the opinion of the Secretary, might have been received or recovered but for the person's neglect or default.
- (3) Any proceedings in relation to any claim against the Compensation Fund are to be as for a debt due by the Crown and are to be brought in a court of competent jurisdiction. The proceedings do not lie against the Secretary.
- (4) In those proceedings—
  - (a) all defences that would have been available to the licensee in relation to whom the claim arose are available to the Crown, and
  - (b) all questions of costs are in the discretion of the court or, where the proceedings are tried with a jury, the judge presiding at the trial.
- (5) Any order for the payment of costs made by the Local Court operates as a judgment debt under the *Civil Procedure Act 2005* and is enforceable as such under that Act.
- (6) No proceedings can be brought against the Crown in relation to a claim against the Compensation Fund after the end of—
  - (a) a period of 6 months after the claimant has been notified that the claim has been disallowed, or

- (b) such longer period as the court may permit, on sufficient cause being shown and on such terms as it thinks fit.

### **175 Limits on amounts recoverable**

- (1) The amount that a person may recover from the Compensation Fund cannot, in any case or in any event, exceed \$500,000 or, if another amount is prescribed by the regulations, the prescribed amount.
- (2) The aggregate sum that may be applied in compensating all persons who suffer or incur pecuniary loss because of a failure to account, or of related failures to account, cannot exceed \$2,000,000 or, if another amount is prescribed by the regulations, the prescribed amount.
- (3) The Secretary may disregard subsection (2) in the case of successive failures to account by a licensee, to the extent that the Secretary is satisfied that the failures are not connected.
- (4) If the total amount of claims or judgments (or both) exceeds the aggregate sum provided for by this section, the Secretary has an unfettered discretion to determine the division and allocation of the available money among the various parties (whether or not to the exclusion of any one or more of them).

### **176 Advertisements**

- (1) The Secretary may cause to be published a notice relating to a defaulting licensee and fixing a date by which claims must be made under this Part.
- (2) The notice is to be published in a newspaper circulating in the district in which the defaulting licensee is or was carrying on business, and also in a newspaper circulating in Sydney. One newspaper may satisfy both requirements.
- (3) Any claim not made in writing on or before the date fixed by the notice is barred, unless the Secretary otherwise determines.
- (4) After that date, the Secretary may distribute compensation in accordance with this Part, having regard only to judgments obtained and claims allowed against the Compensation Fund.

### **177 Subrogation**

- (1) On payment out of the Compensation Fund in settlement in whole or in part of a claim under this Act, the Crown is subrogated, to the extent of the payment, to all the rights and remedies of the claimant against the licensee, or the former licensee, in relation to whom the claim arose, or any other person.
- (2) A certificate given by the Secretary certifying that a specified amount has been paid out of the Compensation Fund in settlement in whole or in part of a claim under this



Act is evidence of the matter certified.

- (3) In the enforcement of any rights or remedies to which the Secretary is subrogated under this section for the purpose of recovering an amount paid out of the Compensation Fund, the amount is taken to be a debt due to the Crown and may be recovered accordingly.
- (4) The Secretary may exercise the rights and remedies to which the Secretary is subrogated under this section in the name of the Secretary or in the name of the claimant concerned.

### **178 Recovery of payments from directors**

- (1) This section applies when the payment of an amount out of the Compensation Fund has been made as a consequence of the act or omission of a corporation (including the payment of any amount to an administrator of the affairs and property of the corporation).
- (2) The Secretary may recover, jointly or severally, from any person who was a director or persons who were directors of the corporation at the time of the relevant act or omission, the amount of the payment as a debt in any court of competent jurisdiction.
- (3) In any proceedings for the recovery of an amount under this section, judgment is not to be entered against a defendant who proves that the act or omission occurred without the defendant's express or implied authority or consent.
- (4) Proceedings may be brought for the recovery of an amount under this section whether or not the person against whom the proceedings are brought, or any other person, has been convicted of an offence in respect of the act or omission as a consequence of which the amount was paid.
- (5) When this section renders a person or persons liable to pay an amount as a consequence of an act or omission of a corporation, the payment by the person or either or any of those persons of the whole or any part of the amount does not render the corporation liable to the person concerned in respect of the amount so paid.

### **179 Production of documents**

- (1) The Secretary may, at any time and from time to time, require the production of documents necessary to support any claim under this Act, or available for that purpose, or for the purpose of exercising functions in respect of a defaulting licensee.
- (2) The Secretary may reject a claim if documents are not produced as required.

### **180 Satisfaction of claims and judgments**

- (1) A claim or judgment against the Compensation Fund can only be satisfied to the extent of money in the Compensation Fund (either then or at a later time). No other

money or property (whether of the Crown or otherwise) is available for that purpose.

- (2) If a number of claims or judgments (or both) against the Compensation Fund cannot be satisfied because of an insufficiency of money in the Compensation Fund, the Secretary has an unfettered discretion to determine the division and allocation of the available money among the various parties (whether or not to the exclusion of any one or more of them).

## **Division 4 Examination of accounts of licensees and former licensees**

### **181 Definitions**

In this Division—

**accounts examiner** means a person appointed as an accounts examiner under this Division.

**associate** has the same meaning as in Division 3.

### **182 Appointment of accounts examiner to examine licensee's accounts**

- (1) For the purpose of safeguarding the Compensation Fund in relation to the affairs of a licensee, the Secretary may, at any time and from time to time, appoint an appropriately qualified person as an accounts examiner to examine the accounts kept by the licensee in connection with the licensee's business.
- (2) A person is appropriately qualified for appointment if the person has such qualifications or experience as in the opinion of the Secretary are appropriate for the purpose of exercising functions under this Division.
- (3) The appointment of an accounts examiner is to be by instrument in writing.
- (4) The Secretary may publicly notify the appointment of an accounts examiner in relation to the accounts of a licensee.

### **183 Accounts examiner to report on accounts**

- (1) An accounts examiner is to furnish to the Secretary a confidential report about the accounts concerned, indicating whether there is any irregularity or alleged or suspected irregularity in the accounts or any other matter that in the person's opinion should, in the interests of the Compensation Fund, be further investigated.
- (2) A copy of the report is required to be sent by post by the Secretary to the licensee as soon as practicable.

### **184 Powers of accounts examiner**

- (1) On production by an accounts examiner of his or her instrument of appointment, the accounts examiner 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—

- (a) produce to the accounts examiner or any assistant of the accounts examiner all records relating to the business of the licensee (including all records made and kept by the licensee under this Act) and (in the case of records stored electronically) produce any such record in written form,
  - (b) give the accounts examiner or any assistant of the accounts examiner all information relating to the records required to be produced under this section,
  - (c) produce to the accounts examiner or any assistant of the accounts examiner all authorities and orders to financial institutions and other documents that may be reasonably required.
- (2) 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 accounts examiner in the exercise or performance of the accounts examiner's functions under this section.

Maximum penalty—50 penalty units.

### **185 Confidentiality**

- (1) An accounts examiner must not communicate to any person (other than a partner, employer, employee or assistant of the accounts examiner)—
- (a) the fact of the accounts examiner's appointment under this Division, or
  - (b) any matter that comes to the accounts examiner's knowledge in the course of the examination,

except in the course of preparing and furnishing the report to the Secretary or in the same circumstances as information obtained in connection with the administration or execution of this Act can be disclosed under section 219.

- (2) A partner, employer, employee or assistant (**the colleague**) of the accounts examiner must not communicate to any person (other than the accounts examiner or a partner, employer, employee or assistant of the accounts examiner)—
- (a) the fact of the accounts examiner's appointment under this Division, or
  - (b) any matter that comes to the colleague's knowledge in the course of the examination,

except in the course of the preparing and furnishing of the report to the Secretary or in the same circumstances as information obtained in connection with the

administration or execution of this Act can be disclosed under section 219.

(3) A person who contravenes this section is guilty of an offence.

Maximum penalty—50 penalty units.

### **186 Former licensees**

This Division extends, with any necessary adaptations, to a former licensee, so that a reference in this Division to a licensee includes a reference to a former licensee and any person who has the possession, custody or control of a written record relating to a former licensee and preserved in accordance with this Act.

## **Part 11 Property Services Statutory Interest Account**

### **187 Statutory Interest Account**

The Secretary is to cause to be established and maintained in the accounting records of the Department an account called the Property Services Statutory Interest Account.

### **188 Money payable to Statutory Interest Account**

The Statutory Interest Account is to consist of—

- (a) any money required or permitted to be paid to the credit of the Statutory Interest Account, whether by this Act or any other Act, and
- (b) income from the investment of the Statutory Interest Account.

### **189 Application of money in Statutory Interest Account**

- (1) Money in the Statutory Interest Account may be applied for any purpose for which it is required or permitted to be applied by or under this or any other Act.
- (2) The Secretary may, with the consent of the Minister, apply money held in the Statutory Interest Account for all or any of the following purposes—
  - (a) supplementing the Compensation Fund by such amount as may be needed to enable the current liabilities of the fund to be met,
  - (b) providing grants or loans for providing or undertaking education or research programs relating to the property services industry and approved by the Minister,
  - (c) providing money for the establishment or administration of rental advisory services,
  - (d) meeting the costs of administering this Act, the [Conveyancers Licensing Act 2003](#) and any other Act prescribed by the regulations for the purposes of this paragraph (or the prescribed provisions of any other Act),

(e) (Repealed)

(f) meeting the costs of operating a scheme or schemes for resolving disputes arising between consumers and providers of services provided in the property services industry,

(g) investing in schemes that relate to the provision of residential accommodation or, subject to such terms and conditions as may be prescribed by the regulations, in loans to authorised deposit-taking institutions.

(3) The Treasurer may determine whether any such money is to be invested in any such scheme or loan and the amount to be invested in a scheme or loan.

(4) In this section—

***property services industry*** includes—

(a) the business of selling, managing or otherwise dealing with property (including businesses) that is subject to licensing, registration or regulation under the [Property, Stock and Business Agents Act 2002](#), or

(b) the carrying out of conveyancing work as defined by the [Conveyancers Licensing Act 2003](#),

and includes anything prescribed by the regulations as being within this definition, but does not include anything prescribed as excluded from it.

### **190 Application of money for purposes of certain Acts**

(1) The following amounts are also payable from the Statutory Interest Account—

(a) such contributions towards the costs, charges and expenses of the administration of the [Residential Tenancies Act 2010](#), the [Retirement Villages Act 1999](#), the [Fair Trading Act 1987](#), the [Strata Schemes Management Act 2015](#), the [Community Land Management Act 1989](#) and the [Residential \(Land Lease\) Communities Act 2013](#) as may be authorised by the Secretary with the consent of the Minister,

(b) half the costs of, or expenses occurred in, administering residential and social housing matters in the Consumer and Commercial Division of the Tribunal,

(c) such contributions towards the costs of, or expenses occurred in, administering strata and community scheme matters in the Consumer and Commercial Division of the Tribunal as may be authorised by the Secretary with the consent of the Minister,

(d) such additional contributions for the purposes set out in paragraphs (a)–(c) as the Minister may approve.

(1A) If an Act referred to in subsection (1) or the [Civil and Administrative Tribunal Act](#)

2013, is not administered by the Minister, the Minister must agree with the other Minister administering that Act as to the contributions payable under that subsection in respect of costs and expenses incurred in respect of the Act concerned.

- (2) Contributions referred to in this section are to be paid in the manner determined by the Treasurer.
- (3) In this section—

**residential and social housing matters in the Consumer and Commercial Division of the Tribunal** means matters relating to the exercise of the functions of the Tribunal in that Division under the *Residential Parks Act 1998*, *Residential Tenancies Act 2010* or *Retirement Villages Act 1999*.

**strata and community scheme matters in the Consumer and Commercial Division of the Tribunal** means matters relating to the exercise of the functions of the Tribunal in that Division under the *Community Land Management Act 1989* or *Strata Schemes Management Act 2015*.

## Part 12 Complaints and disciplinary action

### 191 Grounds for disciplinary action

Disciplinary action under this Part can be taken against a person who is or was the holder of a licence or certificate of registration on any one or more of the following grounds—

- (a) the person has contravened a provision of this Act or any other Act administered by the Minister (including any provision of the *Australian Consumer Law (NSW)*), or the regulations under any such Act, whether or not the person has been prosecuted or convicted of an offence in respect of the contravention,
  - (a1) the person has, in respect of the person's conduct of business or exercise of functions under the licence or certificate of registration, contravened the *Competition and Consumer Act 2010* of the Commonwealth,
  - (b) the person has contravened a condition of the licence or certificate of registration,
  - (c) the person has, in the course of carrying on business or exercising functions under the licence or certificate of registration, acted unlawfully, improperly, unfairly or incompetently,
  - (d) the person is a disqualified person or is otherwise not eligible under section 14 to hold a licence or certificate of registration,
  - (e) the person is not a fit and proper person to be involved in the direction, management or conduct of the business of a licensee,
  - (f) the person has failed to pay any part of a contribution or levy that is due and payable

under Part 10 (Compensation Fund),

- (g) the person has breached an undertaking given by the person to the Secretary under this Act or the *Fair Trading Act 1987*, in respect of the person's conduct of business or exercise of functions under the licence or certificate of registration,
- (h) the person has failed to comply with a direction given to the person by the Secretary pursuant to the taking of disciplinary action under this Part,
- (i) the person has failed to pay a monetary penalty imposed on the person by the Secretary pursuant to the taking of disciplinary action under this Part,
- (j) the issue of the person's licence or certificate of registration was obtained by fraud or mistake,
- (k) grounds specified in the regulations as grounds for the taking of disciplinary action against a person under this Act.

## **192 Disciplinary action**

- (1) Each of the following actions is disciplinary action that the Secretary can take against a person under this Act—
  - (a) caution or reprimand the person,
  - (b) give a direction to the person requiring the person to give a specified undertaking to the Secretary as to the manner in which the person will conduct business or exercise functions under a licence or certificate of registration held by the person,
  - (c) give a direction to the person requiring the person to take specified action within a specified time in connection with the conduct of business or the exercise of functions under a licence or certificate of registration,
  - (d) impose a monetary penalty on the person of an amount not exceeding 100 penalty units in the case of an individual or 200 penalty units in the case of a corporation,
  - (e) impose a condition on the person's licence or certificate of registration,
  - (f) suspend the person's licence or certificate of registration for a period that does not exceed the unexpired term of the licence or certificate of registration,
  - (g) cancel the person's licence or certificate of registration,
  - (h) declare the person to be a disqualified person for the purposes of this Act, either permanently or for a specified period,
  - (i) disqualify the person from being involved in the direction, management or conduct of the business of a licensee.

- (2) A power conferred by this Act to take disciplinary action against a person is a power to take any one or more of the actions that constitute disciplinary action.
- (3) When a licence or certificate of registration is suspended, it is taken not to be in force except for such provisions of this Act or the regulations as the regulations may prescribe as provisions that remain applicable to a suspended licence or certificate of registration.

### **193 Decision to take no further action**

The Secretary may at any stage of a matter that is the subject of consideration by the Secretary under this Part determine to take no further action in respect of the matter, whether or not the matter is the subject of a complaint or a show cause notice and whether or not the Secretary determines that there are grounds for taking disciplinary action in connection with the matter.

### **194 Complaints**

- (1) Any person may make a complaint to the Secretary setting out matters that are alleged to constitute grounds for taking disciplinary action against a person under this Act.
- (2) Action can be taken under this Part whether or not a complaint has been made.

### **195 Show cause notice**

- (1) The Secretary may serve a show cause notice on a person if the Secretary is of the opinion that there is reasonable cause to believe that there are grounds for taking disciplinary action against the person.
- (2) A show cause notice is a notice requiring a person to show cause why disciplinary action should not be taken against the person under this Act on the grounds specified in the notice.
- (3) A show cause notice is to be in writing and is to specify a period of not less than 14 days after service of the notice as the period that the person to whom the notice is directed has to show cause as required by the notice.
- (4) The person on whom a show cause notice is served may within the period allowed by the notice make oral or written submissions to the Secretary in respect of the matters to which the notice relates. In the case of a corporation, submissions may be made by a director or officer of the corporation.

### **196 Power to suspend licence or certificate of registration when show cause notice served**

- (1) When a show cause notice is served on a person, the Secretary may by notice in writing to the person suspend the person's licence or certificate of registration pending a determination by the Secretary of whether to take disciplinary action under



this Act against the person.

- (2) The Secretary may only suspend a licence or certificate of registration under this section if satisfied that the grounds for disciplinary action specified in the show cause notice would, if established, justify the suspension or cancellation of the licence or certificate of registration.
- (3) A suspension under this section may not be imposed for a period of more than 60 days after the show cause notice is served unless—
  - (a) the suspension relates to a failure to lodge an audit report in contravention of section 111 (1) (b)—in which case the suspension may be imposed until the audit report is lodged, or
  - (b) the Secretary considers that the grounds for disciplinary action to which the suspension relates are serious—in which case the suspension may be imposed for the period that the Secretary reasonably requires to investigate the matter.
- (4) The Secretary is not required to afford a person an opportunity to be heard before taking action against the person under this section but must afford a person an opportunity to be heard as soon as reasonably practicable after imposing a suspension under subsection (3) (b) for a period of more than 60 days.
- (5) The Secretary can revoke a suspension under this section at any time by notice in writing to the suspended person.
- (6) This section does not limit or otherwise affect any power to suspend a licence or certificate of registration under section 79A of the *Fair Trading Act 1987*.

### **197 Inquiries and investigation**

The Secretary may conduct inquiries and make investigations in relation to the matters to which a show cause notice relates and the submissions, if any, made by or on behalf of the person to whom the show cause notice relates in relation to those matters, as the Secretary thinks fit.

### **198 Taking of disciplinary action**

- (1) If the Secretary is satisfied that there are grounds for taking disciplinary action under this Act against a person on whom a show cause notice has been served, the Secretary may by order in writing served on the person take such disciplinary action against the person as the Secretary thinks is warranted.
- (2) The order must include a statement of the reasons for the Secretary's decision on the matter.

### **199 Recovery of monetary penalty**

A monetary penalty imposed on a person by disciplinary action under this Part may be recovered by the Secretary in a court of competent jurisdiction as a debt due to the Crown.

### **200 Administrative review of disciplinary action by NCAT**

A person against whom disciplinary action is taken by the Secretary may apply to the Tribunal for an administrative review under the [Administrative Decisions Review Act 1997](#) of the Secretary's decision on the disciplinary action or on a review of the disciplinary action.

### **201 Warning notices**

- (1) The Secretary may authorise publication of a notice warning persons of particular risks involved in dealing with a specified holder of a licence, or a person who does not hold a licence, in connection with the activities of licensees.
- (2) For example, a warning may relate to the risks involved in dealing with a person who has a recent history of unconscionable conduct in the person's dealings with consumers.
- (3) The Secretary may authorise publication of such a notice in any one or more of the following ways—
  - (a) to any person making inquiries to the Secretary about the licensee concerned,
  - (b) by advertisement by the use of any medium,
  - (c) to any media representatives.
- (4) Publication of such a notice may not be authorised unless an investigation has been conducted by the Secretary, whether or not a complaint has been made.
- (5) Before authorising publication of such a notice, the Secretary must give the person concerned an opportunity for a period of not less than 48 hours to make representations to the Secretary about publication of such a notice, unless—
  - (a) the Secretary is not able, after making reasonable efforts to do so, to contact the person promptly and advise the person of that opportunity, or
  - (b) the person refuses to make any representations.
- (6) No opportunity to make representations is required to be given if, in the opinion of the Secretary, there is an immediate risk to the public.
- (7) No liability is incurred by a person for publishing in good faith—
  - (a) a notice under this section, or

- (b) a fair report or summary of such a notice.

## **202 Failure to comply with disqualification from involvement in business**

A person who is disqualified under this Part from being involved in the direction, management or conduct of the business of a licensee must not act contrary to the disqualification.

Maximum penalty—

- (a) 200 penalty units in the case of a corporation, or  
(b) 100 penalty units in any other case.

## **203 Return of suspended or cancelled licence**

A person who has possession of a licence or certificate of registration that has been suspended or cancelled under this Part must give the licence or certificate of registration to an employee of the Department at any office of the Department within 7 days after the suspension or cancellation takes effect.

Maximum penalty—

- (a) 40 penalty units in the case of a corporation, or  
(b) 20 penalty units in any other case.

# **Part 13 Enforcement**

## **204 Authorised officers**

- (1) In this Act—

***authorised officer*** means—

- (a) an employee of the Department for the time being appointed under this Part as an authorised officer, or  
(b) an investigator appointed under section 18 of the [Fair Trading Act 1987](#), or  
(c) a police officer.
- (2) The Secretary may appoint any employee of the Department as an authorised officer for the purposes of this Act.
- (3) An authorised officer who is not a police officer is to be provided by the Secretary with a certificate of identification.
- (4) An authorised officer (other than a police officer) must, when exercising on any premises any function of the authorised officer under this Act, produce the officer's certificate of identification to any person apparently in charge of the premises who

requests its production.

**205 Powers of entry, inspection etc**

- (1) An authorised officer may exercise the powers conferred by this section for the purpose of—
  - (a) ascertaining whether the provisions of this Act or the regulations are being complied with or have been contravened, or
  - (b) investigating a complaint made or intended to be made under this Act, or
  - (c) obtaining evidence, records or information in relation to a matter that constitutes or may constitute a contravention of this Act or the regulations.
- (2) An authorised officer may enter and inspect at any reasonable time any premises that the officer believes on reasonable grounds are used for the carrying on of the business of an agent, whether or not the business is being carried on by the holder of a licence.
- (3) While on premises entered under this section or under the authority of a search warrant under this Part, an authorised officer may do any one or more of the following—
  - (a) require any person on those premises to produce any records in the possession or under the control of that person relating to the carrying on of the business of an agent, and (in the case of records stored electronically) to produce any such record in written form,
  - (b) inspect, take copies of or extracts from, or make notes from, any such records, and for that purpose may take temporary possession of any such records,
  - (c) take possession of any such records if the authorised officer considers it necessary to do so for the purpose of obtaining evidence or protecting evidence from destruction,
  - (d) take such photographs, films and audio, video and other recordings as the authorised officer considers necessary,
  - (e) require any person on those premises to answer questions or otherwise furnish information in relation to the carrying on of the practice of the business of an agent or a contravention of a provision of this Act or the regulations,
  - (f) require the owner or occupier of those premises to provide the authorised officer with such assistance and facilities as is or are reasonably necessary to enable the authorised officer to exercise the functions of an authorised officer under this section.
- (4) An authorised officer is not entitled to enter a part of premises used for residential

purposes, except—

- (a) with the consent of the occupier of the part, or
- (b) a part of premises on which an auction of residential property is being conducted or which is open for inspection in advance of, or in preparation for, such an auction, or
- (c) under the authority of a search warrant.

#### **206 Power of authorised officer to obtain information, records and evidence**

If an authorised officer believes on reasonable grounds that a person is capable of giving information, producing records or giving evidence in relation to a matter that constitutes, or may constitute, an offence against this Act or the regulations, the authorised officer may, by notice in writing given to the person, require the person—

- (a) to provide an authorised officer, by writing signed by the person (or, in the case of a corporation, by a competent officer of the corporation) and given to the authorised officer within the time and in the manner specified in the notice, with any such information, or
- (b) to produce to an authorised officer, in accordance with the notice, any such records, or
- (c) to appear before an authorised officer at a time and place specified in the notice and give any such evidence, either orally or in writing, and produce any such records.

#### **207 Obstruction etc of authorised officers**

A person must not—

- (a) without reasonable excuse, refuse or fail to comply with any notice given or requirement made, or to answer any question asked, by an authorised officer under this Part, or
- (b) provide information or give evidence in purported compliance with a requirement made or question asked by an authorised officer under this Part knowing the information or evidence to be false or misleading in a material particular, or
- (c) wilfully delay, hinder or obstruct an authorised officer in the exercise of the officer's functions under this Part.

Maximum penalty—100 penalty units or imprisonment for 6 months, or both.

#### **208 Taking possession of records to be used as evidence**

- (1) If an authorised officer takes possession of any records under this Part for the purpose of obtaining evidence or protecting evidence from destruction, they may be retained

by the officer until the completion of any proceedings (including proceedings on appeal) in which they may be evidence.

- (2) The person from whom the records are taken must be provided, within a reasonable time after the records are taken, with a copy of the records certified by an authorised officer as a true copy.
- (3) A copy of records provided under this section is, as evidence, of equal validity to the records of which it is certified to be a copy.

## **209 Search warrants**

- (1) An authorised officer under this Act may apply to an authorised officer within the meaning of the *Law Enforcement (Powers and Responsibilities) Act 2002* for the issue of a search warrant for premises if the officer believes on reasonable grounds—
  - (a) that a provision of this Act or the regulations is being or has been contravened on the premises, or
  - (b) that there is on the premises evidence of a contravention of this Act or the regulations.
- (2) An authorised officer within the meaning of the *Law Enforcement (Powers and Responsibilities) Act 2002* to whom such an application is made may, if satisfied that there are reasonable grounds for doing so, issue a search warrant authorising an authorised officer under this Act named in the warrant—
  - (a) to enter and inspect the premises, and
  - (b) to exercise on the premises any function of an authorised officer under this Part.
- (3) Division 4 of Part 5 of the *Law Enforcement (Powers and Responsibilities) Act 2002* applies to a search warrant issued under this section.
- (4) (Repealed)

## **210 Injunctions**

- (1) On the application of the Secretary, the Supreme Court may grant an injunction restraining a threatened or apprehended contravention, or the continuation of a contravention, of a provision of this Act or the regulations.
- (2) An injunction may be granted without the Secretary being required to show a likelihood of damage.
- (3) If in the opinion of the Court it is desirable to do so, the Court may grant an interim injunction pending determination of the application.
- (4) When the Secretary makes an application for the grant of an injunction under this

section, the Court is not to require the Secretary or any other person, as a condition of granting an interim injunction, to give an undertaking as to damages.

(5) This section does not limit any provision of the *Fair Trading Act 1987*.

## **Part 14 Offences and proceedings**

### **Division 1 Offences**

#### **211 Fraudulent conversion and false accounts of money received by licensee or registered person**

(1) This section applies to—

- (a) any money received by a licensee or registered person on behalf of any person in respect of any transaction in the licensee's or registered person's capacity as a licensee or registered person, or any part of any such money, and
- (b) any money so received that is held by the licensee or registered person as a stakeholder or in trust pending the completion of any transaction.

(2) If the licensee or registered person fraudulently converts the money or any part of that money to his or her own use or to the use of any other person, the licensee or registered person is guilty of an indictable offence and liable to imprisonment for a term of not more than 10 years.

(3) If the licensee or registered person fraudulently omits to account for, deliver or pay the money or any part of the money to the person from whom it was received or to the person or persons entitled to it, the licensee or registered person is guilty of an indictable offence and liable to imprisonment for a term of not more than 10 years.

(4) If the licensee or registered person fraudulently renders an account of the money or any part of the money knowing the account to be false in any material particular, the licensee or registered person is guilty of an indictable offence and liable to imprisonment for a term of not more than 10 years.

(5) On the prosecution of a person for an offence under this section it is not necessary to prove the fraudulent conversion by the accused of any specific sum of money if there is proof of a general deficiency on the examination of the books of account, or entries kept, or made by the accused, or otherwise, and the jury are satisfied that the accused fraudulently converted the deficient money or any part of it.

#### **212 Fraudulent accounts for expenses, commission and other charges**

If a licensee or registered person fraudulently renders an account of expenses, commission or other charges incidental to any transaction or proposed or contemplated transaction as a licensee or registered person knowing the account to be false in any material particular, the licensee or registered person is guilty of an indictable offence and

liable to imprisonment for a term of not more than 10 years.

### **213 Offences by persons other than principal offenders**

(1) A person who—

- (a) aids, abets, counsels or procures a person to contravene, or
- (b) induces, or attempts to induce, a person, whether by threats or promises or otherwise, to contravene, or
- (c) is in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of, or
- (d) conspires with others to contravene,

a provision of this Act or the regulations is guilty of an offence against this Act or the regulations and liable to the same penalty as a person who contravenes the provision.

(2) A person does not commit an offence because of this section for any act or omission that is an offence under section 218.

### **214 Operation of Crimes Act not affected**

Nothing in this Division affects the generality of any provisions of the [Crimes Act 1900](#).

## **Division 2 Proceedings**

### **215 Proceedings for offences**

- (1) Proceedings for an offence under this Act or the regulations may be taken and prosecuted only by the Secretary or, in the name of the Secretary, by a person acting with the authority of the Secretary.
- (2) Proceedings for an offence under this Act or the regulations (other than proceedings for an indictable offence) may be dealt with—
  - (a) summarily before the Local Court, or
  - (b) summarily before the Supreme Court in its summary jurisdiction.
- (3) If proceedings are brought in the Local Court, the maximum monetary penalty that the Local Court may impose for the offence is 100 penalty units or such other amount as may be prescribed by the regulations, despite any higher maximum monetary penalty provided in respect of the offence.
- (4) Despite any proceedings against a person for an offence against this Act or the regulations (whether resulting in a conviction or otherwise) the person remains liable to civil proceedings in the same manner as if the proceedings for an offence had not been taken.



## 216 Penalty notices

- (1) An authorised officer may issue a penalty notice to a person if it appears to the officer that the person has committed a penalty notice offence.
- (2) A penalty notice offence is an offence against this Act or the regulations that is prescribed by the regulations as a penalty notice offence.
- (3) The *Fines Act 1996* applies to a penalty notice issued under this section.

### Note—

The *Fines Act 1996* provides that, if a person issued with a penalty notice does not wish to have the matter determined by a court, the person may pay the amount specified in the notice and is not liable to any further proceedings for the alleged offence.

- (4) The amount payable under a penalty notice issued under this section is the amount prescribed for the alleged offence by the regulations (not exceeding the maximum amount of penalty that could be imposed for the offence by a court).
- (5) This section does not limit the operation of any other provision of, or made under, this or any other Act relating to proceedings that may be taken in respect of offences.
- (6) In this section—

**authorised officer** means a person authorised in writing by the Secretary as an authorised officer for the purposes of this section.

## 217 Time for laying information

Proceedings for an offence against this Act (other than proceedings that are to be dealt with on indictment) or the regulations may be commenced within 3 years after the date on which the offence is alleged to have been committed or, with the consent of the Attorney General, at any time.

## 218 Liability of directors etc for offences by corporation—accessory to the commission of the offences

- (1) For the purposes of this section, a **corporate offence** is an offence against this Act or the regulations that is capable of being committed by a corporation.
- (2) A person commits an offence against this section if—
  - (a) a corporation commits a corporate offence, and
  - (b) the person is—
    - (i) a director of the corporation, or
    - (ii) an individual who is involved in the management of the corporation and who is in a position to influence the conduct of the corporation in relation to the

commission of the corporate offence, and

(c) the person—

- (i) aids, abets, counsels or procures the commission of the corporate offence, or
- (ii) induces, whether by threats or promises or otherwise, the commission of the corporate offence, or
- (iii) conspires with others to effect the commission of the corporate offence, or
- (iv) is in any other way, whether by act or omission, knowingly concerned in, or party to, the commission of the corporate offence.

Maximum penalty—The maximum penalty for the corporate offence if committed by an individual.

- (3) The prosecution bears the legal burden of proving the elements of the offence against this section.
- (4) The offence against this section can only be prosecuted by a person who can bring a prosecution for the corporate offence.
- (5) This section does not affect the liability of the corporation for the corporate offence, and applies whether or not the corporation is prosecuted for, or convicted of, the corporate offence.
- (6) This section does not affect the application of any other law relating to the criminal liability of any persons (whether or not directors or other managers of the corporation) who are concerned in, or party to, the commission of the corporate offence.

## **Part 15 Administration**

### **219 Disclosure of information**

- (1) A person must not disclose any information obtained in connection with the administration or execution of this Act unless that disclosure is made—
  - (a) with the consent of the person from whom the information was obtained, or
  - (b) in connection with the administration or execution of this Act, or
  - (c) for the purposes of any legal proceedings arising out of this Act or of any report of any such proceedings, or
  - (d) in accordance with a requirement imposed under the *Ombudsman Act 1974*, the *Government Information (Public Access) Act 2009* or the *Independent Commission Against Corruption Act 1988*, or

- (e) to a regulatory officer or law enforcement officer, for the purposes of assisting the officer in the exercise of the officer's functions, or
- (f) as otherwise authorised by this section or the regulations, or
- (g) with other lawful excuse.

Maximum penalty—20 penalty units or imprisonment for 6 months, or both.

- (2) The Secretary may communicate to any person directly concerned in any transaction with a licensee in connection with his or her business as a licensee any information furnished to the Secretary in connection with the administration or execution of this Act, in so far as it relates to any such transaction and directly concerns any such person.
- (3) The Secretary may request and receive information from a law enforcement officer or regulatory officer for the purpose of assisting the Secretary in the exercise of functions under this Act or under any other Act administered by the Minister.
- (4) The Secretary may enter into agreements and other arrangements for the sharing or exchange of information as authorised by this section.
- (5) In this section—

***law enforcement officer*** means—

- (a) a member of the NSW Police Force, the Australian Federal Police or of the police force of another State or a Territory, or
- (b) the Director of Public Prosecutions or the Crown Prosecutor of the State or the Director of Public Prosecutions or the Crown Prosecutor of the Commonwealth or of another State or Territory, or
- (c) any other person, or officer of an authority, responsible for the investigation or prosecution of offences under laws of the State, the Commonwealth, another State or a Territory.

***regulatory officer*** means an officer or employee of a government agency (including the government of a jurisdiction outside the State and outside Australia) exercising functions under an enactment with respect to fair trading or an enactment that provides for the issue of licences or other authorities in connection with the undertaking of an activity regulated under the enactment.

## **220 Register**

- (1) The Secretary is to maintain a Register for the purposes of this Act and is to enter and keep in the Register particulars of such of the following as the regulations may require—

- (a) the licences and certificates of registration issued under this Act,
  - (b) applications for a licence or certificate of registration that are refused,
  - (c) prosecutions taken under this Act and the result of those prosecutions,
  - (d) warning notices that the Secretary has authorised publication of under this Act,
  - (e) disciplinary action taken under this Act,
  - (f) undertakings given under this Act by the holder of a licence or certificate of registration,
  - (g) the appointment of a manager or receiver under this Act,
  - (h) such other matters as may be prescribed by the regulations.
- (2) Any person is entitled to inspect any entry in the Register on payment of such fee as the Secretary may determine for the giving of access to the Register.

#### **221 Certificate evidence**

A document purporting to be a certificate signed by the Secretary and certifying that any person is or is not or was or was not on any date or during any specified period the holder of a licence of a specified type or the holder of a certificate of registration is evidence of the matters certified in all courts and before all persons and bodies authorised by law to receive evidence.

#### **222 Delegation**

The Secretary may delegate the exercise of any function of the Secretary under this Act (other than this power of delegation) to—

- (a) any person employed in the Department, or
- (b) any person, or any class of persons, authorised for the purposes of this section by the regulations.

### **Part 16 Miscellaneous**

#### **223 Fair Trading Act not affected**

This Act does not limit or otherwise affect the exercise of any function under the [Fair Trading Act 1987](#).

#### **224 Exclusion of personal liability**

A matter or thing done or omitted to be done by the Secretary, an authorised officer or any person acting under the direction of the Secretary does not, if the matter or thing was done or omitted in good faith for the purpose of executing this or any other Act, subject

the Secretary, authorised officer or person so acting personally to any action, liability, claim or demand.

## **225 Service of notices**

- (1) A notice or direction in writing that is required or permitted to be given under this Act may be given as provided by this section.
- (2) A notice or direction may be given to a person other than a corporation—
  - (a) by giving it to the person, or
  - (b) by leaving it at the person's place of residence with someone who apparently resides there and has apparently reached the age of 16 years, or
  - (c) by leaving it at the person's place of employment or business with someone who is apparently employed there and has apparently reached the age of 16 years, or
  - (d) by posting it in a letter addressed to the person at the address last known to the Secretary of the person's place of residence, employment or business, or
  - (e) by email to an email address specified by the person for the service of notices or directions of that kind, or
  - (f) by any other method authorised by the regulations for the service of notices or directions of that kind.
- (3) A notice or direction may be given to a corporation—
  - (a) by giving it to the secretary of the corporation, or any other person concerned in the management of the corporation, personally, or
  - (b) by leaving it at the corporation's only or principal place of business with someone who is apparently employed there and has apparently reached the age of 16 years, or
  - (c) by posting it in a letter addressed to the corporation at the address last known to the Secretary of its only or principal place of business, or
  - (d) by email to an email address specified by the corporation for the service of notices or directions of that kind, or
  - (e) by any other method authorised by the regulations for the service of notices or directions of that kind.
- (4) This section does not limit any provision of the Corporations Act.

## **226 Repeals**

- (1) The *Property, Stock and Business Agents Act 1941* is repealed.

- (2) The *Property, Stock and Business Agents (General) Regulation 1993* is repealed.

## **227 Savings and transitional provisions**

Schedule 1 has effect.

## **228 (Repealed)**

## **229 Displacement of Corporations legislation**

A provision of Part 9 (Management and receivership) is a Corporations legislation displacement provision for the purposes of section 5G of the Corporations Act.

## **230 Regulations**

- (1) The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.
- (2) In particular the Governor may make regulations for or with respect to—
  - (a) prescribing the procedure to be followed in respect of applications under this Act,
  - (b) fixing the maximum amount of remuneration to which a licensee is entitled, by way of commission, fee, gain or reward, for services performed by him or her as a licensee,
  - (c) requiring licensees to display or otherwise publicise or give notice of particulars of their remuneration and prescribe the consequences of a failure to comply with any such requirement,
  - (d) prescribing the accounts and other records to be kept by a licensee and the manner in which they are to be kept,
  - (e) prescribing the conditions applicable to and in respect of the sale by auction of land or livestock,
  - (f) prescribing the manner in which the conditions of the sale by auction of land or livestock must be notified,
  - (g) prescribing a method of service (which may include electronic transmission) of any notice, statement of claim, order or other document authorised or required to be served by or under a provision of this Act, either in addition to or as an alternative to a method of service provided for by the provision concerned,
  - (h) prescribing exemptions from the operation of this Act or specified provisions of this Act,
  - (i) the waiver or refund of the whole or any part of a fee for any service provided by

the Secretary under this Act or the regulations.

- (3) A regulation may create an offence punishable by a penalty not exceeding 40 penalty units in the case of a corporation or 20 penalty units in any other case.

### **231 Review of Act**

- (1) The Minister is to review this Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.
- (2) The review is to be undertaken as soon as possible after the period of 5 years from the date of assent to this Act.
- (3) A report on the outcome of the review is to be tabled in each House of Parliament within 12 months after the end of the period of 5 years.

## **Schedule 1 Savings, transitional and other provisions**

(Section 227)

### **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*
  - Property, Stock and Business Agents Amendment Act 2013*
  - any other Act that amends this Act
- (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*.

### **3 Licences and certificates of registration under repealed Act**

- (1) A person who was the holder of a licence or certificate of registration under a provision of the repealed Act immediately before its repeal is taken to be the holder of the corresponding licence or certificate of registration under this Act.
- (2) The corresponding licence or certificate of registration—
  - (a) is taken to have been issued subject to the same conditions to which it was subject under the repealed Act, and
  - (b) remains in force for the remainder of the period for which it was issued.
- (3) Section 8 applies in respect of a service performed by a person before the commencement of that section as if a reference in that section to a licence included a reference to the corresponding licence under the repealed Act.

#### **Note—**

Licences under the repealed Act were issued for 3 years.

### **4 Pending applications and objections**

- (1) The repealed Act continues to apply as if it had not been repealed to and in respect of—
  - (a) an application for the issue, renewal or restoration of a licence or certificate of registration under a provision of the repealed Act that was pending immediately before its repeal, and
  - (b) any objection under a provision of the repealed Act in respect of such an application.
- (2) A licence or certificate of registration issued or renewed under a provision of the repealed Act pursuant to subclause (1) is taken to have been issued or renewed immediately before the repeal of the provision.

### **5 Pending complaints**

- (1) The repealed Act continues to apply as if it had not been repealed to and in respect of a complaint that was made under section 29, 29A, 60 or 60AA of the repealed Act and was pending immediately before the repeal of those sections.



- (2) For the purposes of the operation of this Schedule, any action taken by a court on such a complaint is to have effect as if it was made immediately before the repeal of the provision of the repealed Act under which the complaint was made.

## **6 Pending appeals**

- (1) Any appeal pending under section 31 or 61 of the repealed Act immediately before the repeal of the section under which the appeal was made is to continue and be determined as if the repealed Act had not been repealed.
- (2) For the purposes of the operation of this Schedule, the determination of the appeal is to have effect as if the appeal was made immediately before the repeal of the provision of the repealed Act under which it was made.

## **7 Records**

Any records kept under or for the purposes of a provision of the repealed Act are taken to be kept under or for the purposes of the corresponding provision of this Act.

## **8 Compensation Fund**

- (1) The Compensation Fund under this Act is a continuation of the Compensation Fund under the repealed Act. The Compensation Fund under the repealed Act is a continuation of the Property Services Council Compensation Fund (***the PSCC Fund***) under the repealed Act.
- (2) Any amount payable to or from the Compensation Fund under the repealed Act or the PSCC Fund immediately before the commencement of this clause is payable instead to or from the Compensation Fund under this Act.
- (3) Contributions made to the Compensation Fund under the repealed Act are taken to have been made to the Compensation Fund under this Act.
- (4) Any payment under the repealed Act out of either the Compensation Fund or the PSCC Fund in settlement in whole or in part of a claim under the repealed Act is, for the purposes of this Act, taken to be a payment made out of the Compensation Fund under this Act in settlement in whole or in part of the claim concerned as if it were a claim under this Act.

## **9 Statutory Interest Account**

- (1) The Statutory Interest Account under this Act is a continuation of the Statutory Interest Account under the repealed Act.
- (2) Any amount payable to the Statutory Interest Account under the repealed Act immediately before the commencement of this clause is payable instead to the Statutory Interest Account under this Act.

(3) Contributions made to the Statutory Interest Account under the repealed Act are taken to have been made to the Statutory Interest Account under this Act.

#### **10 Trust account rates**

A trust account rate determined for an authorised deposit-taking institution and in force under section 36AA of the repealed Act immediately before its repeal is taken to have been determined under section 90 of this Act in respect of that institution until a different rate is determined for that institution under that section.

#### **11 Approval of business name**

The Director-General is taken to have approved of a licensee carrying on, or advertising or holding out that the licensee carries on, business as a licensee under a name for the purposes of this Act if, immediately before the commencement of this clause, the licensee carried on business as a licensee under that name in compliance with section 43A of the repealed Act.

#### **12 Licences cancelled under repealed Act**

A reference in this Act to a licence cancelled under this Act includes a reference to a licence cancelled under the repealed Act.

#### **13 Receivers**

The repealed Act continues to apply to and in respect of a receiver whose appointment under the repealed Act is in force immediately before the commencement of this clause as if the repealed Act had not been repealed.

#### **14 Act extends to acts and omissions before commencement**

Unless the context otherwise indicates or requires, a provision of this Act extends to any act or omission occurring before the commencement of the provision.

#### **15 Continuity of things done before commencement**

Anything done by the Director-General or a licensee under or for the purposes of a provision of the repealed Act is, to the extent that the thing done has effect immediately before the repeal of the provision, taken to have been done under or for the purposes of the corresponding provision of this Act.

#### **16 Disclosure of information**

For the purposes of section 219 (Disclosure of information) of this Act, information obtained in connection with the administration or execution of the repealed Act is taken to have been obtained in connection with the administration or execution of this Act.

### **17 Franchising agreements**

- (1) Section 35 (1) applies only to the entering into of a franchising agreement after the commencement of that section.
- (2) Section 35 (2) extends to a franchising agreement entered into before the commencement of that section.

### **18 Agency agreements**

Section 55 extends to services performed by a licensee under the repealed Act before the commencement of that section.

## **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.

## **Part 3A Provision consequent on enactment of [Statute Law](#)**

## (Miscellaneous Provisions) Act 2008

### 23A Displacement provision

The declaration of a provision of Part 9 of this Act as a Corporations legislation displacement provision for the purposes of section 5G of the Corporations Act extends to a provision of that Part as amended by the *Statute Law (Miscellaneous Provisions) Act 2008*.

## Part 4 Provisions consequent on enactment of Property, Stock and Business Agents Amendment Act 2013

### 24 Definition

In this Part—

**2013 amending Act** means the *Property, Stock and Business Agents Amendment Act 2013*.

### 25 Recovery of commission and expenses

The amendments made to section 55 by the 2013 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) An amendment made by the 2013 amending Act to the *Unclaimed Money Act 1995* extends to money held in a trust account immediately before the commencement of the amendment, 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 the repeal of that Division.
- (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 the commencement of that section.
- (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—
  - (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.

## **Part 5 Provisions consequent on enactment of [Property, Stock and Business Agents Amendment \(Underquoting Prohibition\) Act 2015](#)**

### **27 Definitions**

In this Part—

**2015 amending Act** means the [Property, Stock and Business Agents Amendment \(Underquoting Prohibition\) Act 2015](#).

**existing agency agreement** means an agency agreement for the sale of residential property entered into before the commencement of Schedule 1 [2] to the 2015 amending Act.

### **28 Continuation of existing Division**

Except as provided by clause 29, Division 3 of Part 5 of the Act (as in force immediately before the commencement of Schedule 1 [2] to the 2015 amending Act) continues to apply in relation to any act, matter or thing done in accordance with an existing agency agreement.

### **29 Estimated selling price in existing agency agreements for the sale of residential property**

- (1) Sections 73 and 73A (as substituted and inserted, respectively, by the 2015 amending Act) extend to any act, matter or thing done after the commencement of those sections in connection with the sale of a residential property in accordance with an existing agency agreement.
- (2) An estimate of the likely selling price or price range of residential property, however described, specified in an existing agency agreement is, for the purposes of the application of those sections by subclause (1), taken to be an estimated selling price for the property.
- (3) A real estate agent may, in accordance with section 72A (as inserted by the 2015 amending Act), revise an amount that is taken to be an estimated selling price.

## **Part 6 Provisions consequent on enactment of [Property, Stock and](#)**

## Business Agents Amendment (Property Industry Reform) Act 2018

### 30 Definition

In this Part—

**amending Act** means the *Property, Stock and Business Agents Amendment (Property Industry Reform) Act 2018*.

### 31 Recovery proceedings for services performed

Section 8 (2), as in force immediately before its substitution by the amending Act, continues to apply in respect of proceedings in relation to services to which that subsection relates that were performed before that substitution.

### 32 Existing licences and certificates of registration—consequences of renaming certain certificates of registration

(1) On the substitution of section 17 (1) by the amending Act—

- (a) a certificate of registration as a real estate salesperson is taken to be a certificate of registration as an assistant real estate agent, and
- (b) a certificate of registration as a stock and station salesperson is taken to be a certificate of registration as an assistant stock and station agent, and
- (c) a certificate of registration as a registered manager is taken to be a certificate of registration as an assistant strata managing agent.

(2) Nothing in this clause affects any condition to which a certificate of registration is subject on that substitution or the duration for which any such certificate remains in force.

### 33 Existing licences and certificates of registration—consequences of merger of business agents, on-site residential property managers and real estate agents into single class of real estate agents

(1) On the substitution of section 17 (1) by the amending Act—

- (a) the holder of a business agent's licence is taken to hold a real estate agent's class 2 licence that is subject to a condition that the holder exercise no real estate agent functions other than business agent functions, and
- (b) the holder of an on-site residential property manager's licence is taken to hold a real estate agent's class 2 licence that is subject to a condition that the holder exercise no real estate agent functions other than on-site residential property manager functions, and
- (c) the holder of a real estate agent's licence is taken to hold a real estate agent's

class 2 licence that is subject to a condition that the holder exercise no real estate agent functions other than real estate sale or leasing functions or on-site residential property manager functions, and

- (d) the holder of a certificate of registration as a business salesperson is taken to hold a certificate of registration as an assistant real estate agent that is subject to a condition that the holder exercise no real estate agent functions other than business agent functions, and
- (e) the holder of a certificate of registration that is taken (because of clause 32 (1) (a)) to be a certificate of registration as an assistant real estate agent is taken to hold that certificate subject to a condition that the holder exercise no real estate agent functions other than real estate sale or leasing functions or on-site residential property manager functions, and
- (f) the holder of a certificate of registration as a registered manager who is employed by the holder of an on-site residential property manager's licence is taken to hold a certificate of registration as an assistant real estate agent that is subject to a condition that the holder exercise no real estate agent functions other than on-site residential property manager functions.

- (2) If a person holds more than 1 licence or certificate of registration, only the licence or certificate of registration referred to in this clause is affected by any condition imposed by this clause.
- (3) The Secretary may, by notice in writing to the holder of a licence or certificate of registration, remove or modify a condition imposed by this clause in order to permit the person to exercise more real estate agent functions but only if the Secretary is satisfied the person is eligible and qualified to exercise those functions.
- (4) The Secretary may, by notice in writing to a person who, because of this clause, holds more than 1 real estate agent's licence or certificate of registration as an assistant real estate agent, merge those licences or certificates into a single licence or certificate.
- (5) Nothing in this clause prevents a person from exercising a function that the person was lawfully authorised to exercise immediately before the commencement of this clause.

#### **34 Requirement for audit**

Section 111 (1) (b), as substituted by the amending Act, applies only to an auditor's report completed after that amendment.

#### **35 Suspension of licence or certificate of registration**

Section 196 (3) as substituted by the amending Act extends to permit the suspension of a

licence or certificate of registration for more than 60 days even if the grounds for that suspension occurred before that substitution.

## **Part 7 Provisions consequent on enactment of [Fair Trading Legislation Amendment \(Reform\) Act 2018](#)**

### **36 Definitions**

In this Part—

**amending Act** means the [Fair Trading Legislation Amendment \(Reform\) Act 2018](#).

**commencement day** means the day on which Schedule 2.12 to the amending Act commences.

### **37 Existing certificates of registration**

- (1) Subject to subclause (3), section 26A does not affect the term of a certificate of registration granted under this Act and in force immediately before the commencement day (an **existing certificate**).
- (2) Despite section 26B(2), an application for the renewal of an existing certificate may be made within 6 weeks before the certificate expires and, if renewed, the certificate is no longer an existing certificate for the purposes of this clause.
- (3) A certificate of registration as an assistant stock and station agent subject to a condition limiting the holder to activities relating to livestock that was in force immediately before the commencement day is taken to be a licence granted under this Act for the purposes of sections 25, 25A and 26(6) (as inserted by the amending Act) only.
- (4) Subclause (3) ceases to apply to a certificate of registration if the certificate is cancelled, surrendered or not restored following its expiry.

## **Schedule 2 (Repealed)**