

Property, Stock and Business Agents Bill 2002

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The object of this Bill is to repeal and re-enact the *Property, Stock and Business Agents Act 1941* with the following modifications:

- (a) the issue of licences under the proposed Act will be on the basis of entry-level competence, good character and continuing professional development,
- (b) there will be provision for requiring licence holders to take out professional indemnity insurance and to undertake continuing professional development,
- (c) licences will be renewable annually,
- (d) caretaker managers will be required to be licensed as on-site residential property managers,
- (e) provisions for the issue of certificates of registration for industry employees will parallel the new licensing provisions,
- (f) the Director-General of the Department of Fair Trading will be able to grant exemptions from the requirement that there be a licensee in charge at each place of business under a licence,
- (g) the requirement that at least 50% of the directors of a corporate licensee must be licensed for the business conducted by the corporation is replaced with a requirement that at least one of the directors must be appropriately licensed,
- (h) obligations are placed on a licensee and the licensee in charge at a place of business to properly supervise the business carried on under a licence,
- (i) simplified and modernised disciplinary provisions are introduced, including provision for show cause proceedings, power to suspend, appointment of a manager of a licensee's business, and the keeping of a register of disciplinary action,
- (j) procedures for the taking of action in relation to general trust account deficiencies are simplified,
- (k) powers of inspection and enforcement are enhanced, and broadened to cover unlicensed trading,
- (l) provision is made for a register of bidders at auctions of residential property and rural land and for limiting vendor bids to 1 bid,
- (m) misleading advertisements and statements as to the estimated selling price of residential property are prohibited,
- (n) all benefits received by a licensee will be required to be disclosed in the relevant agency agreement,
- (o) provision is made for the disclosure of information to the client by a real estate agent who provides financial or investment advice,
- (p) the circumstances in which a licensee is required to declare a beneficial interest in a property transaction are clarified,
- (q) provision is made for the prescription by regulation of standard form agency agreements, the introduction of a cooling-off period for agency agreements, and requiring approved information to be provided to consumers prior to entering into an agency agreement,
- (r) the prohibition against recovery of commission under an agency agreement when a copy of the agreement is not served on the consumer in the required time is modified to allow a court to permit recovery of commission in some cases,
- (s) provisions for the payment of compensation out of a Compensation Fund in the event of defalcation by a licensee are extended to apply to transactions where the consumer reasonably believed he or she was dealing with a licensee,
- (t) penalty levels for offences are revised,

(u) the language of the proposed Act is modernised and simplified, redundant provisions are removed and various changes of a minor or statute law revision nature are made.

The Bill also contains savings and transitional provisions and makes consequential amendments to various Acts.

Outline of provisions

Part 1 Preliminary

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

Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

Clause 3 defines certain words and expressions used in the proposed Act.

Clause 4 provides for certain additional activities to constitute activities engaged in by agents in the course of carrying on business.

Clause 5 exempts certain persons from the requirement to hold a licence under the proposed Act.

Clause 6 provides that notes in the proposed Act are explanatory only and do not form part of the proposed Act.

Part 2 Licences and certificates of registration

Division 1 Requirement for licence or certificate of registration

Clause 7 specifies the kinds of licences and certificates of registration that may be granted under the proposed Act.

Clause 8 provides that a natural person must not, without a relevant licence, carry on the business of (or advertise, notify or state that the person 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, or
- (b) a stock and station agent, or
- (c) a business agent, or
- (d) a strata management agent or community managing agent, or
- (e) an on-site residential property manager.

The clause also provides that a natural person 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 person in that capacity unless the person was the holder of a relevant licence.

Clause 9 provides that 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 or is willing to act as or carry on the business of) an agent unless the corporation holds a corporation licence.

The clause also provides that 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.

Clause 10 provides that 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 a real estate salesperson, stock and station salesperson, business salesperson or registered manager, or
- (b) represent that the person is a real estate salesperson, stock and station salesperson, business salesperson or registered manager, or
- (c) act as, or exercise any of the functions of, a real estate salesperson, stock and station salesperson, business salesperson or registered manager.

Clause 11 provides that the holder of a certificate of registration must not act as, or exercise any of the functions of, a real estate salesperson, stock and station salesperson, business salesperson or registered manager unless the person is employed and supervised by the holder of a licence under the proposed Act.

Clause 12 provides that a licensee or registered person must, if requested to do so, produce his or her licence or certificate of registration to an authorised person and allow the authorised person to inspect the licence or certificate.

Clause 13 provides that the holder of a licence or certificate of registration must not let out, hire

or lend the licence or certificate to any other person.

Division 2 Eligibility, qualifications and disqualification

Clause 14 specifies the matters of which the Director-General must be satisfied for a natural person or corporation to be eligible to hold a licence or certificate of registration.

Clause 15 specifies that the qualifications required for the issue of a licence or certificate of registration are the qualifications approved by the Minister from time to time by order published in the Gazette.

The Minister's power to approve qualifications includes, but is not limited to, the power to approve qualifications by reference to the completion of a course of study, the completion of a period of training in a particular activity, the attainment of a standard of competency in a particular activity and the satisfaction of professional development requirements.

Clause 16 specifies the grounds on which a person is disqualified from holding a licence or certificate of registration.

Division 3 Application and issue procedure

Clause 17 sets out the procedure for applying for a licence or certificate of registration. An application is to be made to the Director-General in a form approved by the Director-General.

Clause 18 provides that the Director-General may make inquiries in relation to an application.

Clause 19 provides that the Director-General must grant or refuse an application and cause notice of the decision to be given to the applicant.

Clause 20 provides that a licence or certificate of registration may be granted subject to conditions, including the following conditions:

(a) a condition prohibiting the holder of a licence or certificate of registration from exercising certain functions other than as an employee of a licensee,

(b) a condition requiring the holder of a licence or certificate of registration to undertake or complete specified study, education or training.

Clause 21 provides that a real estate agents licence and a stock and station agents licence is subject to a condition that prohibits the licensee from acting as an auctioneer unless accredited as an auctioneer by the Director-General.

Clause 22 provides that the regulations may require a licensee to be insured under a policy of professional indemnity insurance. It is a condition of a licence that any such regulations are complied with.

Clause 23 specifies special conditions in respect of an on-site residential property manager's licence or certificate of registration of a registered on-site residential property manager.

Clause 24 provides that licences and certificates of registration are to be in the form, and specify the information, determined by the Director-General.

Clause 25 provides that a licence or certificate of registration has effect for 1 year from the date on which it is granted, or a later date specified.

Clause 26 specifies the procedure for the reissue or restoration of a licence or certificate of registration.

Clause 27 provides that a person may apply to the Administrative Decisions Tribunal for a review of a decision by the Director-General to refuse to grant a licence or certificate of registration to the person, or to impose a condition on the person's licence or certificate.

Part 3 General conduct of licensees and registered persons

Division 1 Place and name of business

Clause 28 provides that a licensee must have a registered office within New South Wales (with an exception that allows a licensee who carries on business in another State to have the licensee's registered office in that other State within 50 kilometres of New South Wales).

Clause 29 provides that a licensee must display the licensee's name and description as a licensee outside the licensee's registered office and any other place at which the licensee's business is carried on.

Clause 30 provides that a licensee may carry out business, or advertise or hold out that the licensee carries on business as a licensee, only under the licensee's name (and the name of each other person, if any, with whom the licensee is carrying on business) or a registered business name approved by the Director-General.

Division 2 Business practices and supervision

Clause 31 provides that an individual who carries on business under a licence at more than one place of business, or a corporation that holds a corporation licence, must employ at each place of business as the person in charge, a person who is the holder of a relevant licence.

Clause 32 provides that a licensee must properly supervise the business carried on by the licensee. A similar obligation is placed on a licensee employed by another licensee as the person in charge of business at a place.

The requirement to properly supervise the conduct of the business includes a requirement to properly supervise employees engaged in the business, to establish procedures designed to ensure that the provisions of the proposed Act (and any other laws relevant to the conduct of that business) are complied with and to monitor compliance with the procedures.

The Director-General may issue guidelines as to what constitutes proper supervision of the business of a licensee.

Clause 33 provides that a licensee must not enter into an arrangement with an unlicensed person 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.

Clause 34 provides that any agreement between licensees to share any commission, fee, gain or reward (except an agreement relating to commercial land) must be in writing, signed by the licensees and contain the terms, if any, prescribed by the regulations.

Clause 35 provides that a licensee who enters into a franchising agreement in connection with the conduct of the licensee's business as a licensee must give notice of the agreement to the Director-General.

Clause 36 provides that a licensee cannot commence an action or other proceedings for the recovery of remuneration or reimbursement of expenses until 28 days after a statement of claim has been served on the person to be charged with the remuneration or expenses. The clause also provides for the determination of disputes involving remuneration or reimbursement.

Clause 37 provides that regulations may prescribe rules of conduct to be observed in the course of the carrying on of business under a licence.

Clause 38 provides that the Director-General may accept a written undertaking from the holder of a licence or a certificate of registration as to the manner in which the holder will exercise functions under the licence or certificate.

Clause 39 imposes an obligation of a licensee to notify the Director-General of any failure to account by the licensee.

Clause 40 requires an industry body to give notice of any failure to account by a licensee of which it becomes aware.

Division 3 Employees

Clause 41 provides that a licensee is liable, in tort and contract, for anything done or not done, by an employee within the scope of the employee's authority or for the benefit, or purported or intended benefit, of the licensee or the licensee's business.

Clause 42 specifies the records a licensee must keep in respect of employees.

Clause 43 provides that a licensee must not employ certain specified persons in any capacity in connection with the carrying on of the business conducted by the licensee.

Clause 44 imposes a duty on a licensee to notify the Director-General within 7 days of becoming aware that a person employed by the licensee has become a disqualified person.

Clause 45 imposes a duty on an employee of a licensee to notify the licensee within 7 days if the employee becomes a disqualified person.

Division 4 Conflicts of interest

Clause 46 provides that 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.

Clause 47 requires a real estate agent or real estate sales person acting for the buyer or seller of land to disclose various matters to the client and a prospective buyer when referring the client or prospective buyer for professional services in connection with the sale or purchase.

Clause 48 provides that a licensee cannot act on behalf of both the buyer and seller of land at

the same time.

Clause 49 provides that a real estate agent who is retained by a client as an agent for the sale of a property, or a real estate salesperson employed by the agent, must not obtain a beneficial interest in the property.

Division 5 Advertisements and representations

Clause 50 provides that a licensee must not publish an advertisement relating to or in connection with the licensee's business unless the advertisement includes specified information relating to the licensee's name or business name.

Clause 51 provides that a licensee must not publish, or cause to be published, any statement that is intended, or apparently intended, by the licensee to promote the sale or lease of any property if the statement is false, misleading or deceptive.

Clause 52 provides that a person regulated under the proposed Act who, by any false, misleading or deceptive statement, representation or promise, induces another person to enter into any contract or arrangement is guilty of an offence.

Clause 53 provides that an agreement for the sale and purchase of land, or any interest in land, cannot operate to prevent the purchaser from claiming or being awarded damages or other relief for misrepresentation or concealment.

Part 4 Agency agreements

Division 1 Requirements for agency agreements

Clause 54 defines certain terms used in the proposed Division.

Clause 55 provides that 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 the services were performed pursuant to a written agreement, the agreement complies with any applicable requirements of the regulations and a copy of the agreement was served by the licensee on that person within 48 hours after the agreement was signed.

The regulations may make provision for or with respect to the form, and the terms, conditions and other provisions, of such agreements and may prescribe standard forms for such agreements.

Clause 56 provides that a real estate agent must not enter into an agreement with a person for the sale of residential property unless the agent has provided the person with a copy of the relevant guide approved by the Director-General.

Clause 57 provides that a real estate agent acting on real estate transaction (other than a commercial transaction) is not entitled to any expenses from a person for or in connection with services performed by the agent in the capacity of licensee unless the licensee has disclosed all rebates, discounts or commissions that the licensee will or may receive in respect of those expenses.

Clause 58 provides that a licensee must not enter into an agreement with a person in respect of the sale of residential property or rural land if the property or land is or is to be the subject of a sole agency agreement or exclusive agency agreement with another licensee.

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

Clause 59 provides that there is to be a cooling-off period for every agency agreement in respect of the sale of residential property or rural land. 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.

Clause 60 provides that a client can rescind an agency agreement by serving a notice of rescission on the agent during the cooling-off period and sets out the requirement for a notice of rescission to be effective.

Clause 61 provides for the effect of a rescission of an agency agreement.

Clause 62 provides that a provision of an agreement or arrangement is void to the extent that it would have the effect of excluding, modifying or restricting the operation of the proposed Division.

Part 5 Residential property and rural land sales

Division 1 Contract for sale of residential property

Clause 63 provides that a real estate agent must not offer residential property for sale unless the required documents are available for inspection at the real estate agent's registered office by a prospective purchaser or a prospective purchaser's agent. The required documents include a copy of the proposed contract for the sale of the property and the documents required by section 52A of the *Conveyancing Act 1919* to be attached to the contract before signature by the purchaser.

Clause 64 provides that a real estate agent may insert the purchaser's details in a contract for the sale of residential property, insert in or delete from a contract for the sale of residential property any description of furnishings or chattels to be included in the sale or participate in the exchange or making of contracts for the sale of residential property.

Clause 65 sets out the procedure following the rescission of a contract for the sale of residential property, or an option for the purchase of residential property.

Division 2 Bidding at auction of residential property or rural land

Clause 66 provides that a sale by auction of residential property or rural land must include in the conditions of sale the right by the seller, or by any person acting on behalf of the seller or auctioneer, to make 1 bid. The seller, or any person acting on behalf of the seller or auctioneer, must not make more than 1 bid.

Clause 67 provides that the auctioneer at a sale by auction of residential property or rural land must not take a bid from a person unless the person's relevant details have been entered in a Bidders Record and the person is identified at the auction by the person displaying an identifying number.

Clause 68 imposes an obligation on a real estate agent engaged to act in respect of the sale of residential property or rural land by auction to make a record (the *Bidders Record*) of the persons who will be entitled to bid at the auction.

Clause 69 provides that a real estate agent must not enter a person's name and address in a Bidders Record unless those details are established by proof of identity of the person or, if the person is acting on behalf of another person, a letter of authority to act on behalf of that person specifying that person's name and address.

Clause 70 provides that a Bidders Record is confidential.

Clause 71 provides that the Director-General may approve a consumer education guide for prospective bidders at an auction of residential property or rural land.

Division 3 Representations as to selling price of residential property

Clause 72 provides that a real estate agent, or an agent's employee, must not make a false representation to a seller or prospective seller of residential property as to the agent's or employee's true estimate of the selling price of the property.

Clause 73 creates offences in relation to a real estate agent, or an agent's employee, making false representations to a prospective buyer of residential property, including falsely understating the estimated selling price of the property.

Clause 74 provides that the Director-General may require a real estate agent to substantiate any estimate of the selling price of residential property made by the agent.

Clause 75 provides that the proposed Division extends to an estimated price range in the same way as it applies to estimated price.

Clause 76 provides a definition of *estimate* as used in the proposed Division.

Part 6 Auctions—general

Clause 77 allows the regulations to prescribe conditions that a sale by auction of land or livestock is to be subject to, and require the notification at a sale by auction of any conditions to which the sale is subject.

Clause 78 prohibits the use of collusive practices at auction sales of land or livestock.

Clause 79 provides that an auctioneer, or an auctioneer's employee, 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.

Clause 80 provides that 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 an auction conducted by the auctioneer.

Clause 81 provides that 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 a specified number of bids.

Clause 82 provides that any provision in, or applying to, an agreement for the sale of property by auction that purports to exclude, modify or restrict (otherwise than in accordance with the proposed Act 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.

Clause 83 provides that the successful bidder at an auction of land or livestock must supply to the auctioneer, or an employee of the auctioneer, the bidder's name or, if bidding on behalf of another person, the name of the person on whose behalf he or she bid.

Clause 84 provides that an auctioneer must not, at an auction for the sale of livestock, sell any lot for a price lower than any price bid in relation to the sale of that lot.

Part 7 Trust accounts

Division 1 Preliminary

Clause 85 defines certain terms used in the proposed Part.

Division 2 Payment of trust money into trust account

Clause 86 provides that money received for or on behalf of any person by a licensee:

- (a) is to be held exclusively for that person, and
- (b) is to be paid to the person or disbursed as the person directs, and
- (c) until paid or disbursed is to be kept in a trust account with an authorised deposit-taking institution in New South Wales and approved by the Director-General.

Clause 87 provides that the Director-General may approve an authorised deposit-taking institution for the purposes of the proposed Part.

Clause 88 provides that trust money is not available for the payment of the licensee's debts.

Clause 89 provides that a licensee must notify the Director-General of certain particulars within 5 days after becoming aware that a trust account of the licensee is overdrawn.

Clause 90 provides that interest earned on trust accounts is to be paid to the Statutory Interest Account.

Division 3 Responsibilities of authorised deposit-taking financial institutions

Clause 91 provides that authorised deposit-taking institutions must notify the Director-General of certain matters with respect to trust accounts kept with the institution, including the number of trust accounts opened with the institution during a month and the names of the licensees who opened the accounts.

Clause 92 provides that an authorised deposit-taking institution must, within 5 business days of becoming aware that a trust account kept with it under the proposed Part is overdrawn, notify the Director-General.

Clause 93 provides that an authorised deposit-taking institution must, within 5 days of becoming aware that a cheque presented on a trust account kept with it under the proposed Part has been dishonoured, inform the Director-General.

Clause 94 provides that an authorised deposit-taking institution must, on an annual basis, provide to the Director-General a certificate given by a registered company auditor certifying that the institution has complied with the requirements of the proposed Part in relation to trust accounts and the total amount of interest that the institution paid to the Director-General in respect of those trust accounts for payment to the Statutory Interest Account.

Clause 95 provides an authorised deposit-taking institution with a limited protection from liability in relation to any transaction concerning an account of a licensee kept with the institution or with another financial institution.

Division 4 Unclaimed trust money

Clause 96 provides that a licensee who has held trust account money for more than 2 years must give the Director-General a statement showing particulars of the money held, each person for whom or on whose behalf the money is held and the address of each of those persons last known to the licensee.

Clause 97 provides that a former licensee, or the personal representative of a deceased licensee, who holds money in a trust account kept under the proposed Act must give the Director-General a statement giving particulars of the money held in the trust account.

Clause 98 provides a procedure for the Director-General to dispose of unclaimed money held in licensees' trust accounts. If trust money is not claimed, the money is to be paid into the Compensation Fund and then, if still unclaimed, into the Consolidated Fund.

Clause 99 provides that if an application for the payment to which a person is entitled is made while the money is held in the Compensation Fund or Consolidated Fund, the money must be paid to the person.

Division 5 Information about trust accounts or transactions

Clause 100 provides that the Director-General may require a licensee to give the Director-General a written statement setting out particulars in relation to the licensee's trust accounts, trust money paid to the licensee or transactions by or with the licensee as licensee.

Clause 101 provides that a person directly concerned in a transaction by or with a licensee as licensee may ask the licensee to give the person an itemised account of the transaction.

Clause 102 creates an offence for a licensee who fails, without reasonable excuse, to comply with a requirement under the proposed Division.

Part 8 Records

Division 1 Keeping and inspection of records

Clause 103 defines the term *licensee's records*.

Clause 104 specifies the records a licensee must make and the requirements for keeping the records.

Clause 105 provides for inspection of a licensee's records by an authorised officer.

Clause 106 provides for inspection by an authorised officer of the records of 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.

Clause 107 provides an authorised officer with power to require a licensee or another person who has possession, custody or control of a licensee's records to produce specified licensee's records.

Clause 108 provides an authorised officer with power to take possession of a record produced under the proposed Part if the authorised officer considers it necessary to do so for the purpose of obtaining evidence or protecting evidence from destruction.

Clause 109 imposes additional requirements in relation to the records to be kept by a strata managing agent or community managing agent.

Clause 110 creates offences in relation to a person delaying or obstructing an authorised officer exercising the officer's functions under the proposed Division or failing to comply with a requirement under the proposed Division.

Division 2 Audit of licensee's records

Clause 111 requires a licensee, former licensee or the personal representative of a licensee, within 3 months after the end of the audit period, to have records and documents relating to money held during that period in a trust account audited by an auditor. The auditor's report on the audit must be lodged with the Director-General.

Clause 112 provides that the audit period is the year ending on 30 June, or another period fixed by the Director-General.

Clause 113 provides that if a licensee did not in an audit period receive or hold money for or on behalf of another person, the licensee must make and lodge with the Director-General a statutory declaration to that effect.

Clause 114 specifies the obligations of partners in relation to the audit of records and documents of the partnership.

Clause 115 specifies the qualifications a person must have to act as an auditor for the purposes of the proposed Division.

Clause 116 specifies the duties of an auditor.

Division 3 Freezing of accounts

Clause 117 defines certain terms used in the proposed Division.

Clause 118 provides that the Director-General may give a direction under the proposed Division if it appears to the Director-General that a licensee, the person in charge of a licensee's business at a place or a licensee's employee has, or may have, stolen, misappropriated or misapplied trust money. The Director-General's direction may direct that an amount of trust money be paid to the Director-General, that an amount not be drawn from an account or that an account may be operated only under specified conditions.

Clause 119 provides that a financial institution given a direction under the proposed Division must not pay a cheque or other instrument drawn on the account concerned unless it is also signed by the Director-General (or a person authorised by the Director-General) or give effect to another transaction on the account that is not authorised because of the direction.

Clause 120 provides that after a direction under the proposed 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 been signed by the Director-General, or a person authorised by the Director-General.

Clause 121 provides that the Director-General (or a person authorised by the Director-General) may operate an account that is the subject of a direction under the proposed Division if the holder of the account refuses to operate the account.

Clause 122 provides that the Director-General may withdraw a direction under the proposed Division.

Part 9 Management and receivership

Division 1 Preliminary

Clause 123 defines certain terms used in the proposed Part.

Clause 124 specifies what is meant by a reference in the proposed Part to a licensee's associate.

Clause 125 specifies what is meant by a reference in the proposed Part to a **failure to account**.

Division 2 Management

Clause 126 provides that the Director-General may appoint a manager for a licensee's business in certain circumstances if the Director-General is of the opinion that it is necessary to make the appointment in order to protect the interests of other persons.

Clause 127 specifies qualifications necessary for a person to be eligible for appointment as the manager of a licensee's business.

Clause 128 specifies the powers of a person appointed as the manager of a licensee's business.

Clause 129 provides that the manager of a licensee's business may continue to exercise his or her functions even if a receiver is appointed in respect of the licensee's property.

Clause 130 provides that an act of 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.

Clause 131 provides the Director-General may reimburse a manager for any damages and costs recovered by the manager, or the manager's employee or agent, for anything done or omitted in good faith and in the purported exercise of a function under the proposed Act.

Clause 132 provides that the expenses of the management of a licensee's business that have not otherwise been paid to the manager out of the receipts of the business are to be paid to the manager by the Director-General. An amount paid under this clause is recoverable by the Director-General as a debt owed by the relevant licensee.

Clause 133 provides that the manager of a licensee's business must report to the Director-General on the management of the business.

Clause 134 provides that 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.

Clause 135 provides that the regulations may make provision with respect to the accounts to be kept by the manager of a licensee's business and the purposes for which money in any such account may be expended.

Clause 136 provides that when a licensee's business ceases to be under management any money held by the manager in connection with the business becomes the property of the

licensee.

Clause 137 creates an offence for a person hindering, obstructing or delaying a manager in the exercise of his or her functions.

Division 3 Receivership

Clause 138 provides that the Supreme Court may, on the application of the Director-General, appoint a receiver for all or any of the property of a licensee. An application may be made by the Director-General only in specified circumstances.

Clause 139 provides that 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 receiver of all or any of the property.

Clause 140 provides that before commencing to hear an application for the appointment of a receiver, the Supreme Court may order from the Court any person who is not necessary to the hearing.

Clause 141 provides that on the appointment of a receiver the Director-General must cause a copy of the order of appointment to be served on the relevant licensee or relevant associate and any other person on whom the Supreme Court has directed a copy be served.

Clause 142 provides that the receiver may take possession of receivable property of the relevant licensee or relevant associate.

Clause 143 provides that 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.

Clause 144 provides that 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 prohibiting operations on the account by any person other than the receiver or a person authorised by the receiver.

Clause 145 provides that a person must not, with intent to defeat the purposes of the proposed Division, improperly deal with receivable property, or property that is likely to become receivable property, or operate an account at an authorised deposit-taking institution.

Clause 146 provides that if receivable property has at any time been taken by, or paid or transferred to, a person unlawfully or in breach of trust in certain circumstances the receiver may recover from the person, as a debt, the amount taken, paid or transferred, the amount of any inadequate consideration for the taking, payment or transfer, the amount of any debt resulting from the taking, payment or transfer, or the value of the property taken or transferred, as appropriate.

Clause 147 provides that a certificate given by the receiver, or a person authorised by the Director-General, in relation to certain matters, such as the receipt of property by the licensee or an associate, is admissible in any proceedings taken by a receiver and is evidence of the matters specified in the certificate.

Clause 148 provides that proceedings taken in the name of the receiver in relation to any property may be so taken as if the receiver were beneficially entitled to the property.

Clause 149 provides that 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.

Clause 150 specifies other powers of a receiver.

Clause 151 provides that a receiver may give notice to the relevant licensee or associate, or another 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 the longer period stated in the notice. A receiver may disregard a claim made by a person given a notice if the claim is not made in accordance with the notice.

Clause 152 specifies the procedure to be followed if a licensee claims a lien for remuneration on receivable property.

Clause 153 provides that the Supreme Court may, on the application of a receiver, make such orders as it thinks fit for the examination by the receiver of a licensee or other person in relation to receivable property.

Clause 154 specifies the procedure to be followed in respect of receivable property under the control of a receiver that has not been dealt with in accordance with the proposed Act.

Clause 155 provides that a receiver may invest receivable property in any manner in which trustees are authorised by the *Trustee Act 1925* to invest trust funds.

Clause 156 provides that the Director-General may reimburse a receiver for any damages or costs recovered against the receiver, or the receiver's employee or agent, for anything done or omitted in good faith and in the purported exercise of the receiver's functions.

Clause 157 provides that the Director-General may pay the expenses of the receivership that have not otherwise been paid to the receiver. An amount paid may be recovered by the Director-General from the relevant licensee as a debt.

Clause 158 provides that, on the application of the relevant licensee, the Supreme Court may, if satisfied the expenses of the receivership are excessive, order the taking of accounts between the Director-General and the receiver.

Clause 159 provides that receivable property of a relevant licensee or associate is not liable to be taken in execution of any judgment, order or other process of any court or tribunal.

Clause 160 provides that a receiver, a licensee or a licensee's associate who holds receivable property, or a person who claims receivable property, may apply to the Supreme Court for directions as to the performance of the receiver's functions. The Supreme Court may give such directions as it thinks fit.

Clause 161 provides that the Supreme Court may give general directions to a receiver for the exercise of the receiver's functions.

Clause 162 provides that a receiver must, at such times and in respect of such period as the Supreme Court directs, submit reports on the receivership to the Supreme Court and the Director-General.

Clause 163 provides for the termination of the appointment of a receiver.

Clause 164 creates an offence for a person hindering, obstructing or delaying a receiver in the exercise of his or her functions.

Part 10 Compensation Fund

Division 1 Establishment and management

Clause 165 provides for the establishment by the Director-General of a Property Services Compensation Fund.

Clause 166 provides that certain amounts must be paid into the Compensation Fund.

Clause 167 specifies the purposes for which money in the Compensation Fund is to be applied.

Division 2 Contributions and levies

Clause 168 provides that an applicant for a licence must pay a contribution to the Compensation Fund at the time the application is made. The amount of the contribution is the amount prescribed by the regulations.

Clause 169 provides that if the Director-General is of the opinion that the Compensation Fund is likely to be insufficient to meet the liabilities to which it is subject, the Director-General may, with the approval of the Minister, impose a levy on licensees.

Division 3 Claims

Clause 170 defines certain terms used in the proposed Division.

Clause 171 defines what is meant by failure to account.

Clause 172 specifies that the proposed 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 is entrusted in the course of a licensee's business as a licensee.

Clause 173 specifies the procedure for making a claim against the Compensation Fund.

Clause 174 provides that a person cannot, without the Director-General's leave, commence any proceedings in relation to the Compensation Fund unless the person has made a claim and the Director-General has disallowed the person's claim. The clause specifies other matters relevant to legal proceedings against the Compensation Fund.

Clause 175 specifies the limits on an amount that is recoverable by a person from the Compensation Fund.

Clause 176 provides that the Director-General may cause to be published a notice relating to a defaulting licensee and fixing a date within which claims against the Compensation Fund must be made.

Clause 177 provides that on payment out of the Compensation Fund in settlement in whole or in part of a claim, 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, or any other person.

Clause 178 provides for the recovery, by the Director-General, from the director of a corporation of a payment out of the Compensation Fund for the consequence of an act or omission of the corporation.

Clause 179 provides that the Director-General may require the production of documents necessary to support any claim under the proposed Act, or available for that purpose, or for the purpose of exercising functions in respect of a defaulting licensee.

Clause 180 provides that a claim against the Compensation Fund can only be satisfied to the extent of money in the Compensation Fund.

Division 4 Examination of accounts of licensees and former licensees

Clause 181 defines certain terms used in the proposed Division.

Clause 182 provides that the Director-General may appoint an appropriately qualified person as an accounts examiner to examine the accounts kept by the licensee in connection with the licensee's business.

Clause 183 provides that an accounts examiner is to give the Director-General a confidential report about the accounts concerned, indicating whether there is any irregularity, or alleged or suspected irregularity, in the accounts or another matter that in the examiner's opinion should be further investigated.

Clause 184 sets out the powers of an accounts examiner.

Clause 185 provides that an accounts examiner must not communicate to any person (other than a partner, employer, employee or assistant) the fact that the examiner has been appointed or any matter that comes to the examiner's knowledge in the course of the examination, other than in preparing or furnishing the report to the Director-General or in other specified circumstances.

Clause 186 extends the operation of the proposed Division to former licensees.

Part 11 Property Services Statutory Interest Account

Clause 187 provides that a Property Services Statutory Interest Account is to be established and maintained in the accounting records of the Department.

Clause 188 specifies the money that is payable to the Statutory Interest Account.

Clause 189 specifies how money in the Statutory Interest Account is to be applied by the Director-General, with the consent of the Minister.

Clause 190 specifies that certain other amounts are also payable from the Statutory Interest Account.

Part 12 Complaints and disciplinary action

Clause 191 specifies the grounds on which disciplinary action may be taken against a person who is or was the holder of a licence or certificate of registration.

Clause 192 specifies the disciplinary action that the Director-General may take against a person.

Clause 193 provides that the Director-General may, at any stage of a matter that is the subject of consideration by the Director-General under the proposed Part, determine to take no further action.

Clause 194 provides that any person may make a complaint to the Director-General setting out matters that are alleged to constitute grounds for taking disciplinary action against a person. Action may be taken against a person whether or not a complaint has been made.

Clause 195 provides that the Director-General may serve a show cause notice on a person if the Director-General is of the opinion there is reasonable cause to believe that there are grounds for taking disciplinary action against the person.

Clause 196 provides that the Director-General may, when a show cause notice is served on a person, suspend the person's licence or certificate of registration pending a determination by

the Director-General of whether or not to take disciplinary action. The Director-General may only suspend a licence or certificate of registration 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.

Clause 197 provides the Director-General with power to conduct inquiries and make investigations in relation to the matters to which a show cause notice relates.

Clause 198 provides that if the Director-General is satisfied that there are grounds for taking disciplinary action against a person on whom a show cause notice has been served, the Director-General may take such disciplinary action against the person as the Director-General thinks is warranted.

Clause 199 provides for the recovery as a debt in a court of competent jurisdiction of a monetary penalty imposed by disciplinary action under the proposed Part.

Clause 200 provides that a person against whom disciplinary action is taken may apply to the Administrative Decisions Tribunal under the *Administrative Decisions Tribunal Act 1997* for a review of the decision on the disciplinary action or on a review of the disciplinary action.

Clause 201 provides that the Director-General 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.

Clause 202 creates an offence for a person who is disqualified under the proposed Part from being involved in the direction, management or conduct of the business of a licensee and who acts contrary to the direction.

Clause 203 provides that a person who has possession of a licence or certificate of registration that has been suspended or cancelled must give the licence or certificate to an officer of the Department within 7 days after the suspension or cancellation takes effect.

Part 13 Enforcement

Clause 204 defines the term *authorised officer*.

Clause 205 provides a power for an authorised officer to enter and inspect 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. An authorised officer's powers after entering premises are specified in the clause.

Clause 206 provides a power for an authorised officer to require a person to give information, produce records or give evidence in relation to a matter that constitutes or may constitute an offence under the proposed Act or regulations.

Clause 207 creates an offence for refusing or failing to comply with a requirement made, or to answer a question asked by, an authorised officer, or wilfully delaying, hindering, or obstructing an authorised officer.

Clause 208 provides that an authorised officer may take possession of, and retain until the completion of any proceedings, records for the purpose of obtaining evidence or protecting evidence from destruction.

Clause 209 specifies the procedure for an authorised officer to obtain a search warrant for premises.

Clause 210 provides that the Supreme Court may grant an injunction restraining a threatened or apprehended contravention, or the continuation of a contravention, of a provision of the proposed Act or regulations.

Part 14 Offences and proceedings

Division 1 Offences

Clause 211 creates offences for a licensee or registered person fraudulently converting money received by the 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 money held by the licensee or registered person as a stakeholder or in trust. Offences are also created for fraudulently omitting to account for such money and fraudulently rendering an account of such money.

Clause 212 creates an offence for a licensee or registered person who 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.

Clause 213 makes it an offence to aid or abet, induce, be concerned in or conspire in the commission of an offence under the proposed Act or the regulations.

Clause 214 provides that nothing in the proposed Division affects the provisions of the *Crimes Act 1900*.

Division 2 Proceedings

Clause 215 provides that proceedings for an offence against the proposed Act or regulations may be taken and prosecuted only by the Director-General, or a person acting with the authority of the Director-General.

Such proceedings may be dealt with summarily before a Local Court constituted by a Magistrate sitting alone or summarily before the Supreme Court in its summary jurisdiction.

Clause 216 provides that the regulations may prescribe an offence as a penalty notice offence.

Clause 217 provides that proceedings for an offence against the proposed 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.

Clause 218 makes specific provision in relation to offences by corporations.

Part 15 Administration

Clause 219 prohibits a person who obtains information in connection with the administration or execution of the proposed Act from disclosing the information except in specified circumstances.

Clause 220 requires the Director-General to maintain a Register for the purposes of the proposed Act and specifies the information to be entered and kept in that Register.

Clause 221 provides that a certificate signed by the Director-General certifying that a person is or is not or was or was not on any date or during any period the holder of a licence of a specified class or the holder of a certificate of registration is prima facie evidence of the matters certified.

Clause 222 provides that the Director-General may delegate the exercise of any of the Director-General's functions under the proposed Act to any public servant employed in the Department or any person, or class of persons, authorised by regulation.

Part 16 Miscellaneous

Clause 223 provides that the proposed Act does not limit or otherwise affect the exercise of any function under the *Fair Trading Act 1987*.

Clause 224 confers protection against personal liability for persons exercising functions under the proposed Act.

Clause 225 provides for the service of notices under the proposed Act.

Clause 226 repeals the *Property, Stock and Business Agents Act 1941* and the regulations under that Act.

Clause 227 is a formal provision giving effect to Schedule 1 (Savings and transitional provisions).

Clause 228 is a formal provision giving effect to Schedule 2 (Consequential amendments).

Clause 229 provides that a provision of Part 9 is a Corporations legislation displacement provision for the purposes of section 5G of the *Corporations Act 2001* of the Commonwealth, which will avoid inconsistencies between provisions of that Part and provisions of the Commonwealth Act.

Clause 230 provides a general regulation-making power.

Clause 231 provides that the Minister must review the proposed Act to determine whether the policy objectives of the proposed Act remain valid and whether the terms of the proposed Act remain appropriate for securing those objectives. The review must be undertaken 5 years after the proposed Act commences.

Schedules

Schedule 1 contains savings and transitional provisions consequent on the enactment of the proposed Act.

Schedule 2 contains consequential amendments to various Acts.