

Passed by both Houses



New South Wales

# Property, Stock and Business Agents Bill 2002

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

*Clerk of the Legislative Assembly.  
Legislative Assembly,  
Sydney, , 2002*



New South Wales

## **Property, Stock and Business Agents Bill 2002**

Act No , 2002

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

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

*Chairman of Committees of the Legislative Assembly.*

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Clause 1            Property, Stock and Business Agents Bill 2002

Part 1             Preliminary

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**The Legislature of New South Wales enacts:**

## **Part 1 Preliminary**

### **1 Name of Act**

This Act is the *Property, Stock and Business 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 business agent, or
- (d) a strata managing agent, or
- (e) a community managing agent, or
- (f) an on-site residential property manager.

***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** means any person (whether or not the person carries on any other business) who for reward (whether monetary or otherwise) carries on business as an agent for exercising any of the following functions:

- (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,
- (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,
- (c) any other function that is prescribed by the regulations for the purposes of this definition.

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

**business salesperson** means a person (other than the holder of a business agent's licence) who, as an employee of a business agent or a corporation that employs a business agent:

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

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

**community managing agent** means a person who is engaged or appointed, for monetary or other reward, to exercise functions of an association constituted for a scheme under the *Community Land Development Act 1989*, or any other function that is prescribed by the regulations for the purposes of this definition, but does not include:

- (a) the proprietor of a lot within the scheme, or
  - (b) the secretary or treasurer of the association, or
-

- (c) a person 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.

**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.

**Department** means the Department of Fair Trading.

**Director-General** means the Director-General of the Department.

**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.

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

**land** includes:

- (a) a lot within the meaning of the *Strata Schemes (Freehold Development) Act 1973* or the *Community Land Development Act 1989* and a leasehold interest in a lot within the meaning of the *Strata Schemes (Leasehold Development) Act 1986*, 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.

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**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** means a person (whether or not the person carries on any other business) who, for reward (whether monetary or otherwise):

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

**Note.** It is a condition of an on-site residential property manager's licence that the licensee may act as an on-site residential property manager only in respect of premises at which the licensee's principal place of residence is situated and only if the licensee owns or has a prescribed interest in that principal place of residence.

**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), carries on business as an auctioneer of land or as an agent:

- (a) for a real estate transaction, or
- (b) 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
- (c) 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
- (d) 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

- (e) for any other activity in connection with land that is prescribed by the regulations for the purposes of this definition.

but does not include a person who carries on business as an auctioneer or agent in respect of any parcel of rural land unless the regulations otherwise provide.

**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).

As noted in section 168 of the *Retirement Villages Act 1999*, a selling agent acting on the sale of residential premises in a retirement village must be licensed as a real estate agent under this Act.

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

**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 community manager** means a person (other than a community managing agent holding a strata managing agent's licence) who, as an employee of a community managing agent or a corporation that carries on the business of a community managing agent:

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

**registered manager** means a registered strata manager, registered community manager or registered on-site residential property manager.

**registered on-site residential property manager** means a person (other than the holder of an on-site residential property manager's licence or the holder of a real estate agent's licence) who, as an employee of an on-site residential property manager or a corporation that carries on the business of an on-site residential property manager:

- (a) exercises any of the functions of an on-site residential property manager, or



- (b) engages in any other activity that is prescribed by the regulations for the purposes of this definition.

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

**registered strata manager** 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.

**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.

**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 (a)–(d) of the definition of **real estate agent**, 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.
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***stock and station salesperson*** 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.

***strata managing agent*** means a person (whether or not such person carries on any other business) who, for reward (whether monetary or otherwise), exercises any function of an owners corporation within the meaning of the *Strata Schemes Management Act 1996* or any other function that is prescribed by the regulations for the purposes of this definition, not being:

- (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 executive 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 executive committee or of the owners corporation, or

- (b) a person who maintains or repairs any property for the maintenance or repair of which the owners corporation is responsible.

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

- (2) Where a person carries on business as a business agent and also carries on 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, a reference in this Act to any such person acting as, or carrying on the business of, a business agent

includes a reference to that person carrying on business as an agent for the collection of those instalments.

- (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
  - (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.

#### **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 Director-General 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 Director-General 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 from Act**

- (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 Public Trustee, the Protective Commissioner 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 *Protected Estates Act 1983*, 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) the New South Wales Department of Housing,
  - (k) the Office of Community Housing of the Department of Housing,

- (l) the Aboriginal Housing Office,
  - (m) an organisation for the time being registered with the Office of Community Housing, or 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 a legal practitioner from exercising any function that, had this Act not been enacted, the person might lawfully have exercised as a 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) This Act does not require a business agent or a business salesperson to hold a business agent's licence or a certificate of registration under this Act if:
- (a) the person holds an Australian financial services licence under the *Corporations Act*, or
  - (b) the person is an authorised representative of a financial services licensee within the meaning of Chapter 7 of the *Corporations Act*.
- (6) This Act does not require a corporation to hold a corporation licence in order to 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) a business agent if:
- (a) the corporation holds an Australian financial services licence under the *Corporations Act*, or
  - (b) the corporation is an authorised representative of a financial services licensee within the meaning of Chapter 7 of the *Corporations Act*.

## 6 Notes

Notes included in this Act do not form part of this Act.

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

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

#### **7 Kinds of licences and certificates of registration**

There are the following kinds of licences and certificates of registration under this Act:

- (a) real estate agent's licence,
- (b) stock and station agent's licence,
- (c) business agent's licence,
- (d) strata managing agent's licence,
- (e) on-site residential property manager's licence,
- (f) corporation licence,
- (g) certificate of registration as a real estate salesperson, stock and station salesperson, business salesperson or registered manager.

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

- (1) A natural person must not act as or 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, unless the person is the holder of a real estate agent's licence, or
  - (b) a stock and station agent, unless the person is the holder of a stock and station agent's licence, or
  - (c) a business agent, unless the person is the holder of a business agent's licence, or
  - (d) a strata managing agent or community managing agent, unless the person is the holder of a strata managing agent's licence, or
  - (e) an on-site residential property manager, unless the person is the holder of an on-site residential property manager's licence.

Maximum penalty: 100 penalty units.

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Division 1	Requirement for licence or certificate of registration

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- (2) 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:
- (a) as a real estate agent, unless the person 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 person 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 business agent, unless the person was the holder of a business agent's licence, or employed the holder of such a licence, at the time of performing the service, or
  - (d) as a strata managing agent or as a community managing agent, unless the person 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, or
  - (e) as an on-site residential property manager, unless the person was the holder of an on-site residential property manager's licence or a real estate agent's licence, or employed the holder of such a licence, at the time of performing the service.
- (3) This section applies to a natural person whether or not the person is a member of a partnership.
- (4) The fact that a particular activity is an activity for which more than one class of licence may be appropriate does not require the holding of more than one class 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, a person is not considered to carry on a business merely because the person is a member of a partnership that carries on that business.

**Note.** Subsection (5) makes it clear that "silent" partners are not required to be licensed.

## 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 Salespersons and managers 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 a real estate salesperson, stock and station salesperson, business salesperson or registered manager 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 a real estate salesperson, stock and station salesperson, business salesperson or registered manager in the employment of a person licensed (or required to be licensed) under this Act,
  - (c) act as or exercise any of the functions of a real estate salesperson, stock and station salesperson, business salesperson or registered manager.

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.

**11 Registered salespersons and managers required to 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 a real estate salesperson, stock and station salesperson, business salesperson or registered manager 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 a real estate salesperson, stock and station salesperson, business salesperson or registered manager unless he or she does so under the supervision of a person who:

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- (a) is the licensee in charge of the place of business at which the employee is employed, and
- (b) is the holder of a licence that allows the licensee to exercise that function without contravening this Act.

Maximum penalty: 50 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 Lending of licence or certificate of registration prohibited**

- (1) The holder of a licence or certificate of registration must not 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 licence or certificate of registration**

- (1) A natural person is eligible to hold a licence only if the Director-General is satisfied that the person:
  - (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 person 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, 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 Director-General 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) no director or executive officer (within the meaning of the *Corporations Act*) of the corporation is 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 Director-General 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 class concerned, and
  - (d) is not a disqualified person.

## **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 in the Gazette.
- (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:

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- (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.
- (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 Director-General otherwise determines in a particular case.

## 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 Director-General 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 or section 41 (Licensee not to lend licence) of the *Property, Stock and Business Agents Act 1941*, unless the Director-General has determined under subsection (2) that the offence should be ignored, or
  - (c) is an undischarged bankrupt or is a director or person concerned in the management of a corporation that is the subject of a winding up order or for which a controller or administrator has

been appointed, unless (in the case of an undischarged bankrupt) the Director-General has certified that he or she is satisfied that the person took all reasonable steps to avoid the bankruptcy, or

- (d) at any time in the 3 years preceding the application for the licence or certificate of registration, 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, unless the Director-General has certified that he or she is satisfied that the person took all reasonable steps to avoid the bankruptcy, or
- (e) at any time in the 3 years preceding the application for the licence or certificate of registration, was concerned in the management of a corporation when the corporation was the subject of a winding up order or when a controller or administrator was appointed, unless the Director-General is satisfied that the person took all reasonable steps to avoid the liquidation or administration, or
- (f) is a mentally incapacitated person, or
- (g) is disqualified from holding a licence, certificate of registration or other authority under a corresponding law 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 the *Fair Trading Act 1987*, 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

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- (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 Director-General under that Part, and the failure continues, or
  - (o) has failed to provide the Director-General with an auditor's report that the person is required to provide under this Act on the audit of the records and documents relating to any money held in a trust account kept by the person under this Act, unless the Director-General 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.
- (2) The Director-General 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.
- (3) In this section:
- corresponding law* means a law of another Australian jurisdiction that is declared by the Minister from time to time by order published in the Gazette to be a law that corresponds to this Act.

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

#### **17 Application for licence or certificate of registration**

- (1) An application for a licence or certificate of registration is to be made to the Director-General in a form approved by the Director-General.
- (2) The application is to be accompanied by:
  - (a) an application fee of an amount prescribed by the regulations, and
  - (b) in the case of an application for a licence, the contribution to the Compensation Fund required to accompany the application, and
  - (c) such information and evidence as the Director-General may request for the purposes of determining the application.
- (3) The Director-General may require further information and evidence to be given in connection with an application.

- (4) The Director-General may require the application, and any such information or evidence, to be verified by statutory declaration.
- (5) An application is not duly made until any requirement under this section is complied with.
- (6) A person who in or in connection with an application for a licence or certificate of registration provides information that is false or misleading in a material particular is guilty of an offence.

Maximum penalty: 50 penalty units.

#### **18 Consideration of applications**

The Director-General may make such inquiries as the Director-General considers necessary in relation to an application.

#### **19 Determination of applications**

- (1) After considering an application, the Director-General is to determine the application by either granting or refusing the application.
- (2) The 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).
- (3) The Director-General must cause notice of the Director-General's decision on an application (including reasons for the decision if the decision is to refuse the application) to be given to the applicant.
- (4) For the purposes only of any appeal proceedings arising in connection with an application, the Director-General is taken to have refused the application if the Director-General has not determined the application within 8 weeks after the application was duly made.

#### **20 Conditions—general**

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,

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- (c) a condition requiring a licensee or holder of a certificate of registration 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 from exercising functions under the authority of the licence or certificate of registration in relation to specified activities, or prohibiting the holder from exercising functions under the authority of the licence or certificate of registration except in relation to specified activities.

**Note.** An example of a condition under paragraph (d) is a condition that the holder of a real estate agent's licence act only as a buyer's agent.

## **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 Director-General may accredit the holder of a real estate agent's licence or stock and station agent's licence as an auctioneer if the Director-General is satisfied that the holder has such qualifications in connection with the conduct of auctions and the functions of auctioneers as the Director-General may approve from time to time by order published in the Gazette.
- (3) Without limiting the Director-General's power to approve qualifications, the Director-General 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 Special conditions for on-site residential property managers and registered managers**

- (1) An on-site residential property manager's licence is subject to the condition that the licensee must not carry on business as an on-site residential property manager in respect of premises unless:
  - (a) the licensee's principal place of residence is situated at those premises, and
  - (b) the person owns, or has an interest prescribed by the regulations in, that principal place of residence.

**Note.** This condition prevents a person from being an on-site residential property manager for more than one residential complex. To do that, a person must hold a real estate agent's licence.
- (2) The certificate of registration of a registered on-site residential property manager is subject to a condition that the person must not act as or exercise any of the functions of a registered on-site residential property manager except in respect of premises in which is situated the principal place of residence of the licensee who employs the person.

### **24 Issue of licence or certificate of registration**

- (1) Licences and certificates of registration are issued by the Director-General and are to be in such form and specify such information as the Director-General determines.
- (2) The Director-General may determine that a licence or certificate of registration is to display a photograph of the holder and for that purpose may require an applicant to provide a photograph or to permit his or her photograph to be taken.

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- (3) A licence or certificate of registration may be issued to replace one that the Director-General is satisfied has been lost, stolen, damaged or destroyed. The Director-General may require payment of a fee prescribed by the regulations for the issue of a replacement licence or certificate of registration.

## **25 Duration**

- (1) A licence or certificate of registration takes effect on the date on which it is granted or on such later date as may be specified in it and (unless it is sooner suspended or cancelled) remains in force for 1 year.
- (2) If an application for a licence or certificate of registration is by way of the reissue of an existing licence or certificate of registration, the existing licence or certificate of registration remains in force until the application is determined (even if as a result the existing licence or certificate of registration is in force for more than 1 year).
- (3) The holder of a licence or certificate of registration may at any time surrender it by notice in writing to the Director-General and the licence is thereby cancelled.

## **26 Reissue and restoration of a licence or certificate of registration**

- (1) Application may be made for the reissue of a licence or certificate of registration during the current term of the licence or certificate of registration.
- (2) An application for the reissue of a licence or certificate of registration constitutes an application for a new licence or certificate of registration that is the same as the current licence or certificate of registration, with the new licence to take effect on the expiry of the current licence or certificate of registration.
- (3) If a licence or certificate of registration expires without an application having been made for its reissue, an application may be made for the restoration of the expired licence or certificate of registration but such an application can only be made within 3 months after the expiry of the licence or certificate of registration.
- (4) The regulations may prescribe a fee as a late application fee to accompany an application for restoration of an expired licence or certificate of registration (in addition to any other fee required to accompany an application for a licence or certificate of registration).

- (5) An application for the restoration of an expired licence or certificate of registration constitutes an application for a new licence or certificate of registration that is the same as the expired licence or certificate of registration (but with the new licence to be back-dated to take effect on the expiry of the expired licence or certificate of registration).

**Note.** In all other respects applications for reissue or restoration are subject to the same requirements as apply to and in respect of ordinary applications for a licence or certificate of registration.

- (6) If an application for the restoration of an expired licence or certificate of registration is duly made:
- (a) anything done by the holder of the expired licence or certificate of registration 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 or certificate of registration, except for the purposes of sections 8 (1), 9 (1) and 10, and
  - (b) if the application is granted, the restored licence or certificate of registration is taken to have had effect from the expiry of the expired licence or certificate of registration (and is to be expressed to take effect accordingly).

## 27 Review by ADT

A person may apply to the Administrative Decisions Tribunal for a review of any of the following decisions of the Director-General:

- (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.

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Division 1           Place and name of business

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## **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 Director-General 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 Act 1962* 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.

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- (4) The Director-General 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 Director-General 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) This section does not affect the *Business Names Act 1962*.

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

### **31    Each place of business to be in charge of licensee**

- (1) An individual who carries on business under a licence at more than one place of business must employ at each of those places of business (except the place at which the licensee is personally in charge) as the person in charge of business at that place a person who is the holder of a licence that an individual is required to hold to carry on that business.
- (2) A corporation that holds a corporation licence must employ as the person in charge at each place of business at which the corporation carries on business under the licence a person who is the holder of a licence that an individual is required to hold to carry on that business.
- (3) A licensee must not employ a person to be the person in charge of business at a place of business of the licensee if the person is also

employed to be the person in charge of business at another place of business of the licensee or at a place of business of another licensee.

- (4) A person employed as the person in charge of business at a place of business of a licensee must not exercise functions or provide services on behalf of 2 or more licensees at that place (whether corporations or individuals) unless those licensees are in partnership.
- (5) The Director-General may grant a person an exemption from a provision of this section. The exemption may be granted unconditionally or subject to conditions. The Director-General 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 Director-General 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 employees 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.

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- (4) The Director-General 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.

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:

***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 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 Director-General. The notice must be in the form approved by the Director-General 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 Director-General 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.
- (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 *Consumer Claims Act 1998* 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 the *Consumer Claims Act 1998* to that person, a reference in that Act 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 the *Consumer Claims Act 1998*.

(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.

**Tribunal** means the Tribunal under the *Consumer Claims Act 1998*.

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

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.

**Note.** Part 12 (Complaints and disciplinary action) provides that a contravention of a provision of the regulations is grounds for taking disciplinary action against a person.

### 38 Undertakings by licensees and registered persons

The Director-General 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 Director-General 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).

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**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 Director-General in writing within 7 days after becoming aware of any failure to account by a licensee.

Maximum penalty: 100 penalty units.

**Division 3                      Employees**

**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 certain employees**

- (1) A licensee must make and keep a record of the name and residential address of each employee that the licensee employs as a real estate salesperson, stock and station salesperson, business salesperson or registered manager.
- (2) The licensee must keep the record for at least 3 years after the person ceases to be an employee.
- (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 Director-General may approve.

Maximum penalty: 50 penalty units.

**43    Duty of licensee not to employ 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 if the person:
  - (a)    is a disqualified person, or

- (b) has had his or her licence or certificate of registration suspended or cancelled under this Act (unless the person currently holds a licence or certificate of registration), 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 the person currently holds a licence or certificate of registration).

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 by the licensee was prohibited by this section.

#### **44 Duty of licensee to notify disqualification of employee**

A licensee must notify the Director-General in writing within 7 days after becoming aware that a person employed by the licensee has become a disqualified person.

Maximum penalty: 50 penalty units.

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

A person employed by a licensee must notify the licensee within 7 days after the person becomes a disqualified person.

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 any person has received, receives, or expects to receive in connection with the sale or purchase, or for promoting the sale or purchase, or for providing a service in connection with the sale or purchase, 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) 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 Director-General, and
  - (b) it is acknowledged by the person in writing on the form, and

- (c) it is given and acknowledged 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) a real estate salesperson acting for that real estate agent.

*seller's agent* means:

- (a) a real estate agent acting for the vendor of land, or
- (b) a real estate salesperson 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) A real estate salesperson 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 Director-General 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 Director-General 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) a de facto partner who is living or has lived with the person as the person's husband or wife on a bona fide domestic basis although not married to the person, 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.

*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,

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Division 5 Advertisements and representations

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- (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) If a licensee has an interest in any real or personal property as a principal, the licensee must not publish an advertisement relating to or in connection with the property in a newspaper or otherwise without disclosing that interest in the advertisement.

Maximum penalty: 100 penalty units.

#### **51 Publishing false or misleading advertisements**

- (1) A licensee must not publish or cause to be published in the course of carrying on business as a licensee any statement that:
  - (a) is intended or apparently intended by the licensee to promote the sale or lease of any property, and
  - (b) is materially false, misleading or deceptive (whether to the licensee's knowledge or not).

Maximum penalty: 200 penalty units.

- (2) Without limiting the generality of subsection (1), a statement is taken to be false or misleading for the purposes of this section 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 indicates that the state of affairs does exist.
- (3) A statement is *published* if it is:
  - (a) inserted in any newspaper, periodical publication or other publication, or
  - (b) publicly exhibited 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) contained in any document gratuitously sent or delivered to any person or thrown or left upon premises in the occupation of any person, or
  - (d) broadcast by radio or television, or
  - (e) disseminated by means of an Internet website or electronic mail.

- (4) It is a defence to a prosecution against a person for an offence under this section if the person proves that:
- (a) the person took all reasonable precautions against committing the offence, and
  - (b) the person believed on reasonable grounds that the statement was true or (in the case of a statement that would reasonably tend to lead to a belief in the existence of a state of affairs that does not in fact exist) the person believed on reasonable grounds that the state of affairs existed, and
  - (c) the person had no reason to suspect that the statement was false or misleading.
- (5) Despite any proceedings against a person for an offence under this section (whether resulting in a conviction or otherwise) the person remains liable to all civil proceedings as if the proceedings for an offence had not been taken.
- (6) This section is to be read as being in addition to and not in derogation from any enactment or law relating to false or misleading advertisements or other statements.

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

- (1) A person who, while exercising or performing any function as a licensee or registered person, by any statement, representation or promise that is false, misleading or deceptive (whether to the knowledge of the person or not) or by any concealment of a material fact (whether intended or not), induces any other person to enter into any contract or arrangement is guilty of an offence against this Act.
- 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.

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**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.

## 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 the person and 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 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.
- (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 means of facsimile transmission or by such other means as the regulations may allow.
- (4) A court or tribunal before which proceedings are taken by a licensee for the recovery of commission or expenses from a person may order that the commission or expenses are wholly or partly recoverable

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Part 4 Agency agreements

Division 1 Requirements for agency agreements

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despite 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.

- (5) A court or tribunal is not to make such an order unless satisfied that:
- (a) the failure to serve a copy of the agreement within the required time 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.

**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 Director-General 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

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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 Director-General 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 Director-General 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 solicitor or, if there is more than one client, by each client or their respective solicitors, and
  - (c) be served on the agent in one of the ways provided for by this section.
- (3) A notice of rescission may be served on an agent in any of the following ways:
  - (a) by being given to the agent personally,
  - (b) by being delivered to or left at a place of business of the agent or at any other address specified in the agency agreement as a place where a notice of rescission may be given,
  - (c) by facsimile transmission.

**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 purchaser's solicitor's name and address, 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 a solicitor is or will be acting for the

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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 solicitor. 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:  
*solicitor* includes a licensee under the *Conveyancers Licensing Act 1995*.

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

- (1) A sale by auction of residential property or rural land must 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 (and only 1 bid).
- (2) At a sale by auction of residential property or rural land:
  - (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 one bid and must not make any bid if one of them has already bid, 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, and
  - (d) when the auctioneer takes a bid from the seller or any person on behalf of the seller or auctioneer the auctioneer must, as soon as the bid is taken, clearly state that the bid is a bid by the seller or a person on behalf of the seller or auctioneer.

Maximum penalty: 200 penalty units.

### **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:

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- (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 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.

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 those details are established by the production to the agent of:
  - (a) proof 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 proof of identity for that person.

Maximum penalty: 100 penalty units.

- (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.

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- (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 Director-General 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 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 of residential property**

#### **72    False representation to seller or prospective seller**

A real estate agent or employee of a real estate agent 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.

Maximum penalty: 200 penalty units.

#### **73    False representation to prospective buyer**

- (1) A real estate agent acting pursuant to an agency agreement for the sale of residential property or the employee of such an agent must not, by a statement made in the course of marketing the property, falsely understate the estimated selling price of the property.

Maximum penalty: 200 penalty units.

- (2) An agent or employee is considered to falsely understate the estimated selling price of residential property if the agent or employee states as his or her estimate of that selling price a price that is less than his or her true estimate of that selling price.
- (3) A statement is considered to be made in the course of marketing residential property if the statement is made:
- (a) in an advertisement in respect of the property that is published or caused to be published by the agent, or
  - (b) to a person (orally or in writing) as a prospective purchaser of the property.
- (4) A statement in the agency agreement of the agent's estimate of the selling price of residential property is evidence for the purposes of this section of the agent's true estimate of that selling price.

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

- (1) The Director-General 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:

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- (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 Division extends to estimates of price range**

This Division extends to estimated price range in the same way as it applies to estimated price and for that purpose a reference in this Division to price is taken to include a reference to price range.

**76 Extended meaning of “estimate”**

In this Division, *estimate* includes opinion and belief.

## **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) 200 penalty units in the case of a corporation, or
  - (b) 100 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) 200 penalty units in the case of a corporation, or
- (b) 100 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 Director-General 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 words “Trust Account” are to appear in the name of the trust account and in the description of the trust account in the books and records of the licensee and also on all cheques drawn on the trust account.
- (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.
- (5) A licensee must, within 14 days after closing a trust account, notify the Director-General in writing of the closure.

Maximum penalty: 100 penalty units.

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

- (1) The Director-General 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 Director-General 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 Director-General 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) On the first business day after the end of each named month, each authorised deposit-taking institution must:

- (a) 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) pay the amount of that interest to the Director-General 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 Director-General may, by proceedings brought in a court of competent jurisdiction, recover as a debt an amount due and payable to the Director-General 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 Director-General in writing 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, by notice in writing, inform the Director-General 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.

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- (3) Within 14 days of the end of each named month, an authorised deposit taking institution must provide a written report to the Director-General, 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 Director-General 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 Director-General with such information relating to all or any trust accounts as is specified or described in the regulations,
  - (b) authorising the Director-General to require an authorised deposit-taking institution to provide the Director-General with such information relating to trust accounts identified by the Director-General as is specified or described by the Director-General,
  - (c) any associated matter, including the manner in which, and the time within which, any such information is to be provided to the Director-General,
  - (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 Director-General 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 presented on a trust account kept with it under this Part has been dishonoured, the institution must, by notice in writing, inform the Director-General 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 Director-General 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,

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- (b) the total amount of interest that the institution paid under this Part to the Director-General 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 Unclaimed trust money**

#### **96 Unclaimed trust money held by licensee**

- (1) A licensee who in the month of January in a year holds in a trust account kept by the licensee money that was received by the licensee more than 2 years before that month must furnish to the Director-General in that month a statement (an *unclaimed money statement*) showing particulars of:
  - (a) the money so held, and

- (b) each person for whom or on whose behalf the money is held, and
  - (c) the address last known to the licensee of each of those persons.
- (2) A statement under this section is to be in the form approved by the Director-General.

**97 Unclaimed trust money held by former licensee or personal representative**

- (1) A former licensee, or the personal representative of a deceased licensee, who holds money in a trust account kept under this Act must furnish to the Director-General a statement giving particulars of:
- (a) the money held in the trust account as at the date on which the statement is furnished, and
  - (b) the names of the persons for whom or on whose behalf the money is held, and
  - (c) the address of each of those persons last known to the person furnishing the statement.
- (2) This statement is the first statement that the former licensee or personal representative is required to furnish and it is to be furnished within 3 months after the date on which the person ceased to be a licensee or became the personal representative of the deceased licensee.
- (3) The former licensee or personal representative must furnish a further statement (an *unclaimed money statement*) within 14 days after the period of 12 months has elapsed since the first statement was furnished.
- (4) The further statement is to give particulars of the same matters as the first statement and also include particulars of any payments made from the trust account since the date of the first statement.
- (5) A statement under this section is to be in the form approved by the Director-General.
- (6) The regulations may exempt money or a class of money from the operation of this section.

**98 Disposal of unclaimed money in trust accounts**

- (1) When the Director-General receives an unclaimed money statement under this Division, the Director-General is to:

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- (a) send by post to each person for whom or on whose behalf any money referred to in the statement is held a notice (an *individual notice*) in writing addressed to the person at the person's address shown in the statement stating the particulars of the moneys held for or on behalf of that person, and
  - (b) cause notification to be published in the Gazette (a *Gazette notification*) stating the particulars of the money held for or on behalf of each of those persons.
- (2) Each individual notice and the Gazette notification is to state that, if the money is not paid out of the trust account in which it is held within 3 months after the date of publication of the Gazette notice, the person holding the money will be required to pay it to the Director-General.
- (3) At any time after the expiration of that 3 months the Director-General may, by a notice in writing served personally or by post on the person by whom the money is held, require that person:
  - (a) to pay to the Director-General any moneys referred to in the Gazette notification that have not been previously paid by that person out of the trust account in which they are held, and
  - (b) to furnish to the Director-General, within such period as may be specified in the notice to the person, a statement showing particulars of any payments made out of the money referred to in the Gazette notification since the unclaimed money statement was made.
- (4) The Director-General must pay any money received by the Director-General under this section into the Compensation Fund.
- (5) Within 2 months after 31 December in each year, the Director-General must pay into the Consolidated Fund all money received by the Director-General and paid into the Compensation Fund under this section during the period of 12 months ending on that 31 December.
- (6) When the Director-General makes a payment into the Consolidated Fund, the Director-General is to give the Treasurer a statement containing the following particulars:
  - (a) the name and last known address of each person for whom or on whose behalf the money received by the Director-General was held,
  - (b) the amount held in respect of each of those persons,



- (c) the date of gazettal of the Gazette notification in respect of that money,
  - (d) the name and address of each licensee who furnished an unclaimed money statement to the Director-General in respect of that money.
- (7) A person who fails to comply with the requirements of any notice served on the person under this section is guilty of an offence.
- Maximum penalty: 50 penalty units.

#### **99 Repayment of unclaimed trust money**

- (1) The Treasurer must, on application made to the Treasurer by a person entitled to money paid into the Consolidated Fund under this Division, pay the money to the person.
- (2) If an application for the payment of money to which a person is entitled is made while the money is held in the Compensation Fund, the Director-General must pay the money to the person from the Compensation Fund.

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

#### **100 Director-General may require information**

- (1) The Director-General may by notice in writing served on a licensee require the licensee to furnish to the Director-General 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.

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- (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 on which a community managing agent operates on behalf of an association constituted under the *Community Land Development Act 1989* 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 Director-General 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 managing agents**

- (1) A strata managing agent or community managing agent must keep a copy of the following instruments:
  - (a) an instrument of appointment appointing the agent as strata managing agent or community 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) In this section:

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

***owners corporation*** means an owners corporation constituted under the *Strata Schemes Management Act 1996*.

## **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 Director-General 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:
- (a) 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, and

- (b) lodge the auditor's report on the audit with the Director-General.
- (2) The Director-General may in a particular case or class of cases by order in writing extend the period of 3 months under subsection (1).
- (3) The person must retain a copy of the auditor's report on the audit for a period of three years after the date on which the report was made.
- (4) The auditor's report is to be in a form approved by the Director-General and is to be signed by the auditor.

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 Director-General may fix in respect of the person under this section.
- (2) The Director-General 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 Director-General'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 Director-General considers appropriate.

**113 Statutory declaration required when no trust money held or received**

A licensee who in the course of the audit period applicable to the licensee neither received nor held any money for or on behalf of any other person must, within the period of three months after that day, make and lodge with the Director-General a statutory declaration to that effect.

Maximum penalty: 100 penalty units.



**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
  - (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 Director-General 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) is or has at any time within 2 years before the last day of the period in respect of which the audit is to be made, been an employee or partner of the person whose records or documents are to be audited, or
  - (b) is a licensee, or a shareholder in a corporation that is a licensee and that has not more than twenty shareholders.

**116 Duties of auditors**

- (1) If an auditor in the course of making an audit for the purposes of this Division discovers that any breach of this Act or the regulations has been committed, that there is any discrepancy relating to the trust account to which the audit relates or that the records or documents concerned are not kept in such a manner as to enable them to be properly audited, the auditor must:
  - (a) fully set out the facts so discovered by the auditor in the report made by the auditor for the purposes of the audit, and
  - (b) forward a copy of the report to the Director-General.
- (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 officer 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 Director-General under this Division, are available in the hands of the Director-General 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.

### 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 Director-General may freeze licensee's accounts in particular cases

- (1) A direction under this Division may be given when it appears to the Director-General 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.
- (2) The Director-General 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 Director-General, or
  - (b) an amount must not be drawn from a specified account other than with the Director-General'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 Director-General 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 Director-General or a person authorised by the Director-General 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 Director-General or authorised person on a cheque or other instrument is sufficient evidence of the Director-General'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 Director-General 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 Director-General or a person authorised by the Director-General to sign the cheque or instrument.

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

**121 Director-General may operate account**

- (1) The Director-General or a person authorised in writing by the Director-General (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 Director-General 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 Director-General may withdraw a direction under this Division at any time.
- (3) When a direction is withdrawn, the Director-General 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 been 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) a de facto partner who is living or has lived with him or her as his or her wife or husband on a bona fide domestic basis although not married to him or her, 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 Director-General may appoint a manager for a licensee's business in any of the following cases 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:

- (a) the licensee has made a request to the Director-General for the appointment of a manager, or
  - (b) the licensee's licence has been cancelled or is under suspension, or
  - (c) the Director-General is of the opinion that there has been, or that there may have been, a failure to account by the licensee, or
  - (d) the Director-General 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 Director-General 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
- (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 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 Director-General 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 Director-General is liable for any loss incurred by the licensee as a consequence of any act or omission of the manager or the Director-General 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 Director-General from the Operating Account.
- (2) An amount paid under this section is recoverable by the Director-General as a debt owed by the relevant licensee.

**133 Manager to report to Director-General**

- (1) The manager of a licensee's business must report to the Director-General on the management of the business. A report must be made at such times as the Director-General directs and be in accordance with any directions given by the Director-General.
- (2) A report is to include such information as the Director-General directs.
- (3) On the conclusion of the management of a licensee's business, the manager must, when giving the Director-General his or her final report, lodge with the Director-General 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 Director-General, 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 Director-General only if:
  - (a) the licensee has made a request to the Director-General for the appointment of a receiver, or
  - (b) the licensee's licence has been suspended or cancelled, or
  - (c) the Director-General is of the opinion that there has been, or that there may have been, a failure to account by the licensee, or

- (d) the Director-General 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 Director-General 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 Director-General 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 Director-General 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 Director-General 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 Director-General, 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 a solicitor or barrister, 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 Director-General and:
  - (a) if the Director-General so requires within 1 month after the notice is given—must transfer and deliver the property to the Director-General, 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 Director-General under this section, the Director-General:
  - (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 Director-General under this section.
- (3) The Director-General must apply money paid to the Director-General 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 Director-General 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 Director-General 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 Director-General from the Operating Account.
- (2) An amount paid under this section may be recovered by the Director-General from the relevant licensee as a debt.
- (3) If the Director-General and a receiver fail to agree on the remuneration to be paid to the receiver, the Supreme Court may, on the application of the Director-General 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 Director-General 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 Director-General 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 Director-General**

- (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 Director-General.
- (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 Director-General, or
  - (b) the Director-General otherwise directs in relation to those expenses.

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- (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 Director-General 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 Director-General may apply money held in the Compensation Fund (in such order as the Director-General 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 Director-General in connection with claims against the Compensation Fund,
  - (c) meeting expenses incurred by the Director-General in or in relation to appearances before a court or tribunal with respect to licences under this Act or the *Conveyancers Licensing Act 1995*,
  - (d) meeting the costs of administering the Compensation Fund,

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- (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 Director-General 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 Director-General may, with the approval of the Minister, impose a levy on each licensee.
- (2) A levy is payable to the Director-General at the time, and in the manner, fixed by the Director-General.
- (3) The Director-General 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 Director-General 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 Director-General determines the claimant's claim or a judgment is recovered against the Director-General 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.

**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 Director-General 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 Director-General 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 Director-General may disallow any claim, in whole or in part, in appropriate cases. In particular the Director-General 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 Director-General, 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.
- (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 Director-General, 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 Director-General.
- (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 a Local Court operates as a judgment debt under the *Local Courts (Civil Claims) Act 1970* 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 Director-General may disregard subsection (2) in the case of successive failures to account by a licensee, to the extent that the Director-General 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 Director-General 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 Director-General 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 Director-General otherwise determines.
- (4) After that date, the Director-General 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 Director-General 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 Director-General 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 Director-General may exercise the rights and remedies to which the Director-General is subrogated under this section in the name of the Director-General 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 Director-General 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.

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- (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 Director-General 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 Director-General 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 Director-General 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 Director-General 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 Director-General 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 Director-General 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 Director-General 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 Director-General 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,

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- (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 lawful justification or 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 Director-General 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 Director-General 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 Director-General 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 Director-General 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 (as defined in section 25I of the *Fair Trading Act 1987*) 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 1995*, the *Valuers Registration Act 1975* and any other Act prescribed by the regulations for the purposes of this paragraph (or the prescribed provisions of any other Act),
  - (e) meeting the costs of the administration of the Property Services Advisory Council,

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- (f) meeting the costs of operating a scheme or schemes for resolving disputes arising between consumers and providers of property services,
  - (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* means services provided in the property services industry as defined in section 25I of the *Fair Trading Act 1987*.

#### **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 administration of the *Landlord and Tenant (Rental Bonds) Act 1977*, the *Residential Tenancies Act 1987* and the *Residential Parks Act 1998* as may be agreed from time to time by the Minister and the Ministers administering the *Landlord and Tenant (Rental Bonds) Act 1977*, the *Residential Tenancies Act 1987* and the *Residential Parks Act 1998*,
  - (b) such contributions towards half the costs and expenses incurred in the administration of the *Consumer, Trader and Tenancy Tribunal Act 2001* as are agreed annually by the Minister, the Minister administering the *Landlord and Tenant (Rental Bonds) Act 1977* and the Minister administering the *Consumer, Trader and Tenancy Tribunal Act 2001*, but only to the extent to which those costs and expenses relate to the exercise of the Consumer, Trader and Tenancy Tribunal's jurisdiction in relation to matters arising under the following Acts:
    - (i) the *Community Land Management Act 1989*,
    - (ii) the *Residential Parks Act 1998*,
    - (iii) the *Residential Tenancies Act 1987*,
    - (iv) the *Retirement Villages Act 1999*,
    - (v) the *Strata Schemes Management Act 1996*.

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- (c) such contributions towards the costs, charges and expenses of the administration of the *Retirement Villages Act 1999* as may be authorised by the Director-General with the consent of the Minister,
  - (d) such contributions as may be agreed by the Minister and the Minister administering the *Fair Trading Act 1987* towards the costs, charges and expenses of the administration of that Act,
  - (e) such contributions as may be agreed by the Minister and the Minister administering the *Strata Schemes Management Act 1996* and *Community Land Management Act 1989* towards the costs, charges and expenses of the administration of those Acts,
  - (f) such additional contributions for the purposes set out in paragraphs (a)–(e) as the Ministers referred to in those paragraphs may at any time agree.
- (2) Contributions referred to in this section are to be paid in the manner determined by the Treasurer.

## 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, 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,
- (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 Director-General 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 Director-General 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 Director-General 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 Director-General 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 Director-General 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 Director-General may at any stage of a matter that is the subject of consideration by the Director-General 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 Director-General 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 Director-General 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 Director-General may serve a show cause notice on a person if the Director-General 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 Director-General 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 Director-General may by notice in writing to the person suspend the person's licence or certificate of registration pending a determination by the Director-General of whether to take disciplinary action under this Act against the person.
- (2) The Director-General 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) Such a suspension may not be imposed for a period of more than 60 days after the show cause notice is served.
- (4) The Director-General is not required to afford a person an opportunity to be heard before taking action against the person under this section.
- (5) The Director-General 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 64A of the *Fair Trading Act 1987*.

**197 Inquiries and investigation**

The Director-General 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 Director-General thinks fit.

**198 Taking of disciplinary action**

- (1) If the Director-General 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 Director-General may by order in writing served on the person take such disciplinary action against the person as the Director-General thinks is warranted.
- (2) The order must include a statement of the reasons for the Director-General'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 Director-General in a court of competent jurisdiction as a debt due to the Crown.

**200 Review of disciplinary action by ADT**

A person against whom disciplinary action is taken by the Director-General may apply to the Administrative Decisions Tribunal under the *Administrative Decisions Tribunal Act 1997* for a review of the Director-General's decision on the disciplinary action or on a review of the disciplinary action.

**201 Warning notices**

- (1) 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.
- (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 Director-General may authorise publication of such a notice in any one or more of the following ways:
  - (a) to any person making inquiries to the Director-General 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 Director-General, whether or not a complaint has been made.
- (5) Before authorising publication of such a notice, the Director-General must give the person concerned an opportunity for a period of not less than 48 hours to make representations to the Director-General about publication of such a notice, unless:
  - (a) the Director-General 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 Director-General, 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 officer 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 officer 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 Director-General may appoint any officer 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 Director-General 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
  - (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 may apply to an authorised justice 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 justice 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 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) Part 3 of the *Search Warrants Act 1985* applies to a search warrant issued under this section.
- (4) In this section, *authorised justice* has the same meaning as in the *Search Warrants Act 1985*.

## 210 Injunctions

- (1) On the application of the Director-General, 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 Director-General 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 Director-General makes an application for the grant of an injunction under this section, the Court is not to require the Director-General 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**

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.

**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 Director-General or, in the name of the Director-General, by a person acting with the authority of the Director-General.
- (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 a Local Court constituted by a Magistrate sitting alone, or

- (b) summarily before the Supreme Court in its summary jurisdiction.
- (3) If proceedings are brought in a 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 serve a penalty notice on a person if it appears to the officer that the person has committed an offence against this Act or the regulations, being an offence prescribed by the regulations as a penalty notice offence.
- (2) A penalty notice is a notice to the effect that, if the person served does not wish to have the matter determined by a court, the person can pay, within the time and to the person specified in the notice, the amount of the penalty prescribed by the regulations for the offence if dealt with under this section.
- (3) A penalty notice may be served personally or by post.
- (4) If the amount of penalty prescribed for an alleged offence is paid under this section, no person is liable to any further proceedings for the alleged offence.
- (5) Payment under this section is not to be regarded as an admission of liability for the purpose of, and does not in any way affect or prejudice, any civil claim, action or proceeding arising out of the same occurrence.
- (6) The regulations may:
  - (a) prescribe an offence for the purposes of this section by specifying the offence or by referring to the provision creating the offence, and
  - (b) prescribe the amount of penalty payable for the offence if dealt with under this section, and

- (c) prescribe different amounts of penalties for different offences or classes of offences.
- (7) The amount of a penalty prescribed under this section for an offence is not to exceed the maximum amount of penalty that could be imposed for the offence by a court.
- (8) 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.
- (9) In this section:  
*authorised officer* means a person authorised in writing by the Director-General 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 Offences by corporations**

- (1) If a corporation contravenes, whether by act or omission, any provision of this Act or the regulations, each director of the corporation, and each person concerned in the management of the corporation, is taken to have contravened the same provision unless the director or person satisfies the court that:
  - (a) he or she was not in a position to influence the conduct of the corporation in relation to its contravention of the provision, or
  - (b) he or she, being in such a position, used all due diligence to prevent the contravention by the corporation.
- (2) A person may be proceeded against and convicted under a provision pursuant to subsection (1) whether or not the corporation has been proceeded against or been convicted under that provision.
- (3) Nothing in subsection (1) prejudices or affects any liability imposed by a provision of this Act or the regulations on any corporation by which an offence against the provision is actually committed.

## 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 *Freedom of Information Act 1989* 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 Director-General 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 Director-General 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 Director-General may request and receive information from a law enforcement officer or regulatory officer for the purpose of assisting the Director-General in the exercise of functions under this Act or under any other Act administered by the Minister.
- (4) The Director-General 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 Police Service, 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 Director-General 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 Director-General 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 Director-General may determine for the giving of access to the Register.

**221 Certificate evidence**

A document purporting to be a certificate signed by the Director-General 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 class 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 Director-General may delegate the exercise of any function of the Director-General under this Act (other than this power of delegation) to:

- (a) any public servant employed in the Department of Fair Trading, 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 Director-General, an authorised officer or any person acting under the direction of the Director-General 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 Director-General, 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 himself or herself, or
  - (b) by leaving it at his or her place of residence with someone who apparently resides there and has apparently reached the age of 16 years, or
  - (c) by leaving it at his or her 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 him or her at the address last known to the Director-General of his or her place of residence, employment or business.
- (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



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- (c) by posting it in a letter addressed to the corporation at the address last known to the Director-General of its only or principal place of business.

(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 Consequential amendments of Acts**

Schedule 2 has effect.

#### **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.
- (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.

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## Schedule 1 Savings and transitional provisions

(Section 227)

### 1 Definition

In this Schedule:

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

### 2 Regulations

- (1) The regulations may contain provisions of a savings or transitional nature consequent on the enactment of the following Acts:  
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.

### 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.

## Schedule 2 Consequential amendments

(Section 228)

### 2.1 Community Land Management Act 1989 No 202

#### Section 3 Definitions

Omit “*Property, Stock and Business Agents Act 1941*” from the definition of *managing agent* in section 3 (1).

Insert instead “*Property, Stock and Business Agents Act 2002*”.

### 2.2 Conveyancers Licensing Act 1995 No 57

#### [1] Section 5 Disqualified persons

Omit section 5 (1) (h). Insert instead:

- (h) is a disqualified person under the *Property, Stock and Business Agents Act 2002*.

#### [2] Section 5 (2) (b)

Omit “*Property, Stock and Business Agents Act 1941*”.

Insert instead “*Property, Stock and Business Agents Act 2002*”.

#### [3] Section 19 Multidisciplinary partnerships

Omit “*Property, Stock and Business Agents Act 1941*” from section 19 (3).

Insert instead “*Property, Stock and Business Agents Act 2002*”.

#### [4] Section 22 Sharing staff of legal practitioners and real estate and other agents

Omit “*Property, Stock and Business Agents Act 1941*” from section 22 (1).

Insert instead “*Property, Stock and Business Agents Act 2002*”.



**[5] Section 29**

Omit the section. Insert instead:

**29 Bankers to pay interest to Statutory Interest Account**

- (1) Sections 90 and 91 of the *Property, Stock and Business Agents Act 2002* apply in respect of all money held in a general trust account under this Division as if:
  - (a) the trust account were a trust account opened and kept under section 86 of that Act, and
  - (b) the licensee who opened and keeps the trust account were a licensee under that Act.
- (2) A licensee must, when opening a trust account at an authorised deposit-taking institution under this Division, ensure that the authorised deposit-taking institution is notified that the trust account is, for the purposes of sections 90 and 91 of that Act, to be regarded as a trust account required by that Act. Such a notification is, for the purposes of those sections, to be regarded as a notification that the trust account is required by that Act.

**[6] Section 37 Definition**

Omit “*Property, Stock and Business Agents Act 1941*” from the definition of *PSBA Act*.

Insert instead “*Property, Stock and Business Agents Act 2002*”.

**[7] Section 38 Claims can be made against Compensation Fund**

Omit “Part 6 (Compensation Fund) of the *PSBA Act*” from section 38 (1).

Insert instead “Part 10 of the *PSBA Act*”.

**[8] Section 38 (3)**

Omit “Section 64E (4) of the *PSBA Act*”.

Insert instead “Section 169 (4) of the *PSBA Act*”.

**[9] Section 39 Contributions by licensees**

Omit “section 64D or 64E of the PSBA Act”.  
Insert instead “section 168 or 169 of the PSBA Act”.

**[10] Section 43 Appointment of manager**

Omit “a determination by the Director-General under Part 6 of the *Property, Stock and Business Agents Act 1941*” from section 43 (1) (c).  
Insert instead “a determination by the Director-General under Part 10 of the *Property, Stock and Business Agents Act 2002*”.

**[11] Section 55 Supreme Court may appoint receiver**

Omit “*Property, Stock and Business Agents Act 1941*” from section 55 (2) (c).  
Insert instead “*Property, Stock and Business Agents Act 2002*”.

**2.3 Fair Trading Act 1987 No 68**

**[1] Section 8 Delegation by Director-General**

Omit “*Property, Stock and Business Agents Act 1941*” from section 8 (1) (f).  
Insert instead “*Property, Stock and Business Agents Act 2002*”.

**[2] Section 25I Functions**

Omit “*Property, Stock and Business Agents Act 1941*” from paragraph (a) of the definition of *property services industry* in section 25I (2).  
Insert instead “*Property, Stock and Business Agents Act 2002*”.

## **2.4 Fines Act 1996 No 99**

### **Schedule 1 Statutory provisions under which penalty notices issued**

Omit "*Property, Stock and Business Agents Act 1941*, section 86C" from Schedule 1.

Insert instead "*Property, Stock and Business Agents Act 2002*, section 216".

## **2.5 Landlord and Tenant (Rental Bonds) Act 1977 No 44**

### **[1] Section 8 Deposit of rental bonds with Board**

Insert after section 8 (2):

(2A) If a lessor's agent receives on behalf of the lessor a rental bond for a lease or proposed lease, subsection (2) extends to require the agent to deposit with the Board an amount of money equivalent to the amount of that rental bond and so extends as if a reference in that subsection to "that lessor" were a reference to the agent.

### **[2] Section 20 Rental Bond Interest Account**

Omit "*Property, Stock and Business Agents Act 1941*" from section 20 (2A).

Insert instead "*Property, Stock and Business Agents Act 2002*".

### **[3] Section 20 (2AB)**

Omit "*Property, Stock and Business Agents Act 1941*".

Insert instead "*Property, Stock and Business Agents Act 2002*".

### **[4] Section 20 (2AB)**

Omit "(in the year ending 30 June next succeeding the year in which such an agreement is made)".

## **2.6 Pawnbrokers and Second-hand Dealers Act 1996 No 13**

### **Section 4 Restrictions on operation of this Act**

Omit “*Property, Stock and Business Agents Act 1941*” from section 4 (1).  
Insert instead “*Property, Stock and Business Agents Act 2002*”.

## **2.7 Property, Stock and Business Agents Act 2002**

### **[1] Section 7**

Omit the section.

### **[2] Section 17**

Omit the section. Insert instead:

#### **17 Application to licences of Licensing and Registration (Uniform Procedures) Act 2002**

- (1) The Director-General 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) business agents’ licences,
  - (d) strata managing agents’ licences,
  - (e) on-site residential property managers’ licences,
  - (f) corporation licences,
  - (g) certificates of registration as a real estate salesperson,
  - (h) certificates of registration as a stock and station salesperson,
  - (i) certificates of registration as a business salesperson,
  - (j) certificates of registration as a registered manager.

- 
- (2) Part 2 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 Director-General 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) 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
  - (e) an application for restoration of a licence or certificate of registration under section 10 of that Act may not be made more than 3 months after the date on which the licence expires, and
  - (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) A licence or certificate of registration is taken to be a fixed-term licence for the purposes of Part 2 of the applied Act.
- (5) 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.

**[3] Sections 18, 19 and 24**

Omit the sections.

**[4] Section 25 Duration**

Omit section 25 (2) and (3).

**[5] Sections 26 and 27**

Omit the sections.

**2.8 Licensing and Registration (Uniform Procedures) Act 2002**

**[1] Schedule 1 Licences to which Part 2 of Act applies**

Omit the matter relating to the *Property, Stock and Business Agents Act 1941*.

**[2] Schedule 1**

Insert in alphabetical order of Acts and instruments:

**Property, Stock and Business Agents Act 2002**

section 17 (1) (a), real estate agent's licence,

section 17 (1) (b), stock and station agent's licence,

section 17 (1) (c), business agent's licence,

section 17 (1) (d), strata managing agent's licence,

section 17 (1) (e), on-site residential property manager's licence,

section 17 (1) (f), corporation licence,

section 17 (1) (g), certificate of registration as a real estate salesperson,

section 17 (1) (h), certificate of registration as a stock and station salesperson,

section 17 (1) (i), certificate of registration as a business salesperson

section 17 (1) (j), certificate of registration as a registered manager

**[3] Schedule 2 Registration to which Part 3 of Act applies**

Omit the matter relating to the *Property, Stock and Business Agents Act 1941*.

**2.9 Retirement Villages Act 1999 No 81**

**[1] Section 23 Deposits to be kept in trust**

Omit “*Property, Stock and Business Agents Act 1941*” from section 23 (3) (b).

Insert instead “*Property, Stock and Business Agents Act 2002*”.

**[2] Section 168 Sale of premises**

Omit “*Property, Stock and Business Agents Act 1941*” from the note to section 168 (1).

Insert instead “*Property, Stock and Business Agents Act 2002*”.

**[3] Section 202 Costs of administration**

Omit “*Property, Stock and Business Agents Act 1941*, in accordance with section 63E of that Act” from section 202 (b).

Insert instead “*Property, Stock and Business Agents Act 2002*, in accordance with section 190 of that Act”.

**2.10 Strata Schemes Management Act 1996 No 138**

**[1] Chapter 2, Part 4**

Omit “*Property, Stock and Business Agents Act 1941*” from the introductory note under the heading to Part 4 of Chapter 2.

Insert instead “*Property, Stock and Business Agents Act 2002*”.

**[2] Section 26 What is a strata managing agent?**

Omit “*Property, Stock and Business Agents Act 1941*”.

Insert instead “*Property, Stock and Business Agents Act 2002*”.

**[3] Section 26, note**

Omit “*Property, Stock and Business Agents Act 1941*”.

Insert instead “*Property, Stock and Business Agents Act 2002*”.

**[4] Section 33 Information may be required relating to strata managing agent’s trust account**

Omit “section 36 of the *Property, Stock and Business Agents Act 1941*”.

Insert instead “the *Property, Stock and Business Agents Act 2002*”.

**[5] Section 38 Who is responsible for providing information if a strata managing agent ceases to hold a licence or dies?**

Omit “*Property, Stock and Business Agents Act 1941*”.

Insert instead “*Property, Stock and Business Agents Act 2002*”.

**[6] Section 38 (a)**

Omit “section 36 (6) of”.

**[7] Section 38 (b)**

Omit “section 38 (2) of”.

**[8] Section 40 Certain provisions of other Acts requiring agents to provide information not to apply to affairs of owners corporation**

Omit “section 38A (3), (4), (5), (6) and (7) of the *Property, Stock and Business Agents Act 1941*” from section 40 and from the note to that section wherever occurring.

Insert instead “section 101 of the *Property, Stock and Business Agents Act 2001*”.



**[9] Section 105 Owners corporation may require certain persons to produce records, accounts and property of the owners corporation**

Omit “section 38 of the *Property, Stock and Business Agents Act 1941*” from section 105 (4).

Insert instead “the *Property, Stock and Business Agents Act 2002*”.

**[10] Section 105, note**

Omit “Section 38 of the *Property, Stock and Business Agents Act 1941*”.

Insert instead “The *Property, Stock and Business Agents Act 2002*”.

**[11] Section 162 Order appointing strata managing agent to exercise certain functions**

Omit “*Property, Stock and Business Agents Act 1941*” from section 162 (4) (a).

Insert instead “*Property, Stock and Business Agents Act 2002*”.