

Property, Stock and Business Agents Amendment Bill 2005

Explanatory note

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

Overview of Bill

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

- (a) to make the following changes to the provisions that disqualify a person from holding a licence or certificate of registration:
 - (i) extend the ground of disqualification concerned with involvement in corporate insolvency by basing disqualification on involvement in an externally administered body corporate and by including as a ground of disqualification involvement in the management of a corporation up to 12 months prior to an external administrator being appointed,
 - (ii) make it clear that an existing discretion to grant a licence in a case of undischarged bankruptcy extends to a case of involvement in the management of an insolvent (externally administered) corporation,
 - (iii) make it clear that when considering steps taken to avoid bankruptcy or corporate insolvency regard is to be had to steps taken after financial difficulties first arose,
 - (iv) limit disqualification based on bankruptcy or involvement with an insolvent corporation to licences (so that certificates of registration will not be subject to disqualification on those grounds),
 - (v) include as an additional ground of disqualification the suspension of or disqualification from holding an authority under another Act administered by the Minister (with a discretion for the Director-General to ignore such a disqualification),
- (b) to make it clear, for the purposes of the duty of disclosure of a seller's agent to prospective buyers, that a **prospective buyer** is a person who has made an offer of which the principal has been informed to purchase the land concerned and also to make it clear that a bid at auction does not make the bidder a prospective buyer for this purpose,
- (c) to make it clear that the duty of disclosure of a buyer's or seller's agent with respect to benefits to be received by third parties only applies to third parties to whom the agent has referred the client or a prospective buyer,
- (d) to extend the duty of disclosure that a licensee has when the licensee advertises a property in which the licensee has an interest as principal to cover situations where the licensee is a corporation and a director is an owner of the property or the licensee is a director of a corporation and the corporation is an owner of the property,
- (e) to require real estate agents, stock and station agents and their employees to disclose in the course of the marketing of residential property or rural land that the highest bid at an auction of the property was a vendor bid if the property was passed in and the bid is referred to in marketing the property,
- (f) to make it clear that the requirement to verify a bidder's name and address for the purposes of the Bidders Record can be satisfied by using 2 proof of identity documents (one to verify name and the other to verify address),
- (g) to strengthen existing controls for the prevention of dummy bidding at auctions of residential property or rural land, including by prohibiting the making of bids on behalf of the seller except one bid made by the auctioneer (with exceptions for bids by a co-owner trying to purchase the interest of a co-owner and bids by executors and administrators of deceased estates), and

by increasing penalties,

(h) to increase the penalty for engaging in collusive practices at auction sales from the existing penalty of 200 penalty units for a corporation and 100 for an individual to 500 penalty units for a corporation and 250 for an individual,

(i) to make it an offence for an auctioneer to falsely announce a bid,

(j) to require the name of a trust account kept by a licensee to include the name of the licensee or firm and to allow inclusion, at the end of the account name, of the name or other identifier of the person on whose behalf the account is held,

(k) to require authorised deposit-taking institutions with which trust accounts are kept and that are required to pay monthly interest on trust account balances to the Statutory Interest Account to pay that interest before the end of the 7th business day of the following month (rather than the 1st business day as at present),

(l) to enable the Director-General to give directions to authorised deposit-taking institutions with which trust accounts are kept as to the manner and form in which information about trust accounts is to be provided to the Director-General,

(m) to change the existing procedure for repayment of unclaimed money paid to the Consolidated Fund by authorising the Director-General to deal with claims by way of payments to or from the Compensation Fund kept under the Act,

(n) to make it clear that a licensee director of a licensee corporation or the licensee in charge of a licensee's place of business is not required to be accredited as an auctioneer merely because auctions will be conducted as part of the business of the corporation or place of business,

(o) to increase the penalty for breaches of the rules of conduct prescribed under the Act,

(p) to provide for the Director-General to require a licensee to discontinue unjust conduct and to rectify the consequences of that conduct,

(q) to make other amendments of a minor, consequential or savings and transitional nature.

Outline of provisions

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

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

Clause 3 is a formal provision that gives effect to the amendments to the *Property, Stock and Business Agents Act 2002* set out in Schedule 1.

Schedule 1 Amendments

Disqualification from holding a licence or certificate of registration

Section 16 of the Act sets out the circumstances that disqualify a person from being the holder of a licence or certificate of registration under the Act.

Schedule 1 [3]–[6] amend section 16 as follows:

(a) Currently, a person is disqualified by being involved, in the 3 years prior to an application for a licence or certificate of registration, in the management of a corporation that was the subject of a winding up order or for which a controller or administrator was appointed. The amendments extend the disqualification to other forms of corporate insolvency by referring to a body corporate that is externally administered (with an exception for voluntary winding up). The amendments also extend the disqualification to cover a person concerned in the management of a body corporate within 12 months before it became externally administered.

(b) Currently the Director-General has a discretion to grant a licence or registration to an undischarged bankrupt. The amendments make it clear that this discretion extends to cases of involvement in the management of an insolvent corporation and also make it clear that in determining whether to

exercise the discretion the Director-General is to have regard to steps that could have been taken by the person to avoid bankruptcy or corporate insolvency from when the financial difficulties concerned first arose (not just from when the bankruptcy or insolvency was notified).

(c) Grounds of disqualification that relate to bankruptcy or involvement in corporate insolvency will be limited to disqualification from holding a licence (so as not to apply to a certificate of registration).

(d) Suspension or disqualification from holding a licence, permit or other authority under legislation administered by the Minister is added as a further ground of disqualification from holding a licence or certificate of registration, with a discretion for the Director-General to ignore such a suspension or disqualification.

Schedule 1 [1] and [10] make consequential amendments.

Licensee conduct

Schedule 1 [9] increases the penalty for a contravention by a licensee of the rules of conduct prescribed by the regulations. The offence is currently in the regulations and the amendment transfers the offence to the Act, increasing the penalty from 40 penalty units in the case of a corporation or 20 penalty units in any other case to 100 penalty units in the case of a corporation or 50 penalty units in any other case.

Schedule 1 [8] makes a consequential amendment.

Schedule 1 [11] makes it clear, for the purposes of an agent's duty to disclose details of any relationship the agent has with a person to whom the agent refers the client or a prospective buyer of land, that **prospective buyer** means a person who has made an offer to buy the land of which the principal has been informed.

Schedule 1 [12] makes it clear that the duty of disclosure of a buyer's or seller's agent with respect to the details of benefits to be received by third parties in connection with the sale or purchase of land only applies to third parties to whom the agent has referred the client or a prospective buyer.

Schedule 1 [13] inserts a definition of **prospective buyer** that makes it clear that a bid at auction does not make the person a prospective buyer for the purposes of agents' disclosure duties.

Schedule 1 [14] extends the existing requirement that a licensee must include in an advertisement relating to property details of any interest that the licensee has in the property as a principal so that the requirement will also require disclosure of the fact that:

- (a) the licensee is a corporation and a director of the corporation is an owner of the property, or
- (b) the licensee is a director of a corporation and the corporation is an owner of the property.

Schedule 1 [15] inserts the following new provisions to give the Director-General power to deal with unjust conduct by licensees:

- (a) Proposed section 53A provides a definition of **unjust conduct**.
- (b) Proposed section 53B provides for the Director-General, with the consent of the Minister, to require the giving of various undertakings by a licensee who has repeatedly engaged in unjust conduct, or to apply to the Consumer, Trader and Tenancy Tribunal for an order that the licensee refrain from that conduct or comply with any such undertaking.
- (c) Proposed section 53C requires a licensee to observe any undertakings given by the licensee and also provides for lodgment with the Tribunal and registration of undertakings given by licensees.
- (d) Proposed section 53D confers various powers on the Tribunal to order a licensee to refrain from unjust conduct and to observe any undertakings given to the Director-General.
- (e) Proposed section 53E provides for the variation and discharge of the

Tribunal's orders.

Auctions

Existing section 66 allows only one bid to be made by or on behalf of the seller at an auction of residential property or rural land. **Schedule 1 [16]** replaces that section and adds a new section 66A that will prevent dummy bidding by:

(a) prohibiting the seller from making a bid, prohibiting a person from making a bid on behalf of the seller (except one bid made by the auctioneer on behalf of the seller) and prohibiting a person from procuring another person to make a bid on behalf of the seller, and

(b) prohibiting an auctioneer from acknowledging a bid that was not made, prohibiting an auctioneer from accepting a bid that the auctioneer knows was made by or on behalf of the seller (except the one bid that the auctioneer can make on behalf of the seller) and prohibiting an auctioneer from making more than one bid on behalf of the seller, and

(c) preventing an auctioneer from making a bid on behalf of the seller unless the auction conditions permit it and are announced before the auction and the bid is announced as a vendor bid.

The prohibition against bidding by or on behalf of the seller will not apply to bids by an executor or administrator of a deceased estate, or bids by a co-owner trying to buy the interest of another co-owner. For such a bid to be allowed, the auction conditions will have to permit it, the auctioneer will have to announce before the auction starts that such a vendor bid is allowed, and the auctioneer will have to announce such a bid to be a vendor bid as soon as it is made.

Schedule 1 [17] makes it clear that the regulations can require other information to be included in the Bidders Record for an auction.

Schedule 1 [18] makes it clear that for the purposes of an entry in the Bidders Record both a bidder's name and address must be established by proof of identity documents but that 2 proof of identity documents can be used for that purpose (one to verify name and the other to verify address).

Schedule 1 [20] provides that a real estate agent, stock and station agent or an employee of such an agent must not in the course of marketing residential property or rural land that was passed in at auction indicate the highest bid made at the auction if the bid was a vendor bid without also indicating that the bid was a vendor bid (that is, a bid made on behalf of the seller). **Schedule 1 [19]** makes a consequential amendment to a heading.

Schedule 1 [21] increases the penalty for the existing offence under the Act of engaging in various collusive practices in relation to the sale by auction of land or livestock. The existing maximum penalty is 200 penalty units for a corporation or 100 penalty units for an individual. The new maximum penalty will be 500 penalty units for a corporation or 250 penalty units for an individual.

Trust accounts

Schedule 1 [22] provides that the name of a trust account and the description of a trust account in the records of a licensee must include the name of the licensee or firm of licensees and may include at the end of the account's name a name or other matter to identify the person on whose behalf money in the account is held.

Schedule 1 [23] alters the existing requirement for authorised deposit-taking institutions with which trust accounts are kept to pay monthly interest on trust account balances to the Statutory Interest Account so that the interest will be payable before the end of the 7th business day of the following month, rather than before the end of the 1st business day of the following month as at present.

Schedule 1 [24]–[27] provide for the giving of directions by the Director-General to authorised deposit-taking institutions as to the manner and form in which those institutions are required to provide certain information concerning licensee trust accounts kept at those institutions.

Schedule 1 [28]–[30] vary the provisions dealing with unclaimed money in licensee trust accounts to enable the Director-General to deal with claims for repayment of unclaimed money and make those payments from the Compensation Fund under the Act, with provision for the Compensation Fund to be reimbursed from the Consolidated Fund in the case of repayment of unclaimed money already paid to the Consolidated Fund. This will replace the existing regime whereby claims for repayment of unclaimed money are made to the Treasurer for payment from the Consolidated Fund.

Other amendments

Schedule 1 [2] and [7] make it clear that a licensee director of a licensee corporation or the licensee in charge of a licensee's place of business is not required to be accredited as an auctioneer merely because auctions will be conducted as part of the business of the corporation or place of business. This does not limit the existing requirement that real estate agents and stock and station agents who conduct auctions are required to be accredited as auctioneers.

Schedule 1 [31] and [32] enact consequential savings and transitional provisions.