NSW Legislative Assembly Hansard

Property, Stock and Business Agents Amendment Bill

Extract from NSW Legislative Assembly Hansard and Papers Tuesday 8 November 2005.

Second Reading

Ms DIANE BEAMER (Mulgoa—Minister for Western Sydney, Minister for Fair Trading, and Minister Assisting the Minister for Commerce) [8.45 p.m.]: I move:

That this bill be now read a second time.

The Property, Stock and Business Agents Act 2002 commenced on 1 September 2003 and represented the most comprehensive reform of the regulation of property agents in New South Wales in some 60 years. The Government has been monitoring the Act's operation in practice, and today I will outline a range of amendments to strengthen the legislative framework and finetune some aspects for the benefit of consumers and the industry. People engage in property and business sales and purchases relatively infrequently, yet they are some of the most important and expensive transactions we undertake in our lives. When someone engages an agent to act on their behalf, they place an enormous amount of trust in that person. Consumers face risks such as not finding a buyer or tenant, failing to maximise the true value of the property, and the potential loss of deposit or rental income.

The key elements of the reforms introduced by the Government in 2002 included mandatory professional development to lift industry standards, tightening of probity entry requirements, increased transparency at auctions through bidder registration, requirements to substantiate price estimates, increased requirements to disclose conflicts of interest, and streamlined disciplinary processes. Since the Act's commencement real estate investigators from the Office of Fair Trading have attended more than 500 property auctions. More than 70 formal cautions have been issued for breaches of auction requirements, mainly relating to minor matters such as auctioneers not displaying required signage and accepting bids from people who have not displayed their bidder registration cards when making a bid.

In some of the more serious matters, I can also advise that 82 notices have been issued to licensees to show cause why disciplinary action should not be taken against them, and eight real estate agents have had their licences cancelled and been permanently disqualified from the industry due to misappropriation of trust creditor funds. Despite these results, I am pleased to be able to report that since the introduction of the Government's reforms the number of breaches of auction requirements has consistently fallen. Indeed, the most recent survey of 46 auctions in September 2005 resulted in only six minor cautions, no prosecutions, and no penalty notices. In another place I have congratulated the majority of agents and auctioneers on the way in which they conduct their businesses. Most have accepted and are working with the changes.

But to ensure the Act continues to be effective in meeting the needs of consumers and the industry, some additional amendments are required. These amendments fall broadly into three categories, and will contribute to an improvement in the operation of the Act in practice—firstly, to licensing entry requirements for agents; secondly, to the provisions relating to the auctions process; and, thirdly, to agent conduct.

I will now provide an overview of the provisions. First I will deal with the provisions concerning licensing entry requirements and the grounds upon which a person may be disqualified from operating as a property agent. Because of the significance of property transactions to consumers, and the handling of large amounts of trust money, it is imperative that high standards of probity apply to property agents. One way of addressing this is through regulating who can obtain a licence or certificate under the Property, Stock and Business Agents Act, and specifying the grounds upon which those licences can and should be cancelled or suspended. Section 16 of the Property, Stock and Business Agents Act establishes several grounds for disqualifying people from holding a licence or certificate. Some of these grounds require finetuning because of gaps that have become apparent now that the Act has been operating for more than two years.

Under section 16 of the Act a person may be disqualified if they are 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". However, this concept does not adequately capture all directors or people involved in the management of insolvent corporations, which reflects on their ability and suitability to handle money. The current reference to a winding-up order only refers to a winding up by a court and excludes a creditor's voluntary winding up, which occurs where the directors are not able to make a declaration as to the solvency of the corporation. Also, a liquidator is not a controller or administrator, so the appointment of a liquidator to a corporation, unless by a court, is not currently grounds for disqualification. In order to address these situations currently excluded, the bill provides for the broader concept of a "director or person involved in the management of an externally administered body corporate" to replace the existing concept.

A body corporate that is the subject of a member's voluntary winding up will be excluded from this section. A voluntary winding up occurs where a company is solvent and is being wound up because it is no longer needed by its shareholders as a structure through which they wish to conduct some part of their business affairs. Furthermore, the current provisions in section 16 which provide for disqualifying a director or person concerned in the management of a corporation that is the subject of a winding-up order do not specify a time frame. A person may therefore avoid disqualification by resigning the day before the appointment of an external administrator. The bill therefore provides that a director or person concerned in the management of a company in the 12 months prior to it becoming externally administered should be disqualified. Only actions taken by the person whilst involved in the management of the corporation will be considered.

Similar concepts are contained in the Corporations Act 2001, which deals with a court's power of disqualification in relation to insolvency and the non-payment of debts. Another matter requiring modification relates to the disqualification of an undischarged bankrupt from holding a licence, because there has been some uncertainty in interpretation. The intended purpose of the disqualification provision is to ensure that people who have demonstrated an inability to adequately manage their business, and who may put their financial needs before those on whose behalf they act, should be excluded from holding a licence. The Act currently provides that the Commissioner for Fair Trading may grant a licence to an undischarged bankrupt if satisfied that the person took all reasonable steps to avoid the bankruptcy.

The amendments proposed in the bill make it clear that the commissioner should consider the steps taken by the applicant to avoid bankruptcy when financial difficulties first arose in the business, and not just consider the steps taken once bankruptcy, liquidation or administration became imminent. For example, a person should not be granted the discretion based solely on their actions after they have been served with a bankruptcy notice, because this would ignore the financially irresponsible behaviour which led to the serving of the notice. In addition, the commissioner's discretion to grant a licence to an undischarged bankrupt does not currently appear to apply consistently to a director or person concerned in the management of a failed company. But there is no reason why this discretion should not apply equally. It is therefore proposed to amend the Act to ensure that the commissioner's discretion applies equally to an undischarged bankrupt as well as to people involved in the management of an externally administered corporation.

Under the current legislation, disqualification on the grounds of bankruptcy or association with a failed company applies equally to applicants for a licence or certificate. This is unduly onerous on applicants for a certificate under the Act, given that they work under the supervision of a licensee, and the licensee now has an explicit duty in relation to supervision, backed up by guidelines from the Commissioner for Fair Trading. The bill therefore provides that disqualification for certificate holders on the grounds of bankruptcy or association with a failed company should not apply as they do not handle moneys in their own right. Section 16 also currently provides that a person is disqualified if he or she holds a licence or authority that has been suspended under the Fair Trading Act 1987 where serious consumer protection grounds exist.

However, this does not address the fitness of a trader who has been suspended or disqualified under other fair trading legislation and who now wishes to enter the property agent industry. Suspension or disqualification is an indicator that a serious offence has been committed. Accordingly, where disciplinary action has been taken by the commissioner against the holder of an authority under other fair trading legislation, resulting in the person's disqualification or suspension under that legislation, it is proposed that the person should also be disqualified under the Property, Stock and Business Agents Act. To ensure some flexibility in this provision the bill also provides that the commissioner may ignore such a disqualification where it is appropriate in the circumstances—for example, if it can be demonstrated that the disciplinary action taken does not affect the applicant's suitability to trade fairly.

The second category of amendments contained in the bill relates to auctions. These amendments are aimed at lifting and sustaining consumer confidence in the auction process. As I said earlier, the Government's reforms to promote better transparency and fairness through bidder registration at auctions—which have now been in place for more than two years—have been positively received by agents and consumers alike. But again, a few amendments are necessary to improve the legislation and its operation in practice. In summary, these changes relate to clarifying proof of identity requirements in relation to bidder registration; new offences and penalties targeted at preventing dummy bidding and collusive practices at auctions; marketing of properties after an unsuccessful auction; and removing unnecessary accreditation for directors of corporation licensees whose employees conduct auctions.

First I will deal with the proof of identify provisions. Section 69 of the current Property, Stock and Business Agents Act provides that an agent must not enter a person's name and address in a bidders record unless those details are established by the production of certain specified forms of proof of identity. These include a drivers licence, an Australian passport, and other forms prescribed by the regulations. Some confusion has arisen in practice about whether there is a need for an agent to check other information if a passport is produced which does not indicate the person's address. The bill will put beyond doubt the need for a bidder to provide additional information to verify their address at the time of registering for an auction. I recently announced that the

Government would introduce amendments to outlaw the practice of dummy bidding and increase penalties relating to collusive practices at auctions.

Section 66 provides that only one bid may be made by or on behalf of the seller at an auction of residential property or rural land. The purpose of this provision is to deter the making of dummy bids on behalf of the seller aimed at artificially increasing the selling price of the property. It is also an offence to aid and abet the making of more than one vendor and to engage in collusive practices at auctions. To put it beyond any doubt, the bill explicitly outlaws dummy bidding in relation to residential property or rural land. Dummy bidding is essentially defined as a bid by or on behalf of the seller other than the single vendor bid made by the auctioneer on behalf of the seller. The fact that the auctioneer will be the only person authorised to make the seller bid will make it very transparent. The proposed new offence will allow the penalty to be imposed on the person who actually made the dummy bid and will not require proof that it was made at the request of, or with the knowledge of, the vendor.

A maximum penalty of 500 penalty units is to be imposed for a corporation and 250 penalty units in any other case. This reflects the seriousness of any action by a person who seeks to damage the auction process or bring it into disrepute. The dummy bidding provisions will also be required to be notified by the auctioneer prior to the auction. In order to help facilitate the purchasing of a property at auction by a co-owner, for example, if a relationship breaks down, or by the executor or administrator of a deceased estate, the bill ensures that people in these circumstances will have the right to make more than one bid, provided the contract discloses the circumstances, the auctioneer announces the making of more than one bid prior to the commencement of bidding, and each bid by the executor or co-owner is announced as such.

Section 78 prohibits collusive practices at auction sales. The section applies to persons using any collusive practice to induce or attempt to induce a person to bid in a way that prevents free and open competition. It also extends to those persons who agree to abstain from bidding or bidding in a certain manner as a result of a collusive practice. To bring it in line with the penalty for the new dummy bidding offence, the bill increases the current penalties for collusive practices from 200 to 500 penalty units for corporations, and from 100 to 250 penalty units in other cases. Related to this is the issue of invented bids. A popular claim in the media, following a Victorian court finding against an agent several years ago, is that auctioneers will sometimes take bids from trees and passing cats and dogs. The bill tightens up the operation of the current auction provisions in the Act by clearly making it an offence to invent a bid by acknowledging that one has been made when this is not in fact the case.

The maximum penalty proposed for this offence will be 250 penalty units. A further amendment relates to the circumstances where a property is passed in at auction and is later marketed for sale. In statements or advertisements made by agents when marketing such properties, the last bid made at the auction is often stated. If the last bid were to be made by the seller, a potential buyer of the property could be misled as to the market value of the property. So that consumers can be better informed, the bill provides that where the amount of the last bid is stated in subsequent marketing and that bid was in fact the seller's bid, it is to be identified as such. This information is also to be recorded in the Bidders Record.

The final set of amendments relating to auctions provides that the director of a corporation, licensee or a licensee-in-charge does not need auctioneer accreditation unless he or she is personally conducting auctions. Under section 21 of the Act, real estate agents and stock and station agents who wish to carry out auctions must obtain specific auction accreditation as a condition of their licence. The purpose is to ensure that they have the specific skills to carry out this form of selling. Section 14 (2) (d) of the Act requires at least one of the directors of a corporate licensee to hold a licence that an individual person is required to hold to carry on the business that the corporation carries on. Furthermore, section 31 (2) of the Act also requires that there needs to be a licensee-in-charge at each place of business and that that person must hold a licence that an individual is required to hold to carry on that business.

Discussion has recently arisen in relation to whether the director of a corporation licensed as a real estate agent with staff that undertake auctioning needs to be accredited as an auctioneer since there is no auction licence per se, but rather an individual accreditation of auctioneers under section 21. The requirements in sections 14 (2) and 31 (2) of the Act in relation to directors and licensees-in-charge are essentially aimed at ensuring that the people supervising others in a real estate business have the appropriate skills and qualifications to do so. This is necessary in terms of longer-term transactions, which generally benefit from the establishment of systems and procedures. However, an auctioneer essentially acts individually and does not act under supervision while carrying out an auction.

If an offence is committed by an auctioneer as an employee, a licensee-in-charge's auctioneer qualifications are not relevant. A strict interpretation of sections 14 (2) and 31 (2) would mean that an employee with individual auctioneer accreditation cannot conduct auctions for their employer if the employer is not accredited also as an auctioneer. But if that same employee freelances, they are able to contract their auctioneering services without the director of a corporation or the licensee-in-charge having the auctioneering accreditation. The bill amends the Act to remove the imposition of this unnecessary requirement, so that either the director of a corporation

licensee or a licensee-in-charge will not be required to hold auctioneer accreditation unless they are actually personally conducting auctions.

The third and final category of amendments contained in this bill covers a number of miscellaneous amendments to agent conduct requirements. These include: clarifying an agent's duty of disclosure, information to be included in advertisements, increasing penalties for breaches of rules of conduct, and allowing the Commissioner for Fair Trading to require an agent to discontinue unjust conduct and rectify the consequences of such conduct. Section 47 of the Act requires an agent to disclose certain relationships and financial benefits to a prospective buyer, for example, a fee the agent will receive for referring the person to another service provider, or a relationship the agent has with the service provider. There has been some confusion as to what a prospective buyer is, and therefore when disclosure needs to take place.

The bill clarifies that disclosures to a prospective buyer need only be made after an offer to purchase has been passed on to the principal. In addition, section 47 (1) (c) imposes a disclosure requirement in relation to any benefit any person has received. It is proposed to clarify that the section only requires disclosure in relation to any benefit received by a person to whom the agent has referred the client or prospective buyer. Section 50 (2) of the Act requires an agent advertising a property for sale to disclose in the advertisement if he or she has an interest in the property as a principal. The purpose of this requirement is to promote transparency where an agent engages in property transactions relating to his or her own property. However, if the property is owned by a company of which the agent is a director, no disclosure is required.

Similarly, if one of the directors of a corporate licence holder sells his or her property as an individual, then no disclosure is required. It is proposed that section 50 be amended to also require disclosure where the agent is linked to the owner of the property being advertised by a common individual or individuals licensed under the Property, Stock and Business Agents Act 2002. This will ensure that the spirit of the legislation in promoting a high degree of transparency for consumers is maintained. Section 86 provides that money received for or on behalf of any person by a licensee is to be held exclusively for that person and is to be paid or disbursed as the person directs, and, until so paid or disbursed, to be held in a trust account at an authorised deposit-taking institution.

To help prevent misappropriation of clients' money, the Act establishes audit requirements relating to licensees' trust accounts. Section 86 requires that the trust account is to be in the name of the licensee or firm of licensees or, if the licensee is a corporation, in the name of the corporation. Many licensees operate a number of trust accounts, for example, a general trust account plus a range of accounts in which funds belonging to specific clients are held. In those cases, the name of the client will also be included in the account name, for example "Owners Corporation 1234". To help facilitate trust account investigations by the Office of Fair Trading, the bill amends section 86 to clarify that the name of the licensee or firm of licensees or corporation is to appear as a prefix of the account name, followed by any other necessary identifier of the trust account.

This will make accounts easier to identify and assist with auditing procedures. A number of minor amendments are proposed in relation to the operating procedures involving trust accounts. Under section 90 interest earned on trust accounts is paid into the statutory interest account by authorised deposit-taking institutions on the first business day of each month. To provide a more reasonable time frame for these institutions, it is proposed to allow payment by the seventh business day, a more realistic time frame. Section 91 provides that authorised deposit-taking institutions must, within 14 days after the end of each month, notify the commissioner in writing of several details concerning trust accounts, including the number of accounts opened in the month, the names of the licensees who opened the accounts, the names and numbers of those accounts, and the addresses of the branches where the accounts are kept.

This information is currently provided in hard copy, which is sometimes difficult to manage. The bill therefore amends section 91 to provide that the Commissioner for Fair Trading can prescribe the method by which a financial institution is to notify the required information relating to trust accounts, and this may include, for example, in electronic form. Under division 4 of part 7 of the Act, unclaimed money held in a licensee's trust account for more than two years must be paid to the Commissioner for Fair Trading and deposited in the Compensation Fund. The provision requires that remaining unclaimed money be remitted to Treasury following the end of each year. Section 98 requires that Treasury be provided with details of persons entitled to the money and the amount to which they are entitled.

Under section 99 Treasury must pay money to an entitled person on application. Treasury has recently changed its requirements and now requires government agencies to keep their own unclaimed money register of the persons entitled to money. Claims by entitled persons are made to and paid by the agency, and the agency then recoups the money from Treasury. The bill therefore seeks to amend sections 98 and 99 to reflect current Treasury requirements. The bill also increases penalties for breaches of the rules of conduct. These are prescribed in the Property, Stock and Business Agents Regulation 2003, and establish ethical standards of behaviour for agents. The rules currently include a requirement for agents to act honestly, fairly and professionally with all parties in a transaction and not to mislead or deceive any parties.

Given the potential detriment from a breach of the rules and the serious consequences that may flow for consumers, the bill amends section 37 of the Act to include a specific offence for a breach of the rules of conduct. The penalty for this offence will be 100 penalty units for a corporation and 50 penalty units for an individual. The final amendment I wish to outline relates to a new power for the Commissioner for Fair Trading to require an agent to discontinue unjust conduct. The Property, Stock and Business Agents Act already allows disciplinary action to be taken against a licensee for dishonest and unfair conduct. But the Act does not provide for the commissioner to require the licensee to discontinue unjust conduct against a consumer nor to provide compensation for such conduct. There are provisions in the Motor Dealers Act 1974 which provide this option and it is proposed that similar provisions be inserted in the Property, Stock and Business Agents Act.

Unjust conduct covers behaviour that is dishonest or unfair, in breach of contract, in contravention of the Act or regulations, or any relevant Act administered by the Minister for Fair Trading, or failure to comply with a condition or restriction on the licence. Under the amendments contained in the bill, the commissioner would be able to request the licensee to discontinue the unjust conduct or rectify the consequences of the conduct, and apply to the Consumer, Trader and Tenancy Tribunal for a binding order restraining the conduct if the licensee does not desist. This wider range of options for the commissioner will ensure that appropriate action can be taken when it is appropriate to provide a remedy for consumers where unjust conduct has occurred.

I have today outlined a number of amendments to the Property, Stock and Business Agents Act 2002 which seek to strengthen the rights of consumers, and finetune and clarify some administrative and operational arrangements. These amendments arise as a result of the Government's monitoring of the Act's operation in practice and ongoing consultation with all stakeholders in the industry. A draft of the bill was forwarded to major stakeholders for their consideration and review, and several submissions were received and taken into account in the final drafting. I want to thank those organisations for their input to the bill, and for their ongoing co-operation with Fair Trading on these matters. I commend the bill to the House.