
Agents Financial Administration Bill 2010

Explanatory Notes

Short Title

The short title of the Bill is the Agents Financial Administration Bill 2010.

Objectives of the Bill

The *Property Agents and Motor Dealers Act 2000* (PAMD Act) provides for the licensing and regulation of real estate agents, resident letting agents (letting agents for community titles schemes), pastoral houses (sellers of rural-based livestock, chattels and real property), property developers, motor dealers, auctioneers and commercial agents (predominantly debt collectors). The PAMD Act also establishes a claim fund for consumers who suffer financial loss from particular conduct of a licensee.

The Bill implements the former Service Delivery and Performance Commission's (SDPC) recommendation to split the PAMD Act into industry specific Acts by enacting a law, separate to the industry specific Acts, to provide for the administration of trust accounts held by agents to be regulated under the industry specific Acts and to establish a claim fund to compensate persons for financial loss arising from their dealings with these agents.

The Bill forms part of a package of Bills that give effect to the split of the PAMD Act, with the other Bills being the Property Agents Bill 2010, the Motor Dealers and Chattel Auctioneers Bill 2010 and the Commercial Agents Bill 2010 (Agents Bills). The main object of the Bill is to protect consumers from financial loss in dealings with agents licensed under the Agents Bills.

Reasons for the Bill

SDPC Review

In 2008, the SDPC conducted a review of the PAMD Act with a view to reducing the regulatory burden on business while maintaining effective consumer protection. The Government supported (fully, partially or with

qualification) 22 of the 48 recommendations. The SDPC report on the review and the Government's response were tabled in Parliament on 23 April 2009.

One SDPC recommendation (recommendation B1) was to repeal the PAMD Act and establish separate Acts regulating real estate agents and motor dealers respectively. It was also recommended that the trust account provisions be transferred to the *Fair Trading Act 1989*, and commercial agents be regulated under the *Security Providers Act 1993*. The Government supported splitting the PAMD Act into industry specific Acts, and it was considered more appropriate to establish separate Acts to deal with trust fund provisions and the regulation of commercial agents respectively.

While the purpose of the Bill is to house provisions relating to the administration of trust accounts and the claim fund in a separate Act, the Bill also implements a number of minor amendments to address operational issues. The Bill reduces current penalties under the PAMD Act to allow infringement notices to be issued for more minor trust account breaches, such as an early drawing of a commission from a trust account. Under the PAMD Act, these offences attract a maximum penalty of three years imprisonment. Consequently, they are indictable offences and an infringement notice cannot be issued. The Bill reduces the penalties from three years to two years, which provides an efficient and appropriate means of enforcement for relatively minor breaches.

The Bill also expressly provides that the chief executive may publish the information contained in the register of undertakings on the department's website, to ensure the register can be easily accessed by the public.

The Bill does not continue the current provisions under the PAMD Act for the chief executive to approve a person as an auditor of a licensee. The ability for the chief executive to approve an auditor was a requirement carried over from the *Auctioneers and Agents Act 1971*, which preceded the PAMD Act. This requirement was introduced to ensure that agents in rural areas could comply with auditing requirements where a qualified auditor was not readily available, and could not be appointed by the agent. The number of applications for approval of auditors has dropped to approximately 3 every 5 years, with no applications made to the chief executive since 2006. As licensees no longer have difficulty appointing qualified auditors, these provisions have not been continued under the Bill.

Achievement of the Objective

The Bill establishes a law to provide for the administration of trust accounts held by agents to be regulated under the Agents Bills and to establish a claim fund to compensate persons in particular circumstances for financial loss arising from their dealing with these agents.

The main object of this Bill is to protect consumers from financial loss in dealings with agents licensed under the Agents Bills.

The object is to be achieved by regulating the way agents establish, manage and audit trust accounts, establishing a claim fund to compensate persons in particular circumstances for financial loss arising from dealings with agents, and promoting administrative efficiency for claims made against the claim fund.

Alternatives to the Bill

The Government response to the SDPC review recommended that an Act, separate from the industry specific Acts, provide for the administration of trust accounts kept by agents. While, each industry specific Act could provide separately for the establishment and administration of a claim fund, providing for claim fund matters in this Bill avoids duplication and simplifies the regulatory framework. The Bill in its current form is the best mechanism to achieve the Government's policy to replace the PAMD Act with industry specific Acts.

Estimated Cost for Government Implementation

The implementation of the new licensing framework will require the development and implementation of new licensing systems, including new business processes, new data systems and data migration, the development of new forms, Smart Service Queensland scripting to reflect the new licensing categories, and a communication campaign to inform existing licensees of the changes to the licensing framework.

It is estimated that the implementation costs for the split of the PAMD Act will total \$1.06 million. The Department of Employment, Economic Development and Innovation has evaluated the work required for implementation and considers that \$0.52 million can be absorbed within existing resources, with funding for the balance of \$0.54 million being granted by the Cabinet Budget Review Committee at Mid-Year Review. The total costs include licence database systems changes to reflect the new

licensing categories (\$0.28 million for engaging a third party supplier to make changes to the licensing system), data migration activities (\$0.26 million), implementation and change management costs for programs and systems (\$0.11 million). A communications campaign is also required to inform licensees of the changes to the licensing framework, with scripting changes, changes to forms and other governance costs also being incurred (\$0.41 million).

Consistency with Fundamental Legislative Principles

In general, the fundamental legislative principles affected by the Bill are the same as those which were identified and addressed in the establishment of the PAMD Act. More detailed consideration of these matters is provided as follows:

Is the Bill consistent with principles of natural justice?

Clause 39 provides that the chief executive may freeze a licensee's account if it appears that trust money has or may have been stolen or misappropriated. The immediate freezing of an account without providing a licensee with an opportunity to make representations is a denial of natural justice. This provision is justified on the basis that the stealing or misappropriation of trust money can result in significant consumer detriment as consumers can lose relatively large sums of money. The provision prevents the continuation of any misappropriation in relation to an amount of trust money, reducing the extent of any financial loss to a consumer or preventing future financial loss to others consumers.

Is the legislative power proportionate?

Clause 41 provides that QCAT may not stay a decision to freeze a licensee's account under clause 39 while it decides a review of the decision. The removal of the power to stay the original decision may amount to a breach of the fundamental legislative principle that legislative power be proportionate, and that extraordinary power only be conferred for extraordinary or urgent circumstances. Not providing for the stay of a decision by the chief executive to freeze an account while the decision is being reviewed is necessary to ensure that any stealing or misappropriation of trust money not continue and to minimise the risk of any future financial loss for consumers dealing with the licensee.

Does the Bill reverse the onus of proof in criminal proceedings without adequate justification?

Clause 133 provides that an entry in a document kept by or belonging to a licensee is evidence that the entry has been made by or with the authority of the licensee. The provision reverses the onus of proof by requiring the licensee to prove that an entry in a document has not been made by the licensee or with the authority of the licensee. However, it is a reasonable assumption made for the purpose of procedural efficacy to assume that entries in documents in the possession of the licensee or belonging to the licensee have been made with the authority of the licensee, particularly given that evidence related to the authorship of entries in documents is likely to be within the knowledge of the licensee.

Clause 135 provides that an act done or omitted to be done for a person by a representative of the person within the scope of the representative's actual or apparent authority is taken to have been done or omitted to be done by the person, unless the person proves the person could not, by the exercise of reasonable diligence, have prevented the act or omission. The reversal of the onus of proof is justified on the grounds that the information relating to the exercise of reasonable diligence would be peculiarly within the knowledge of the licensee and would otherwise be difficult to establish.

Clause 136 provides that if a corporation commits an offence against a provision of the Bill, an executive officer is automatically liable for committing the offence of failing to ensure the corporation complies with the provision, subject to the defences that the executive officer took all reasonable steps to ensure the corporation complied, or that the executive officer was not in a position to influence the conduct of the corporation. The reversal of the onus of proof is justified because provisions which a corporation may contravene have the potential to cause substantial consumer detriment and it is appropriate that an executive officer who is in a position to influence the conduct of the corporation, and who is responsible for a contravention, be accountable. This provides an incentive for the executive officers of a corporation to ensure that the corporation is compliant. The clause also provides that it is sufficient for the executive officer to prove that the act or omission that constituted the offence was done or made without the officer's knowledge, despite the officer having taken all reasonable steps to ensure the corporation complied with the provision.

Does the Bill in all other respects have sufficient regard to the rights and liberties of individuals?

Imposition of liability for the acts of others

Clause 135 provides that an act done or omitted to be done for a person by a representative of the person within the scope of the representative's actual or apparent authority is taken to have been done or omitted to be done also by the person, unless the person provides the person could not, by the exercise of reasonable diligence, have prevented the act or omission. While the clause imposes liability for the actions of others, it is justified on the grounds that it follows the general law of agency in that the principal is liable for the actions of their agent. The clause is also consistent with one of the main themes of the Bill in that principal licensees must ensure their employees comply with the Bill, and are responsible for the acts and omissions of their employees.

Clause 136 provides that if a corporation commits an offence against a provision of the Bill, an executive officer is automatically liable for committing the offence of failing to ensure the corporation complies with the provision, subject to the defences that the executive officer took all reasonable steps to ensure the corporation complied, or that the executive officer was not in a position to influence the conduct of the corporation. The imposition of liability for the actions of the corporation is justified because provisions which a corporation may contravene have the potential to cause substantial consumer detriment and it is appropriate that an executive officer who is in a position to influence the conduct of the corporation, and who is responsible for a contravention, be accountable. This provides an incentive for the executive officers of a corporation to ensure that the corporation is compliant. The clause also provides that it is sufficient for the executive officer to prove that the act or omission that constituted the offence was done or made without the officer's knowledge, despite the officer having taken all reasonable steps to ensure the corporation complied with the provision.

To provide further justification, clause 136 is consistent with one of the main themes of the Bill in that principal licensees must ensure their employees comply with the Bill, and are responsible for the acts and omissions of their employees. The clause is also consistent with the suitability requirements for applicants and licensees under the Agents Bills. In deciding whether a corporation is suitable, the chief executive must have regard to whether an executive officer of the corporation has been convicted of an offence against this Bill or the Agents Bills. If derivative

liability was not imposed, an executive officer who had influence over an offence by a corporation that resulted in the corporation's licence being cancelled, could continue the unlawful conduct under a new corporate entity.

Another issue that may be raised in relation to clause 136 is that derivative liability can potentially apply to any offence under the Bill. However, it is not considered appropriate to limit derivative liability to certain offences, such as more serious offences. This is because there is potential for the commission of relatively minor offences in a manner that is systematic and widespread.

It is noted that the Council of Australian Governments is undertaking a review of provisions imposing liability on executive officers. The object of the review is to ensure that there is sufficient justification for making directors liable for corporate fault. As the review has not yet been finalised, it is anticipated that any further assessment around the appropriateness of executive officer liability in relation to offences in the Bill would be undertaken once the review is completed.

Right not to be defamed

Clause 139 allows the Minister or chief executive to make or issue public warning statements identifying individuals who have committed offences against the Bill. These public statements may have an adverse affect on individuals. However, before making a statement, the Minister or chief executive must be satisfied that it is in the public interest to do so. Accordingly, the inconsistency with the fundamental legislative principle is justified on the grounds that it is in the public interest to allow the making of warning and information statements for the protection of consumers.

It should be noted that this power is common in consumer protection legislation. It is a vital power as public warning statements can protect consumers from committing large amounts of money or entering into transactions in which they would suffer detriment, while information statements play an educative role in informing consumers about particular conduct or behaviour that may place consumers at risk. The power also alerts licensees to non-compliant behaviours. The public exposure of non-compliant licensees also provides a compliance incentive to other licensees wishing to avoid such negative publicity.

It is a reserve power, not able to be delegated, and used only in the rarest of circumstances where it becomes apparent to the Minister or chief executive there is a demonstrable, tangible pattern of conduct or behaviour that may

cause widespread detriment to consumers. An example of where its use may be considered is where the Minister or chief executive has strong evidence that consumers may suffer financial detriment and such loss may be considerable if a public warning statement is not issued.

Clause 140 provides that nothing in the Bill affects or limits any civil remedy that a person may have against a licensee or another person for any matter. Accordingly, the Minister and chief executive will not have immunity from legal liability in relation to public statements and this is a matter that is taken into consideration in deciding to issue a statement that identifies a person.

Does the Bill have sufficient regard to the institution of Parliament?

The Bill replicates the relevant heads of regulatory power under the PAMD Act. The matters to be prescribed under regulation are those matters usually prescribed under regulations, i.e. matters to be prescribed in documents and minor offences. As these are mostly administrative matters that can be subject to change over time, it is appropriate that they are provided for in a regulation, rather than primary legislation. The regulation will comply with the requirements of section 4(5) of the *Legislative Standards Act 1992*.

Clause 104 provides for monetary limits on amounts that may be paid from the claim fund for a single claim or arising out of the wrongdoing of a single person to be prescribed by regulation. It is appropriate that this amount be prescribed by regulation, as the scale of financial loss that can be suffered in these transactions will be subject to changes in the value of these transactions. The maximum amount that can be claimed should have some correlation with the financial loss that is suffered by consumers in these transactions.

Consultation

The SDPC conducted extensive consultation as part of its review of the PAMD Act by holding meetings and workshops with industry, consumer, academic and Government stakeholders. The SDPC's recommendations subsequently arose out of this consultation process.

Industry stakeholders were again consulted in the development of this Bill and the other related Bills. The peak bodies that were consulted include the:

- Auctioneers and Valuers Association of Australia;

- Australian Livestock and Property Agents Association;
- Australian Property Institute;
- Australian Resident Accommodation Managers' Association;
- Institute of Mercantile Agents (Queensland division);
- Motor Trades Association Queensland;
- Property Council of Australia;
- Property Sales Association of Queensland;
- Queensland Law Society;
- Royal Automobile Club of Queensland;
- Real Estate Institute of Queensland; and
- Urban Development Institute of Australia (Queensland).

A draft of this Bill and the other related Bills was released for public consultation during the second week of August 2010. All submissions received on the consultation draft were considered before finalisation of the Bill for introduction to Parliament.

Uniform or complementary with legislation of the Commonwealth or another State

The Bill does not form part of a uniform scheme, nor is it complementary with legislation of the Commonwealth or another State.

Notes on Provisions

Part 1 Preliminary

Division 1 Introduction

Clause 1 provides that the short title of the Bill is the Agents Financial Administration Bill 2010.

Clause 2 provides that the Bill commences on a day to be fixed by proclamation.

Clause 3 provides that the Bill is to apply to the State, and as far as the legislative power of the State permits, to the Commonwealth and to the other States. However, nothing in the Bill makes the State, the Commonwealth or any other State, liable to be prosecuted for an offence.

Clause 4 exempts a prescribed officer (an accountable officer under the *Financial Accountability Act 2009* or a public service officer) from the provisions of the Bill in relation to trust money for which the officer is responsible if another Act provides for the way the prescribed officer must deal with the trust money.

Division 2 Object

Clause 5 provides that the main object of the Bill is to protect consumers from financial loss in dealings with agents licensed under an Agents Bill. Subclause (2) provides the ways in which the objects are to be achieved.

Division 3 Interpretation

Clause 6 provides that the dictionary in the schedule defines particular words used in the Bill.

Clause 7 provides that a person is ‘in charge’ of a licensee’s business at a place where the licensee carries on business only if the person personally supervises, manages and controls the conduct of the licensee’s business at the place. Subclause (2) defines ‘licensee’s business’ to mean the licensee’s business carried on under the authority of the licensee’s licence.

Part 2 Trust accounts

Division 1 Opening trust accounts

Clause 8 provides that a trust account or special trust account can only be opened at an approved financial institution within the State, and that the licensee must provide a copy of the licensee’s licence to a manager or officer in charge of the institution before opening the account.

Clause 9 requires the licensee to ensure that the name of the trust account the licensee opens includes the words “general trust account” or “special trust account” as appropriate.

Clause 10 requires a licensee to give the chief executive written notice within 14 days of opening a trust account, changing the name of the trust account or closing the trust account. The written notice must identify the type of trust account, the financial institution where the account is or was kept, the account name and number and the identifying number of the financial institution.

Division 2 Payment to trust accounts

Clause 11 provides that clauses 12 and 13 apply if the licensee receives an amount for a transaction or with a written direction for its use.

Clause 12 requires a licensee, immediately upon receiving a relevant amount, to pay it to the licensee’s general trust account, or if the licensee is directed in accordance with clause 13(1) to invest the amount, to pay it into a special trust account, in accordance with clause 13(2).

Clause 13 provides for the circumstances when a licensee must invest a relevant amount instead of paying it into a general trust account. If the licensee receives the amount for a sale, and the sale is to be completed on a day stated in the contract, or on a day ascertainable on the day the contract was entered into, that is more than 60 days after the amount is received, and all the parties to the sale direct that the amount be invested, the licensee must pay the amount into a special trust account in accordance with the direction.

Clause 14 prohibits a licensee from paying an amount into a trust account other than an amount that must be paid under this division. However, if a licensee receives an amount that consists of an indivisible amount of trust money and non-trust money, the licensee must pay the amount into the licensee's general trust account and draw the non-trust money from the account within 14 days after the money becomes available for drawing.

Clause 15 provides that a licensee who holds more than one licence is not required to keep a general trust account for each licence.

Clause 16 protects trust account money by providing that an amount paid, or required to be paid, to a trust account cannot be used by the licensee to pay a debt to a licensee's creditor, and cannot be attached or taken in execution under a court order or process by a licensee's creditor.

Division 3 Payments from trust accounts

Clause 17 requires an amount paid to a trust account to be kept in the account until it is paid out in accordance with the Bill and to be paid out in a way permitted by the Bill.

Clause 18 provides for the circumstances and way in which a licensee is permitted to draw a transaction fee or transaction expenses in relation to a particular transaction from a trust account.

A licensee may draw an amount from a licensee's trust account to pay the licensee's transaction fee or expenses only if the amount is drawn against the transaction fund for the transaction and the licensee is authorised to draw the amount under this clause.

A licensee is authorised to draw an amount from the transaction fund to pay a transaction expense when the expense becomes payable. At the finalisation of a transaction, a licensee is also authorised to draw an

amount, less the total of the licensee's transaction fee and any outstanding transaction expense, from the transaction fund to pay the person entitled to the amount or in accordance with the person's written directions. The licensee is authorised to draw the licensee's fee from the transaction fund when the amount to be paid to the entitled person has been paid and the transaction has been finalised.

If a dispute about the transaction fund arises, the transaction is not taken to be finalised until the licensee is authorised to pay out the transaction under clause 22.

Where the person asks for payment of the balance of the fund, the licensee must pay the amount to the entitled person or in accordance with the person's written direction within 14 days of the request. If the person has not asked for payment of the balance, the licensee must pay the amount to the entitled person or in accordance with the person's written direction within 42 days after the person became entitled to the balance.

Division 4 Other trust account obligations

Clause 19 sets out a licensee's obligation to account to clients for all amounts received by the licensee in relation to a transaction, including the source and amount of any rebate, discount, commission or benefit the licensee received for any expenses the licensee was authorised to incur by the client or for referring the client to someone else for services in connection with the transaction.

A licensee is required to give a client an account in writing, setting out the amount received in relation to the transaction, how the amounts were or are to be paid out and the source of any rebate, discount, commission or benefit the licensee received within 14 days of receiving the client's written request for an account, or if no request is received, within 42 days after the relevant transaction has been finalised.

Clause 20 sets out the duties of managers of financial institutions where trust money has been deposited under the Bill. A financial institution must—

- allow an inspector, on the inspector's signed written demand, to inspect and copy any documents relating to a relevant account; and

- immediately inform the chief executive if a licensee's trust account is overdrawn; and
- immediately inform the chief executive of the amount of the cheque and the amount in the account if there is insufficient money in a licensee's trust account to meet a cheque drawn on the account.

Division 5 Disputes about trust money

Clause 21 provides that the division applies if a licensee holds a transaction fund for a transaction in a trust account, and, before the transaction fund is paid out in accordance with the Bill, the licensee receives written notice from a party to the transaction that ownership of the fund, or part of it, is in dispute.

Clause 22 prohibits a licensee from paying out an amount in dispute unless the licensee receives written notice from all parties setting out who is entitled to the amount in dispute or that legal proceedings have begun to determine who is entitled to the amount in dispute, or, if no notice is provided to the licensee within 30 days after receiving notice of the dispute, the amount is paid in accordance with clause 24.

Clause 23 provides that if the licensee receives written notice from all parties setting out who is entitled to the amount in dispute, the licensee must pay the amount to the person entitled to the amount in the notice. If the licensee receives written notice that legal proceedings have started to determine who is entitled to the amount in dispute, the licensee must pay the amount to the court in which the proceedings have been started.

Clause 24 applies if the licensee has not received within 30 days of receiving notice of the dispute, written notice from all parties setting out the person entitled to the money in dispute or written notice that legal proceedings have been started to determine who is entitled to the money. Within 7 days after the end of the 30 day period, the licensee must give all parties to the transaction notice stating either, that after 30 days the licensee will pay the disputed amount to a named person who the licensee believes is entitled to receive it unless the licensee receives a notice under clause 22, or that the licensee cannot decide who is entitled to the amount and will keep the amount in the trust account until a notice is received under clause 22.

Where the licensee decides to pay the amount to the person the licensee considers is entitled to it, the licensee may pay the amount to the person, if the licensee does not receive a notice under clause 22 within 30 days after notice of the licensee's decision is provided.

Part 3 Audit requirements

Division 1 Preliminary

Clause 25 provides the definition of 'auditor' for the purposes of part 3.

Division 2 Provisions about auditors

Clause 26 requires a principal licensee who is required to keep a trust account to appoint an auditor for the trust account.

Clause 27 requires a licensee who appoints an auditor to notify the chief executive in writing, within 1 month after the appointment, of the auditor's name and address and evidence that the auditor has accepted the appointment, where the licensee has not already provided this information when applying for the licence.

Clause 28 provides for the steps that must be taken by an auditor and a licensee if the auditor resigns or dies or the licensee terminates the auditor's appointment. If an auditor resigns or the licensee ends the auditor's appointment, either the auditor or licensee must immediately notify the chief executive of the ending of the appointment and the reasons for it.

An auditor or licensee who is required to give the chief executive notice under clause 28(1) and fails to give this notice commits an offence.

If the licensee's auditor dies, the licensee must notify the chief executive as soon as the licensee becomes aware of the death.

Where an auditor's appointment ends, the licensee must appoint another auditor, within 1 month, and give the chief executive written notice of the

new auditor's name and address and evidence that the auditor has accepted the appointment.

Clause 29 permits the chief executive to report on a matter about an auditor to the Australian Securities and Investment Commission or the auditor's professional supervisory body if the chief executive believes on reasonable grounds that the auditor has not performed the auditor's functions up to generally accepted professional standards of competency, or has failed to detect or report material irregularities in a licensee's trust accounts or has failed to properly perform an auditor's functions under the Bill.

Division 3 Audit of trust accounts

Clause 30 provides the definitions of audit month, audit period, audit report and trust account for the purposes of division 3.

Clause 31 requires a licensee's trust accounts to be audited for each audit period, as defined, for which the licensee carried on business as a licensee and operated a trust account. If a licensee has not operated a trust account for an audit period, the licensee does not need to have the trust account audited provided the licensee gives the chief executive a statutory declaration that the licensee did not operate a trust account during the period.

Clause 32 sets out the time within which a licensee must have the licensee's trust accounts audited and file the auditor's signed original audit report with the chief executive.

The licensee must, within 4 months after the last day of the audit month in each year have the trust accounts for the last audit period audited by the licensee's auditor and file a signed original report with the chief executive.

The chief executive may extend the time in which the licensee must comply with these requirements if the auditor or licensee applies in writing to the chief executive for an extension. The written application for an extension of time must state the grounds on which the extension is sought.

If a licensee is charged with an offence relating to a failure to file an audit report, it does not matter that the failure to file happened without the licensee's authority or if the failure to file was contrary to the licensee's instructions.

Clause 33 provides for the functions of an auditor in relation to a licensee's trust account.

The functions of an auditor are –

- to inspect and audit in each period the trust accounts of each licensee who has appointed the auditor;
- to make an audit report for the licensee for the audit period;
- to make two unannounced examinations of the licensee's trust accounts during the audit period, if the licensee is a licensee for the whole audit period;
- to make one unannounced examination of the licensee's trust accounts during the audit period, if the licensee has been a licensee for less than the whole audit period but for more than 6 months.

The clause also prohibits unannounced examinations of a licensee's trust account within 2 months after the last day of the audit period or another unannounced examination.

Clause 34 requires an auditor to immediately give written notice to the chief executive if the auditor cannot report that a particular trust account has been satisfactorily kept, or if the auditor finds, on an unannounced examination of a licensee's trust accounts, an irregularity that ought to be brought to the chief executive's attention.

Clause 35 permits an auditor to ask a licensee to produce the licensee's general account or to give information about the licensee's accounts if necessary to enable the auditor to decide whether a licensee's trust accounts have been kept satisfactorily. If the licensee refuses, the auditor must immediately report the refusal in writing to the chief executive.

Clause 36 provides that if a licensee who is required to keep trust accounts ceases to be a principal licensee, the licensee must have the trust accounts audited and file the auditor's signed original audit report with the chief executive within two months after the licensee stops being a principal licensee. The period to be audited starts on the day immediately after the end of the period covered by the last audit or where no audit has occurred, from the day the licensee was first required to keep trust accounts, and ends on the day the licensee ceases to be a principal licensee.

Clause 37 provides that an auditor who audits a licensee's trust account must give the licensee an original signed audit report that includes matters prescribed in the clause.

Part 4 Freezing trust accounts and appointing receivers and special investigators

Division 1 Definitions

Clause 38 provides the definitions of account, defalcation, holder of an account, licensee, money, receivership property, trust money and trust property for the purposes of part 4.

Division 2 Freezing licensees' accounts

Clause 39 permits the chief executive to give a written direction to the holder of an account and the financial institution where the account is kept, if it appears that a licensee, the person in charge of a licensee's business at a place or an employee of the licensee has or may have stolen, misappropriated or misapplied trust money. The chief executive may direct, that all or part of the amount standing to the credit of a stated account be paid to the chief executive if a claim has been made against the fund for the trust money; that no money may be withdrawn from a stated account without the chief executive's approval; or that the stated account may be operated only under stated conditions.

The direction must be given to the holder of each account and the financial institution where the account is kept, and state the account to which it relates and any conditions under which the account may be operated.

If an amount is paid to the chief executive, the amount must be paid by the chief executive to the claim fund.

Clause 40 prohibits a financial institution that has been given a written direction by the chief executive from paying a cheque or other instrument drawn on the relevant account unless the cheque or instrument is also signed by the chief executive or giving effect to another transaction on the account that is not authorised because of the direction.

The prohibition applies whether or not a copy of the direction has been given to anyone else.

For clause 39(2)(b), the chief executive's signature on the cheque or other instrument is sufficient evidence of the chief executive's approval to draw an amount from the account to honour the cheque or other instrument.

A manager or principal officer in charge of an office or branch of the financial institution where the account is kept, or another officer of the financial institution, must not knowingly contravene clause 40.

Clause 41 provides that a person who is dissatisfied with the chief executive's decision under clause 39 may apply to QCAT for a review of the decision. However, the chief executive's decision may not be stayed by QCAT.

Clause 42 prohibits the holder of an account frozen by a direction of the chief executive from signing a cheque or other instrument on the account unless the cheque or instrument has first been signed by the chief executive or a person authorised by the chief executive to sign the cheque or instrument.

Clause 43 permits the chief executive, or a person authorised by the chief executive in writing, to operate an account that is subject to a direction where the account holder is unwilling to operate the account.

This may be done by the chief executive or authorised person making a statutory declaration that the account holder is unwilling to operate on the account. This is sufficient evidence for the financial institution at which the account is held.

Clause 44 provides that the chief executive may withdraw a direction at any time. The chief executive must give notice that the direction has been withdrawn to all persons given the direction. The direction stops having effect when it is withdrawn.

Division 3 Receivers

Subdivision 1 Appointment

Clause 45 provides that if the chief executive believes on reasonable grounds a defalcation (e.g. stealing, embezzlement, misappropriation or misapplication of trust money) has, or may have, been committed in relation to a licensee's trust account, the chief executive may appoint a

receiver with the licensee's consent. If the licensee does not consent, the chief executive may appoint a receiver after giving written notice to the licensee of the proposed appointment and inviting the licensee, within a stated time of at least 21 days, to show why the appointment should not be made, and where, after considering any written representations made by the licensee within the stated time, the chief executive considers the grounds for appointment still exist.

The chief executive may appoint a receiver immediately if the chief executive believes, on reasonable grounds, that a person is not able to obtain payment or delivery of trust property held for the person by a licensee because—

- of the licensee's mental or physical infirmity;
- the licensee has died;
- the licensee has abandoned the business;
- the licensee has been disqualified from holding a licence;
- the licensee's licence has been suspended or cancelled;
- the licensee has been refused renewal of the licensee's licence; or
- the licensee's licence has expired.

Clause 46 sets out the trust property over which a receiver may be appointed. A receiver may be appointed over trust property held by a licensee; held by another person for a licensee; recoverable by a licensee; or where the licensee is dead, that may be recoverable by the personal representative of the licensee.

Clause 47 provides that the chief executive may only appoint appropriately qualified persons as receivers. A person is able to be appointed as both a receiver and a special investigator (under part 4, division 4) over the same trust property.

Clause 48 provides the process for appointment of a receiver by the chief executive. The chief executive must appoint the receiver by signed notice. A copy of the appointment notice must be given to the receiver and the licensee as soon as practicable after the notice has been signed.

Clause 48(5) provides that if the licensee is a corporation, the corporation is required to give notice of the receiver's appointment to each person who was an executive officer of the corporation at the time the event giving rise

to the appointment happened, unless the corporation has a reasonable excuse.

Subdivision 2 Receiver's functions and powers

Clause 49 sets out the functions of a receiver. The functions of a receiver are—

- to take possession of receivership property;
- to manage receivership property;
- to receive claims against receivership property;
- if the licensee held the receivership property in trust, to identify the persons entitled to the money and to distribute it to them;
- to identify any defalcation that has or may have been committed; and
- to report to the chief executive about a receivership.

Clause 50 gives power to a receiver to ask a person to provide information that the receiver reasonably requires about receivership property. A person must provide the information, unless the person has a reasonable excuse.

It is a reasonable excuse for the person to refuse to give information if doing so might incriminate the person.

Clause 51 provides for the receiver to take possession of receivership property. The receiver must allow the person who would be entitled to the receivership property, if it were not in the receiver's possession, to inspect it, or if it is a document, to take a copy of it.

The receiver must return receivership property that is not required for the receivership to the licensee or other person who has a right to it.

Clause 52 provides that if a receiver requires a person in possession of receivership property to give possession of it to the receiver and the person does not comply, the receiver may apply to a court having jurisdiction for the recovery of debts up to the amount or value of the receivership property for an order for possession of the property.

Clause 53 provides for enforcement of an order made by a court for possession of receivership property by the receiver. The court may make an order authorising a police officer, or the receiver and a police officer to

enter stated premises and search for the receivership property and seize and move the property to a place the receiver considers appropriate.

Clause 54 prohibits a person from withdrawing an amount or making a payment from an account to defeat a receiver's functions; or destroying, concealing or moving receivership property; or giving the property to another person; or placing the property under another person's control.

Clause 55 provides that a receiver may deal with receivership property in the same way that a licensee may have lawfully dealt with the property.

Clause 56 prohibits a person from obstructing a receiver in the performance of the receiver's functions or the exercise of the receiver's powers.

Subdivision 3 Distributing receivership property

Clause 57 requires a receiver to give notice to persons who may have a claim against receivership property and provides how a person may make a claim.

The notice provided by the receiver must state a time, at least 1 month after the notice is given, for particulars and grounds of a claim against receivership property to be given to the receiver. A claim must state the event that gave rise to the claim, when the event occurred, when the claimant became aware of the financial loss, if the claimant was not aware of the loss when the event happened, and the claimant's estimated financial loss.

The receiver may require the claimant to verify the claim or part of the claim. An example of how the claim may be verified is by statutory declaration.

Clause 58 requires a receiver to give a person who wishes to make a claim against the receivership property reasonable access, free of charge, to documents held by the receiver to assist the person to provide particulars and grounds for the claim.

Clause 59 provides that a receiver must consider all claims against receivership property, provides circumstances in which a receiver may and must refuse a claim, and notice requirements where the receiver refuses a claim. The receiver must refuse a claim if the receiver is satisfied the person does not have a lawful claim against the property. The receiver may

refuse a claim if particulars and grounds for the claim were not provided within the timeframe specified in the receiver's notice to the person.

Clause 60 provides that a receiver may pay an allowed claim only if the receivership property is sufficient to pay all allowed claims. If the receivership property is not sufficient, the receiver—

- may pay any part of the property that consists of money to the chief executive; and
- must give the allowed claims and any documents relating to the claims to the chief executive; and
- must give a report to the chief executive stating that the property is insufficient to pay all the claims allowed by the receiver and identifying the claims that the receiver considers should be paid from the claim fund.

Money paid to the chief executive by the receiver under this provision must be paid into the claim fund, and paid from the fund to pay unsatisfied claims against the fund in relation to the licensee.

Clause 61 requires a receiver to give receivership property consisting of money in the receiver's possession, to the chief executive if the money has not been dealt with under the division and the chief executive asks for it.

The chief executive must pay the money to the fund, and then pay the money from the fund, in the following order—

- in reimbursement of claims paid from the fund in relation to the licensee;
- to pay unsatisfied claims against the fund in relation to the licensee;
- to pay the remuneration and costs of a receiver appointed under clause 45;
- to pay the remuneration and costs of a special investigator appointed under clause 68;
- to pay claims by the licensee against the money.

Subdivision 4 Recovery of receivers' remuneration and costs

Clause 62 provides that the licensee is liable to reimburse the chief executive for an amount paid by the chief executive for the receiver's remuneration and costs. If the licensee is a corporation, the licensee and the executive officers of the corporation at the time the event giving rise to the appointment of the receiver happened, are jointly and severally liable to reimburse the receiver's remuneration and costs. The chief executive may recover the amount liable to be reimbursed as a debt.

Subdivision 5 Ending receivership

Clause 63 sets out the circumstances when a receiver's appointment ends. A receiver's appointment ends if—

- the receiver resigns by signed notice to the chief executive;
- the receiver or licensee applies to the chief executive to end the appointment and the chief executive approves the application;
- the receiver dies; or
- the chief executive ends the appointment by signed written notice given to the receiver.

Clause 64 sets out how receivership property must be dealt with when a receiver's appointment ends and the chief executive has not asked for the property under clause 61.

If the chief executive appoints a new receiver within 14 days to replace the former receiver, the former receiver must give the new receiver the receivership property as soon as reasonably practicable or comply with any direction of the chief executive about how the property should be dealt with.

If a new receiver is not appointed within 14 days, the former receiver must give the receivership property to the licensee or other persons who have a right to it.

The chief executive may direct the former receiver to destroy or give the chief executive any part of the receivership property consisting of

documents if the documents have not been given to the person entitled to them.

The former receiver must comply with a direction under clause 64(4).

Clause 65 provides that a receiver must give a report to the chief executive when directed to do so, and must give a report when the receiver's appointment ends. The receiver is not entitled to be paid for the receivership until all the reports the receiver is required to give have been given to the chief executive.

Subdivision 6 Miscellaneous

Clause 66 provides that a receiver of a deceased licensee is not to be taken as the deceased's personal representative.

Clause 67 protects receivership property by providing that receivership property cannot be levied or taken or attached under a court judgment.

Division 4 Special investigators

Clause 68 allows the chief executive, by written notice, to appoint a special investigator over a licensee's trust account if the chief executive considers that the trust account has not been kept as required by the Bill.

The notice must state the licensee's name and the trust account, the terms on which the special investigator is appointed and the special investigator's functions and powers. A copy of the notice must be given to the licensee.

The chief executive may only appoint a person the chief executive is satisfied is appropriately qualified to perform a special investigator's functions. An inspector is eligible for appointment as a special investigator.

Clause 69 sets out the functions of a special investigator. A special investigator may be appointed to perform any of the following functions—

- inspecting the licensee's trust accounts and records that relate to trust accounts;
- preparing or constructing trust account records that are incomplete;

- performing other accounting tasks to establish the status of the trust account;
- reporting to the chief executive under clause 72.

Clause 70 provides that, for the term of the appointment, the chief executive may give a special investigator any or all of the powers of an inspector. A special investigator's powers end when the appointment of the investigator ends.

Clause 71 requires the licensee over whose trust account the special investigator has been appointed to comply with the investigator's lawful requests unless the licensee has a reasonable excuse. The special investigator must advise the chief executive of any failure by a licensee to comply with a request.

Clause 72 requires a special investigator to report to the chief executive as required by the chief executive. If the investigator believes that sufficient grounds exist to appoint a receiver, the investigator must immediately advise the chief executive of the grounds.

Clause 73 provides that the licensee over whose trust account the special investigator was appointed is liable to reimburse the chief executive for an amount paid by the chief executive for the special investigator's remuneration and costs. If the licensee is a corporation, the licensee and the executive officers of the corporation at the time the event giving rise to the appointment of the special investigator happened, are jointly and severally liable to reimburse the investigator's remuneration and costs. The chief executive may recover the amount liable to be reimbursed as a debt.

Clause 74 sets out the circumstances when a special investigator's appointment ends. A special investigator's appointment ends if—

- the special investigator resigns by signed notice given to the chief executive; or
- the investigator dies; or
- the investigator's notice of appointment states the appointment ends on the happening of an event and the event happens; or
- the chief executive ends the appointment by signed notice given to the investigator.

Part 5 Jurisdiction of QCAT

Clause 75 provides that QCAT has jurisdiction to hear and decide claims, other than minor claims, against the fund; to review decisions of the chief executive in relation to minor claims; and to review a decision of the chief executive to freeze a licensee's trust account under clause 41.

Part 6 Claim fund

Clause 76 establishes a claim fund consisting of the amount standing to the credit of the claim fund under the repealed *Property Agents and Motor Dealers Act 2000* (repealed Act), amounts payable to the fund under this Bill and other amounts that may be transferred to the fund by the Treasurer. Accounts for the fund are to be kept as part of the departmental accounts of the department. The Treasurer must transfer amounts to the fund that are appropriated from time to time to meet claims against the fund or the remuneration and costs of a receiver or special investigator payable from the fund.

Clause 77 permits the fund to be used to pay the amount of all claims allowed against the fund. The fund may also be used to pay the remuneration and costs of a receiver or special investigator appointed under the Bill. The Treasurer is also given power to transfer an amount from the fund to the consolidated fund.

Clause 78 permits the chief executive, on behalf of the State, to enter an agreement with a financial institution about general trust accounts kept by licensees with the financial institution, subject to the Minister's prior approval. An agreement may provide for the:

- payment of interest on the whole or part of the amounts held in licensees' general trust accounts to the consolidated fund;
- informing the chief executive of the amounts held in licensees' general trust accounts;
- auditing licensees' general trust accounts; and
- other matters about licensees' general trust accounts.

A financial institution is permitted to pay interest to the consolidated fund under an agreement.

Part 7 Claims against the fund

Division 1 Preliminary

Clause 79 sets out the definitions of claimant, claim notice, financial loss, licensee, marketeering contravention, registered office, relevant person and respondent for part 7. It defines a marketeering contravention as a contravention by a relevant person (e.g. a property agent or an employee or agent of, or a person carrying on business with, the property agent, or a person having control of the property agent's registered office or business) of the particular conduct provisions in the Property Agents Act 2010 addressing unfair sales practices associated with the sale of residential property.

Clause 80 provides a definition of “non-investment residential property” which links the purchase of residential property to relevant stamp and transfer duty concessions, and therefore provides an objective criterion for determining if property was purchased for investment purposes. This definition is necessary as claims against the claim fund exclude losses arising from residential properties purchased for investment purposes.

Division 2 Making and dealing with claims

Clause 81 provides that a person may make a claim against the claim fund, if provided for in an Agents Bill or if the person suffers financial loss because of a contravention of part 2 of this Bill.

Clause 82 sets the time limits for making a claim against the fund for claims other than claims relating to a marketeering contravention. A person may make a claim against the fund if the person makes the claim one year after the person becomes aware that the person has suffered financial loss because of the event or three years after the happening of the event that caused the financial loss, whichever is earlier.

Clause 83 sets the time limits for making a claim for capital loss because of a marketeering contravention in relation to the person's purchase of non-investment residential property. A person may make a claim against the fund if the person provides the chief executive with notice in the approved form that the person intends to make a claim within one year after the contract date for the purchase of the property and the person makes the claim within 6 years after the contract date.

Clause 84 provides that a claim given to the chief executive by a receiver is taken to have been made within the time.

Clause 85 provides that a claim, other than a claim for loss because of a marketeering contravention, must be made to the chief executive in the approved form, stating—

- the event alleged to give rise to the claim;
- when the event happened;
- if the claimant was not immediately aware of suffering financial loss because of the event, when the claimant became aware of the loss;
- all the relevant particulars about the event and the financial loss; and
- the estimated financial loss suffered.

A claim is taken to have been made on the day it is given to the chief executive, even if the claimant has not been able to state all the particulars at that time.

If the claim is not made within the allowed time limit, the chief executive is required to give the claimant a notice in the approved form advising the claimant that claim is out of time and that the claimant may apply to QCAT within 14 days for an extension of time.

Clause 86 provides that a claim against the fund for capital loss because of a marketeering contravention in relation to the purchase of a non-investment residential property must be made to the chief executive in the approved form and state the realised capital loss claimed.

The chief executive may require the claimant to verify the claim or part of the claim.

It is declared that if the purchase was made by more than one person, only one claim may be made.

A claim may be made by one of the purchasers or by two or more of the purchasers jointly.

Clause 87 requires the chief executive to give notice of the claim and a copy of the claim to the person (the respondent) whose actions are alleged to have given rise to the claim. However, this provision does not apply to a claim given to the chief executive by a receiver. The respondent has 14 days after receiving notice of the claim to give the chief executive any relevant information.

The respondent may attempt to settle the claim with the claimant, and if the claim is settled, the respondent must immediately advise the chief executive in writing and provide evidence of the settlement. If the chief executive is satisfied that the claim has settled, the claim may be treated as having been withdrawn.

Clause 88 requires a respondent that is a corporation, within 14 days of receiving a claim notice, to give written notice of the claim to each person who was an executive officer of the corporation at the time of the event giving rise to the claim, unless the corporation has a reasonable excuse. An executive officer who is required to be notified by the corporation, is taken to be a respondent to the claim.

The respondent corporation is taken to have complied with the requirement to give notice if the notice has been sent to each executive officer's residential or business address last known to the corporation.

Within 21 days after receiving the claim notice from the chief executive, the respondent corporation must give written notice to the chief executive of the name and last known residential and business address of each person who was an executive officer of the corporation at the time of the event giving rise to the claim, a copy of each notice given to an executive officer and information about when the notice was given.

Clause 89 provides that if a claim has not settled within 28 days after the claim notice is received by the respondent, the claimant may give the chief executive written notice that the claimant wants to proceed with the claim. The chief executive decides the claim if it is a minor claim (that is, a claim of not more than \$10,000). The claim is referred to QCAT to decide if it is a claim other than a minor claim.

Clause 90 provides that if a claim has not settled, the chief executive may direct an inspector to investigate the claim. If an inspector investigates a claim, the inspector must make a report and provide a copy to the chief executive. The chief executive must give a copy of the report to the claimant and the respondent, and if the report is about a claim to be decided by QCAT, to the president of QCAT.

Division 3 Minor claims

Clause 91 sets out the procedure for deciding minor claims. A ‘minor claim’ is defined in the dictionary in the Schedule to the Bill as a claim of not more than \$10,000. The chief executive must invite the claimant and the respondent, by written notice, to give the chief executive written comments in relation to an inspector’s report under clause 90 within 14 days after giving the notice. If comments are received from one or all of the parties, the chief executive must provide the other party with a copy of the comments and invite the party to provide further comments within a stated time of not less than 14 days. The chief executive must have regard to the report and to all comments received from parties when deciding the claim. The chief executive is to decide a claim without a hearing. The chief executive may ask the claimant and the respondent for further information or documents reasonably required to enable the claim to be decided.

Clause 92 permits the chief executive, at any time before deciding a claim, to amend the particulars of the claim, on the application of a party if the chief executive is satisfied the amendment is of a formal or minor nature and that no party will be unfairly prejudiced by the amendment. The chief executive may also amend the particulars of a claim, on the chief executive’s own initiative, if all the parties agree. On amendment, the amended claim is to be treated as the claim.

Clause 93 permits the chief executive to consider and decide a claim in the absence of any comments or submissions by a respondent, if the chief executive is satisfied that the respondent has been given notice of the claim, but has not responded to it, or that the respondent cannot be located after reasonable inquiries have been made into the respondent’s whereabouts.

Clause 94 provides that the chief executive may allow a claim or reject it, wholly or partly. The chief executive may allow a claim only if satisfied on the balance of probabilities that an event involving the respondent that is an allowable claim happened and that the claimant suffered financial loss because of the event. If the claim is allowed wholly or partly, the chief executive must take into account any amount the claimant might reasonably have recovered if not for the claimant’s neglect or default. In allowing a claim, the chief executive must decide the amount of the claimant’s financial loss and must name the person who is liable for the loss.

Clause 95 provides that the chief executive must give an information notice for a decision about a minor claim. ‘Information notice’ is defined in the dictionary to mean a notice complying with the *Queensland Civil and Administrative Tribunal Act 2009* (QCAT Act), section 157(2). In addition to the requirements of the information notice under the QCAT Act (e.g. the notice must state the decision, the reasons for the decision and that the person has a right to have the decision reviewed by QCAT), the information notice must also include:

- the chief executive’s findings in relation to the facts of the case;
- if the decision is that an amount must be paid to the claimant from the fund, that the respondent named in the decision is liable to reimburse the fund to the extent of the amount paid to the claimant and if more than 1 person is named as being liable, the liability of the named persons is joint and several;
- that if no application is made to have the decision reviewed within the time allowed under the QCAT Act, the decision binds all parties and if the decision is to allow the claim and authorise payment from the fund, the respondent named in the decision is liable to reimburse the fund to the extent of the amount paid to the claimant from the fund.

Clause 96 provides that a party may apply, as provided under the QCAT Act, to QCAT for a review of the chief executive’s decision.

Clause 97 provides that if no application to review the chief executive’s decision is made within the time allowed, the decision is binding on the parties and an amount paid to the claimant from the fund may be enforced by the chief executive as a debt owed to the chief executive by the respondent named in the decision. The respondent is not able to subsequently challenge the correctness of the decision or the amount payable.

Division 4 Claims other than minor claims

Clause 98 provides that QCAT may allow or reject a claim. QCAT may allow a claim only if satisfied on the balance of probabilities that an event involving the respondent that is an allowable claim happened and that the claimant suffered financial loss because of the event. If the claim is allowed wholly or partly, QCAT must take into account any amount the claimant might reasonably have recovered if not for the claimant’s neglect or default

and any amount ordered to be paid to the claimant as compensation under the Property Agents Bill 2010. In allowing a claim, QCAT must decide the amount of the claimant's financial loss and must name the person who is liable for the loss.

Division 5 Deciding financial loss for non-investment residential property

Clause 99 provides that Division 5 applies if the chief executive or QCAT is deciding a claim arising out of a marketeering contravention relating to the purchase of non-investment residential property.

Clause 100 sets out the test for deciding the loss for which compensation is payable for a claim arising out of a marketeering contravention relating to the purchase of non-investment residential property. The financial loss is the amount of difference between the purchase price (or value, if purchased with other than money) paid by the claimant and the contract price (or value, if purchased with other than money) of the property when it is later on-sold by the claimant.

A loss is only realised upon completion of the on-sale of the property.

Clause 101 provides that the chief executive or QCAT must decide whether the contract price (or value) for the on-sale reasonably reflected the property's market value when the contract was entered into. If the chief executive or QCAT decides that the contract price or value does not reasonably reflect the property's market value, a price reflecting reasonable market value must be fixed. The contract price or value as adjusted by the chief executive or QCAT is taken to be the contract price or value for the purposes of working out financial loss.

Division 6 Payment of claims and liability of persons for payments from the fund

Clause 102 provides that if a minor claim is allowed by the chief executive or a claim, other than a minor claim, is allowed by QCAT, the chief executive must authorise payment of the claim from the fund. A payment from the fund for a minor claim must not be made until the end of the

period allowed for review, and if a review application is made, until the review and any appeal is finally decided. For claims decided by QCAT, the payment must not be made until the end of the period allowed for an appeal, and if an appeal is made, until the appeal is finally decided. A payment from the fund is taken to be in full settlement of the claim against the fund.

Clause 103 provides that when an amount for a claim is paid from the fund, the person named in the claim decision as being liable for the claimant's loss is liable to reimburse the fund to the extent of the amount paid to the claimant. If the responsible person is a corporation, the corporation and each person who was an executive officer of the corporation when the event giving rise to the loss happened is jointly and severally liable to reimburse the fund. The chief executive may recover as a debt an amount for which a person is liable to reimburse the fund. When payment has been made, the chief executive must give a letter of demand to the person or persons named as being liable to reimburse the fund. The demand must require the person or persons to pay the amount within 28 days of receiving the demand.

Clause 104 provides that a claimant may not recover from the fund an amount more than the balance of the claimant's loss, after deducting the amount (including the value of all benefits) received or recovered by the claimant from a source other than the fund and the amount (including the value of all benefits) the chief executive or QCAT considers the claimant might reasonably have received or recovered if not for the claimant's neglect or default.

For a single claim, a claimant is able to recover from the fund an amount no more than the amount prescribed by regulation. A regulation may be made prescribing the maximum total amount that may be paid from the fund arising out of a contravention, failure to ensure clear title to a vehicle, stealing, misappropriation or misapplication by a single person. A claimant may not recover more than \$35,000 from the fund for a single claim if the claim relates to non-investment residential property purchased by the claimant arising out of a marketeering contravention. Interest is not payable from the fund for a claim allowed against the fund.

Clause 105 requires a claimant to give the chief executive written notice of an amount or benefit, other than an amount from the fund, that the claimant receives for the claimant's financial loss, whether it is received before or after the claim is paid.

Division 7 Reimbursement to fund

Clause 106 requires the chief executive to pay to the fund any amount recovered in relation to a payment from the fund.

Clause 107 provides that if a claimant who has received a payment from the fund recovers an amount more than the claimant is entitled to recover, the claimant must reimburse the overpayment. If the claimant has recovered a thing capable of physical delivery for which the claimant has received a payment from the fund, the claimant must deliver it to the chief executive in accordance with any direction the chief executive makes, or reimburse the fund with the amount of payment the claimant has received for the thing. If the chief executive takes possession of the thing, it may be sold by the chief executive. The chief executive may recover the overpayment or the amount the claimant received for the thing as a debt.

Part 8 Proceedings generally

Division 1 Extending time

Clause 108 gives jurisdiction to QCAT to extend the time within which an applicant may file a claim or seek review of a decision of the chief executive. The time may be extended if QCAT is firstly satisfied the application for an extension is made within the allowed time.

In addition QCAT must be satisfied the extension is appropriate having regard to—

- the reasons of the applicant for not making the claim or seeking the review within the allowed time limit; and
- the application generally; and
- for a claim, the relative hardships that an extension of time or a refusal to extend time would place on the claimant or the respondent; and
- the justice of the matter generally.

There is no appeal against the decision of QCAT on an application to extend time.

Division 2 Proceedings involving a claim against the fund

Clause 109 permits the chief executive to make submissions in a proceeding before QCAT involving a claim against the fund, whether or not the chief executive is a party to the proceeding.

Clause 110 provides that section 131 of the QCAT Act applies to the chief executive, which allows the chief executive to register and enforce a monetary decision of QCAT.

Division 3 Applications for reimbursement orders

Clause 111 allows the chief executive to apply to QCAT for a reimbursement order. If the chief executive decides to allow a minor claim and the person named in the decision as being liable to reimburse the fund in accordance with the letter of demand from the chief executive has not done so, the chief executive may apply to QCAT for an order that the person reimburse the fund. The application must be accompanied by a copy of the claim, the written notice of the chief executive's decision, the decision and the information notice, the letter of demand from the chief executive. The application must also be accompanied by a statutory declaration by the chief executive stating the amount paid from the fund in settlement of the claim and the amount of any payment received from the respondent in satisfaction of the claim.

Clause 112 provides that, upon receiving an application for a reimbursement order, the registrar must fix a date for consideration of the application by QCAT; give a copy of the application and accompanying documents to the respondent; and advise that QCAT will make a reimbursement order if satisfied that –

- the chief executive has made a decision in relation to the claim against the fund; and
- under the chief executive's decision, the respondent is liable to reimburse the fund in a stated amount; and
- an information notice was given to the respondent; and

-
- the respondent did not apply to QCAT to have the decision reviewed; and
 - a letter of demand was sent to the respondent; and
 - the respondent has not paid the stated amount within the time allowed under the letter of demand.

The registrar must invite the respondent to make written submissions for QCAT's consideration about when and how the respondent intends to satisfy the amount paid from the fund in settlement of the claim. The submission must be received on a date notified to the respondent, being at least 7 days before the date fixed for consideration of the application.

Division 4 QCAT's orders

Clause 113 allows QCAT to order a person to stop something that is in contravention of the Bill. While it is similar to an injunctive power, it can be exercised upon application by the chief executive prior to other proceedings in either QCAT's original or review jurisdiction being started. QCAT may make an order without providing notice to the person subject to the order, provided QCAT allows the person a reasonable opportunity to show cause why the order should not be confirmed. If, after considering the person's submission and any further submission by the chief executive, QCAT is not satisfied that the order should continue, QCAT must rescind the order. It is an offence to contravene an order under this clause. An order has effect once it is given to the person who is the subject of the order.

Clause 114 provides for the orders QCAT may make in relation to claims against the fund. QCAT may make the following orders—

- an order allowing or rejecting the claim, wholly or partly;
- an order stating who is liable for claimant's financial loss and the amount of the loss;
- an order about recovery of an amount payable in relation to a claim;
- an order that no amount is recoverable in relation to a claim.

Clause 115 provides that QCAT must make a reimbursement order if satisfied that—

- the chief executive has made a decision about a claim against the fund; and
- under the decision, the respondent is liable to reimburse the fund in a stated amount; and
- written notice of the decision, a copy of the decision and an information notice were given to the respondent; and
- the respondent did not apply to QCAT for a review of the chief executive's decision; and
- the respondent did not pay the stated amount within the time allowed under the letter of demand.

A reimbursement order must state that the respondent is liable to pay to the chief executive a stated amount within a stated period.

Clause 116 provides that a decision or order of QCAT for a claim fund proceeding takes effect when the decision or order is made, if all parties are present, or when the decision or order is published. The clause also provides that a decision or order involving the claim fund must be published.

Division 5 Chief executive's right of appeal

Clause 117 allows the chief executive to appeal to the appeal tribunal, as constituted under the QCAT Act, against a decision of QCAT on the ground of an error of law.

Part 9 Injunctions and undertakings

Division 1 Injunctions

Clause 118 permits an injunction to be granted by the District Court against a person under this part.

Clause 119 permits an application for an injunction to be made by the chief executive or by a person aggrieved by the respondent's conduct.

Clause 120 provides that the District Court may grant an injunction if it is satisfied that the respondent has engaged in, or is proposing to engage in, conduct that constitutes, or would constitute—

- a contravention of the Bill; or
- attempting to contravene the Bill; or
- aiding, abetting, counselling or procuring a person to contravene the Bill; or
- inducing or attempting to induce, whether by threats, promises or otherwise, a person to contravene the Bill; or
- being in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of the Bill; or
- conspiring with others to contravene the Bill.

Clause 121 provides that the District Court may grant an injunction to restrain a respondent from engaging in conduct whether or not it appears to the court that the person intends to engage again, or to continue to engage in, the conduct that has given grounds for the grant of an injunction, and whether or not the respondent has previously engaged in that kind of conduct.

The court may grant an injunction requiring a respondent to do something whether or not it appears to the court that the person intends to fail again, or continue to fail, to do the act or thing that has given grounds for the grant of an injunction, and whether or not the respondent has previously failed to do the act or thing. The court may grant an interim injunction until an injunction application is finally decided, and may rescind or vary an injunction at any time.

Clause 122 provides that the District Court may grant an injunction in the terms the court considers appropriate, including restraining a respondent from carrying on business as a licensee for a stated period or except in accordance with stated terms and conditions, or requiring a respondent to take specified action, such as disclosing or publishing information to remedy adverse consequences caused by the respondent's contravention.

Clause 123 states that when the chief executive applies for an injunction, no undertaking as to damages or costs may be required or made.

Division 2 Undertakings

Clause 124 gives power to the chief executive, if the chief executive believes on reasonable grounds that a person has contravened, or has been involved with contravening the Bill to issue the person with a written notice that—

- states the act or omission constituting the contravention; and
- asks the person to give a written undertaking not to continue or not to repeat the act or omission.

If the person gives the undertaking, and stops the conduct where the contravention is conduct consisting of a series of acts or omissions, and the chief executive accepts the undertaking, offence proceedings for the contravention may not be started against the person unless the chief executive withdraws the undertaking under clause 126.

Clause 125 provides that, without limiting clause 124, the chief executive may accept an undertaking given by a person for this clause about anything for which the chief executive or an inspector has a function or power. For example, undertakings could be made to provide for compensation to be paid, corrective advertising or compliance training to be undertaken.

Clause 126 provides that an undertaking may be varied or withdrawn by the person who gave it, with the chief executive's approval. The chief executive may vary or withdraw an undertaking, if the chief executive believes, on reasonable grounds, that before the undertaking was accepted—

- the person who gave it had contravened the Bill in a way the chief executive was not aware of; and
- had the chief executive known about the contravention, the chief executive would not have accepted the undertaking at all, or would not have accepted it unless its terms were changed.

The chief executive may also withdraw an undertaking if the chief executive believes, on reasonable grounds, that it is no longer necessary. If an undertaking is varied or withdrawn, the chief executive must give the person providing the undertaking written notice of the variation or withdrawal. The withdrawal or variation takes effect when the person receives the written notice.

Clause 127 provides that the chief executive may apply to the District Court to enforce an undertaking if the chief executive believes, on reasonable grounds, that a person bound by an undertaking has breached its terms.

The court may make a one or more of the following orders if satisfied that the person has contravened a term in the undertaking:

- an order directing the person to comply with the term;
- an order that the person pay the state an amount not more than the financial benefit attributable to the contravention;
- an order directing the person to pay compensation to a person who has suffered loss as a result of the contravention;
- an order directing the person to give a security bond to the State for a stated period; or
- another order the court considers appropriate.

The chief executive can apply to the court for an order that a security bond be forfeited to the State. The court can grant the order if satisfied that the person contravened the undertaking during the period for which the bond was given.

Clause 128 requires the chief executive to keep a register of undertakings. The chief executive may publish information contained in the register on the department's website. A person may inspect or access details of the register at a place decided by the chief executive or by using a computer, on payment of any fee that is prescribed by regulation.

Part 10 General contraventions, evidentiary matters and legal proceedings

Division 1 General contraventions

Clause 129 prohibits a person from operating a licensee's trust account unless the person is the licensee, a person employed by the licensee who is

authorised by the licensee to operate the account or the person is otherwise authorised by the Bill to do so.

Clause 130 prohibits a person from making false or misleading statements to the chief executive, an inspector or a public service employee.

Clause 131 prohibits a person from giving a document containing false or misleading information to the chief executive, an inspector or a public service employee.

Division 2 Evidentiary matters

Clause 132 makes provision for evidentiary matters in relation to proceedings under the Bill, including presuming:

- the appointment or power of an inspector, unless a party, by reasonable notice, requires proof of the appointment or power;
- that a signature purporting to be the signature of the chief executive or an inspector is evidence of that signature; and
- that a certificate purporting to be signed by the chief executive, a member of QCAT, the principal registrar under the QCAT Act or an inspector is evidence of particular prescribed matters.

Clause 133 provides that an entry in a book kept by or belonging to a licensee or found in the licensee's premises, is evidence that the entry has been made by or with the authority of the licensee.

Division 3 Proceedings

Clause 134 provides for proceedings for offences and the time limits for starting a proceeding. The maximum penalty that is able to be imposed on a summary conviction of an indictable offence (an offence for which the maximum penalty is 2 or more years imprisonment) is 200 penalty units or 1 year's imprisonment.

The prosecution may elect for an indictable offence to be heard by way of summary proceeding under the *Justices Act 1886* or on indictment. If a person charged with an indictable offence asks at the start of a summary proceeding for the offence that the charge be prosecuted on indictment, the

magistrate must not decide the charge by way of summary proceeding and must proceed by way of committal proceeding.

Clause 135 provides for the responsibility of a person for the acts or omissions of a representative of the person. If a person's state of mind is relevant in relation to a particular act or omission, it is enough to show that the act was done or omitted to be done by a representative of the person within the scope of the representative's actual or apparent authority, and the representative had the state of mind.

The act or omission of a person's representative, acting within the scope of the representative's actual or apparent authority, is taken to be the act of the person, unless the person can prove that the person could not have prevented the act or omission with the exercise of reasonable diligence.

Clause 136 requires executive officers of a corporation to ensure the corporation complies with the Bill. If a corporation commits an offence against a provision of the Bill, each of the executive officers of the corporation commits the offence of failing to ensure the corporation complies with the provision. However, it is a defence for an executive officer to prove that the officer took all reasonable steps to ensure the corporation complied with the provision where the officer was in a position to influence the conduct of the corporation in relation to the offence, or to prove the officer was not in a position to influence the conduct of the corporation in relation to the offence

Clause 137 provides that a court may, in addition to any other penalty it might impose on a licensee for conviction for an offence under the Bill, order that—

- the person's licence or registration certificate be suspended for a stated period; or
- the person's licence or registration certificate be cancelled; or
- the person be disqualified from holding a licence or registration certificate for a stated period or permanently.

The chief executive may apply to the court for the court to make such an order.

Clause 138 provides for how a charge involving a false or misleading statement, representation or entry, or false or misleading information should be stated.

Part 11

General

Clause 139 permits the Minister or the chief executive to publish public warning statements about the commission of offences against the Bill and persons who commit the offences, including identifying particular offences and persons.

The Minister or the chief executive must be satisfied that it is in the public interest to issue the statement. An example of when this might be the case is where a person is committing an offence, or series of offences, where consumers could lose a significant amount of money. The chief executive could issue a public warning statement to prevent any further consumer losses.

It should be noted that this power is standard in consumer protection legislation. It is a vital power as public warning statements can protect consumers from committing large amounts of money or entering into transactions in which they would suffer detriment, while information statements play an educative role in informing consumers about particular conduct or behaviour that may place consumers at risk. The power also alerts licensees to non-compliant behaviours. The public exposure of non-compliant licensees also provides a compliance incentive to other licensees wishing to avoid such negative publicity.

It is a reserve power, not able to be delegated, and used only in the rarest of circumstances where it becomes apparent to the Minister or chief executive there is a demonstrable, tangible pattern of conduct or behaviour that may cause widespread detriment to consumers. An example of where its use may be considered is where the Minister or chief executive has strong evidence that consumers may suffer financial detriment and such loss may be considerable if a public warning statement is not issued.

Clause 140 provides that nothing in the Bill is intended to affect or limit any civil remedy a person may have against a licensee or other person in relation to any matter.

Clause 141 provides that nothing in the Bill limits the application of the *Criminal Proceeds Confiscation Act 2002*.

Clause 142 permits the chief executive to delegate the chief executive's powers to an appropriately qualified public service employee. However, this power of delegation does not apply to the chief executive's power to make public warning statements.

Clause 143 provides for the approval of forms for use under the Bill.

Clause 144 requires the Minister to ensure that a review of the operation of the Bill is started within three years of the commencement of this clause. The Minister must table a report of the outcome of the review in the Legislative Assembly as soon as practicable after the review is finished.

Clause 145 provides for the making of regulations by the Governor in Council.

Part 12 Transitional provisions

Clause 146 sets out the definitions for part 12.

Clause 147 provides for the transitional arrangements for the claim fund under the repealed Act. A claim that has been made against the claim fund under the repealed Act and not finished before commencement, continues as if it were a claim against the claim fund under the Bill. Rights and liabilities related to the claim fund under the repealed Act are taken to be rights and liabilities of the claim fund under the Bill.

Clause 148 continues the appointments of existing special investigators appointed under the repealed Act.

Clause 149 provides transitional arrangements for QCAT reviews of chief executive decisions begun under the repealed Act but not decided at the commencement of this Bill. If a review of the chief executive's decision had been started but not decided before commencement, QCAT may continue to decide the review under the repealed Act. Where a person could have applied for a review of the chief executive's decision under the repealed Act prior to commencement, the person may apply for a review of the decision as if that Act had not been repealed.

Clause 150 provides for the continuation of legal proceedings brought under the repealed Act that have not been finalised. It also continues any rights a person has under the repealed Act to commence a legal proceeding by allowing a person to commence a proceeding under this Bill.

Clause 151 provides for the continuation of injunctions granted under the repealed Act by providing that an injunction granted under the repealed Act is a valid injunction under this Bill according to its terms. It also provides for the granting of an injunction, if the District Court is satisfied that, prior

to commencement of the Bill, a person has engaged in conduct that constituted a contravention of the repealed Act, or was otherwise involved in a contravention of the repealed Act.

Clause 152 provides for the continuation of undertakings granted under the repealed Act, by providing that an undertaking provided by a person under the repealed Act is a valid undertaking under this Bill. It also provides for the granting of an undertaking if the chief executive reasonably believes that a person has before commencement of the Bill contravened or been involved in a contravention of the repealed Act.

Clause 153 provides for the transitional arrangements for the register of undertakings under the repealed Act by providing that the register of undertakings kept under the repealed Act is taken to be the register of undertakings to be kept under this Bill

Clause 154 provides that a financial institution that was an approved financial institution under the repealed Act immediately before commencement, continues to be an approved financial institution for this Bill.

Clause 155 provides for the transitional arrangements for agreements with financial institutions under the repealed Act. An agreement entered into between the chief executive and a financial institution under the repealed Act is taken to be an agreement between the chief executive and the financial institution under this Bill.

Clause 156 provides for the transitional arrangements for trust accounts held by licensees under the repealed Act. A trust account operating under the repealed Act is taken to be a trust account under this Bill.

Clause 157 provides for the transitional arrangements for approved auditors under the repealed Act. An approved auditor under the repealed Act is taken to be an auditor under this Bill. Under the repealed Act, where a licensee could not appoint a qualified auditor, a person could apply to the chief executive to be approved as the auditor for a licensee. The requirements around the approval of an auditor by the chief executive are not continued under this Bill. The ability for the chief executive to approve an auditor was a requirement carried over from the *Auctioneers and Agents Act 1971*, which preceded the PAMD Act. This requirement was introduced to ensure that agents in rural areas could comply with auditing requirements where a qualified auditor was not readily available, and could not be appointed by the agent. The number of applications for approval of auditors has dropped to approximately 3 every 5 years, with no applications

made to the chief executive since 2006. As licensees no longer have difficulty appointing qualified auditors, these provisions have not been continued under the Bill.

Clause 158 provides for the transitional arrangements where a person has applied to the chief executive to be an approved auditor. The application is to be decided under the repealed Act. If the application is approved under the repealed Act, the person is taken to be an auditor under this Bill.

Clause 159 provides for the transitional arrangements where an audit has been commenced but not finalised under the repealed Act. The requirements of the audit under the repealed Act continue to apply to the audit.

Clause 160 provides for the transitional arrangements for disputes about trust money arising prior to the commencement of the Bill. A dispute about trust money under the repealed Act is taken to be a dispute under this Bill. For clause 160(1), a written notice given or anything done or given under the repealed Act is taken to be a notice given or something done or given under this Bill.

Clause 161 provides that a receiver appointed by the chief executive under the repealed Act is taken to be a receiver appointed under this Bill. If the receiver is in possession of property prior to commencement, the receiver is taken to be in possession of the property under this Bill.

Clause 162 provides for the continued force of orders under the repealed Act for a person in possession of receivership property to give it to the receiver.

Clause 163 provides that proceedings for alleged offences against particular provisions of the repealed Act, may be started, continued or completed and the court may hear and decide the proceedings, as if the repealed Act had not been repealed.

Clause 164 provides for the continuation of existing delegations of the chief executive's power under the repealed Act. Where a delegation is in force prior to commencement of this Bill, the person is taken to have been delegated the equivalent power under this Bill.

Schedule

The schedule sets out the dictionary containing the definitions of particular words used in the Bill.

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