

(Reprint No. 1)

SOUTH AUSTRALIA

LAND AGENTS ACT 1994

This Act is reprinted pursuant to the Acts Republication Act 1967 and incorporates all amendments in force as at 7 December 1995.

It should be noted that the Act was not revised (for obsolete references, etc.) by the Commissioner of Statute Revision prior to the publication of this reprint.

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being

Land Agents Act 1994 No. 90 of 1994
[Assented to 15 December 1994]¹

as amended by

Statutes Amendment (Sunday Auctions and Indemnity Fund) Act 1995 No. 96 of 1995 [Assented to 7 December 1995]²

¹ Came into operation 1 June 1995: *Gaz.* 25 May 1995, p. 2198.

² Came into operation on assent: s. 2(1).

NOTE:

- *Asterisks indicate repeal or deletion of text.*
- *For the legislative history of the Act see Appendix 1.*

An Act to regulate land agents and their sales representatives; to repeal the Land Agents, Brokers and Valuers Act 1973; to amend the District Court Act 1991; and for other purposes.

The Parliament of South Australia enacts as follows:

Short title

1. This Act may be cited as the *Land Agents Act 1994*.

**PART 1
PRELIMINARY**

Commencement

2. This Act will come into operation on a day to be fixed by proclamation.

Interpretation

3. In this Act, unless the contrary intention appears—

"**agent**"—*see section 4*;

"**business**" includes a share of, or interest in, a business or the goodwill of a business, but does not include a share in the capital of a corporation;

"**Commissioner**" means the Commissioner for Consumer Affairs;

"**Court**" means the Administrative and Disciplinary Division of the District Court of South Australia;

"**dealing with land**" includes granting or taking a lease or tenancy agreement over land;

"**director**" of a body corporate includes—

- (a) a person occupying or acting in the position of director or member of the governing body of the body corporate, by whatever name called and whether or not validly appointed to occupy or duly authorised to act in the position; and
- (b) any person in accordance with whose directions or instructions the directors or members of the governing body of the body corporate are accustomed to act;

"**indemnity fund**" means the fund maintained under Part 3;

"**land**" includes—

- (a) an interest in land; and
- (b) an exclusive right (whether deriving from the ownership of a share or interest in a body corporate or partnership or arising in some other way) to the separate occupation of land or a building or part of a building;

"**legal practitioner**" means a person admitted and enrolled as a practitioner of the Supreme Court of South Australia;

"**money**" includes an instrument for the payment of money that may be negotiated by a bank;

"**mortgage**" means a legal or equitable mortgage over land;

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"mortgage financing" means negotiating or arranging loans secured by mortgage including receiving or dealing with payments under such transactions;

"sales representative" means a person who, for or on behalf of an agent, induces or attempts to induce, or negotiates with a view to inducing, a person—

- (a) to acquire or dispose of land or a business; or
- (b) to make an offer to acquire or dispose of land or a business; or
- (c) to accept an offer to acquire or dispose of land or a business; or
- (d) to enter into a contract for the acquisition or disposal of land or a business,

whether or not the agent is the owner of the land or business, but does not include a person who so acts only in relation to a lease of land that is not to be used for the purposes of a business;

"sell" includes auction and exchange, and **"purchase"** has a corresponding meaning.

Note: For definition of divisional penalties (and divisional expiation fees) see Appendix 2.

Meaning of agent

4. (1) A person is an agent for the purposes of this Act if the person carries on a business that consists of or involves—

- (a) selling or purchasing or otherwise dealing with land or businesses on behalf of others, or conducting negotiations for that purpose; or
- (b) selling land or businesses on his or her own behalf, or conducting negotiations for that purpose.

(2) However, a person does not act as an agent in so far as—

- (a) the person sells or purchases or otherwise deals with land or businesses on behalf of others, or conducts negotiations for that purpose, in the course of practice as a legal practitioner; or
- (b) the person sells land or businesses, or conducts negotiations for that purpose, through the instrumentality of an agent; or
- (c) the person engages in mortgage financing.

Commissioner to be responsible for administration of Act

5. The Commissioner is responsible, subject to the control and directions of the Minister, for the administration of this Act.

PART 2
REGISTRATION AND MANAGEMENT OF AGENT'S BUSINESS

Agents to be registered

6. (1) A person must not carry on business, or hold himself or herself out, as an agent unless registered under this Act.

Penalty: Division 5 fine.

(2) A person required by this Act to be registered as an agent is not entitled to commission or other consideration for services as an agent unless the person—

- (a) is, at the time of rendering the services, registered as an agent; and
- (b) is authorised, in writing, to act as an agent by the person for whom the services are rendered or a person authorised to act on behalf of that person.

(3) Any commission or other consideration paid or given to a person who is, under subsection (2), not entitled to it may be recovered from the person as a debt.

Application for registration

7. An application for registration must—

- (a) be made to the Commissioner in the manner and form approved by the Commissioner; and
- (b) be accompanied by the fee fixed by regulation.

Entitlement to be registered

8. (1) A natural person is entitled to be registered as an agent if the person—

- (a) has the educational qualifications required by regulation; and
- (b) has not been convicted of an offence of dishonesty; and
- (c) is not suspended or disqualified from practising or carrying on an occupation, trade or business under a law of this State, the Commonwealth, another State or a Territory of the Commonwealth; and
- (d) is not an undischarged bankrupt or subject to a composition or deed or scheme of arrangement with or for the benefit of creditors; and
- (e) has not, during the period of five years preceding the application for registration, been a director of a body corporate wound up for the benefit of creditors—
 - (i) when the body was being so wound up; or
 - (ii) within the period of six months preceding the commencement of the winding up.

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- (2) A body corporate is entitled to be registered as an agent if—
- (a) the body corporate—
 - (i) is not suspended or disqualified from practising or carrying on an occupation, trade or business under a law of this State, the Commonwealth, another State or a Territory of the Commonwealth; and
 - (ii) is not being wound up and is not under official management or in receivership; and
 - (b) no director of the body corporate—
 - (i) has been convicted of an offence of dishonesty; or
 - (ii) is suspended or disqualified from practising or carrying on an occupation, trade or business under a law of this State, the Commonwealth, another State or a Territory of the Commonwealth; or
 - (iii) has, during the period of five years preceding the application for registration, been a director of a body corporate wound up for the benefit of creditors—
 - (A) when the body was being so wound up; or
 - (B) within the period of six months preceding the commencement of the winding up.

Duration of registration and annual fee and return

9. (1) Registration remains in force (except for any period for which it is suspended) until—
- (a) the registration is surrendered or cancelled; or
 - (b) the registered agent dies or, in the case of a registered body corporate, is dissolved.
- (2) A registered agent must, each year not later than the date fixed by regulation—
- (a) pay to the Commissioner the fee fixed by regulation; and
 - (b) lodge with the Commissioner a return in the manner and form required by the Commissioner.
- (3) Where a registered agent fails to pay the annual fee or lodge the annual return in accordance with subsection (2), the Commissioner may, by notice in writing, require the agent to make good the default and, in addition, to pay to the Commissioner the amount fixed by regulation as a penalty for default.
- (4) Where the agent fails to comply with the notice within 28 days after service of the notice, the agent's registration is cancelled.
- (5) The Commissioner must notify the agent in writing of the cancellation of the agent's registration.
- (6) A registered agent may surrender registration.

(7) In this section—

"**registered agent**" includes a registered agent whose registration has been suspended.

Incorporated agent's business to be properly managed and supervised

10. A registered agent that is a body corporate must ensure that the agent's business is properly managed and supervised by a registered agent who is a natural person.

Penalty: Division 4 fine.

Entitlement to be sales representative

11. (1) A person must not employ another person as a sales representative unless that other person—

(a) —

(i) holds the qualifications required by regulation; or

(ii) is registered as an agent under this Act or has been registered as a sales representative or manager, or licensed as an agent, under the repealed *Land Agents, Brokers and Valuers Act 1973*; and

(b) has not been convicted of an offence of dishonesty; and

(c) is not suspended or disqualified from practising or carrying on an occupation, trade or business under a law of this State, the Commonwealth, another State or a Territory of the Commonwealth.

Penalty: Division 5 fine.

(2) A person must not—

(a) be or remain in the service of a person as a sales representative; or

(b) hold himself or herself out as a sales representative; or

(c) act as a sales representative,

unless he or she—

(d) —

(i) holds the qualifications required by regulation; or

(ii) is registered as an agent under this Act or has been registered as a sales representative or manager, or licensed as an agent, under the repealed *Lands Agents, Brokers and Valuers Act 1973*; and

(e) has not been convicted of an offence of dishonesty; and

(f) is not suspended or disqualified from practising or carrying on an occupation, trade or business under a law of this State, the Commonwealth, another State or a Territory of the Commonwealth.

Penalty: Division 7 fine.

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**PART 3
TRUST ACCOUNTS AND INDEMNITY FUND**

DIVISION 1—PRELIMINARY

Interpretation of Part 3

12. (1) In this Part, unless the contrary intention appears—

"**auditor**" means a registered company auditor within the meaning of the *Corporations Law*;

"**fiduciary default**" means a defalcation, misappropriation or misapplication of trust money occurring while the money is in the possession or control of—

(a) an agent; or

(b) a firm of which an agent is a member;

"**record**" includes information kept by computer, microfilm or other process;

"**trust account**" means an account in which trust money is required to be deposited by an agent;

"**trust money**", in relation to an agent, means money—

(a) that is received by the agent when acting as an agent; and

(b) to which the agent is not wholly entitled in law and in equity.

(2) A reference in this Part to a fiduciary default extends to a fiduciary default that occurred before the commencement of this Act.

DIVISION 2—TRUST ACCOUNTS

Trust money to be deposited in trust account

13. (1) An agent must, as soon as practicable after receiving trust money, deposit the money in an account (in the name of the agent) approved by the Commissioner at a bank, building society or credit union.

Penalty: Division 5 fine.

(2) An agent must not pay any other money into the agent's trust account.

Penalty: Division 5 fine.

(3) An agent must not withdraw, or permit another person to withdraw, money from a trust account except in accordance with this Part.

Penalty: Division 5 fine.

(4) The Commissioner may, by notice in writing to a bank, building society or credit union—

(a) approve accounts of a particular class (being accounts that carry interest at a rate considered satisfactory by the Commissioner) for the purposes of this section; or

(b) vary or revoke any such approval.

Withdrawal of money from trust account

14. An agent may withdraw money from a trust account—

- (a) for payment to the person entitled to the money or for payment in accordance with the directions of that person; or
- (b) in satisfaction of a claim for commission, fees, costs or disbursements that the agent has against the person on behalf of whom the money is held; or
- (c) to satisfy an order of a court against the person on behalf of whom the agent is holding the money; or
- (d) for payment into a court before which proceedings have been instituted in relation to the money; or
- (e) for the purpose of dealing with the money in accordance with the *Unclaimed Moneys Act 1891*; or
- (f) for making any other payment authorised by law.

Payment of interest on trust accounts to Commissioner

15. Interest that a bank, building society or credit union is liable to pay in respect of trust money held in a trust account must be paid by the bank, building society or credit union to the Commissioner on the days fixed by regulation.

Appointment of administrator of trust account

16. (1) If the Commissioner knows or suspects on reasonable grounds that an agent—

- (a) is not registered as required by law; or
- (b) has been guilty of a fiduciary default in relation to trust money; or
- (c) has operated on the trust account in such an irregular manner as to require immediate supervision; or
- (d) has acted contrary to this Act or otherwise unlawfully or improperly or negligently in the conduct of the business; or
- (e) in the case of a natural person—
 - (i) is dead or cannot be found; or
 - (ii) is suffering from mental or physical incapacity preventing the agent from properly attending to the agent's affairs; or
- (f) has ceased to carry on business as an agent; or
- (g) has become bankrupt or insolvent or has taken the benefit (as a debtor) of a law relating to bankrupt or insolvent debtors or, in the case of a body corporate, is being wound up, is under official management or is in receivership,

the Commissioner may appoint a person to administer the agent's trust account.

(2) This section applies in relation to conduct occurring before or after the commencement of this Act.

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(3) The Commissioner must, as soon as practicable after appointing an administrator, give notice in writing of the appointment to—

- (a) the agent; and
- (b) all persons who are entitled (whether solely or jointly) to withdraw money from, or deal with money in, the account; and
- (c) the bank, building society or credit union at which the account is held.

(4) A person who has been given notice of the appointment of an administrator, or who knows that an administrator has been appointed, must not withdraw money from, or deal with money in, the trust account while the appointment continues.

Penalty: Division 5 fine.

(5) A bank, building society or credit union that has been given notice of the appointment of an administrator must not, while the appointment continues, accept any withdrawal of, or dealing with, money in the trust account unless the withdrawal or dealing is at the direction, or with the written approval, of the administrator.

Penalty: Division 5 fine.

Appointment of temporary manager

17. (1) Where an administrator is appointed under this Division, the Commissioner may appoint that person or some other person to be a temporary manager to transact any urgent or uncompleted business of the agent.

(2) The Commissioner must, as soon as practicable after appointing a temporary manager, give notice in writing of the appointment to the agent.

Powers of administrator or temporary manager

18. The following powers may be exercised by an administrator or temporary manager:

- (a) the administrator or manager may require any person in a position to do so—
 - (i) to produce documents and records relating to the agent's business including written records that reproduce in a readily understandable form information kept by computer, microfilm or other process; and
 - (ii) to provide information relevant to the agent's business; and
- (b) the administrator may require any person in a position to do so to provide all authorities and orders to bankers, financial institutions and others that may be reasonably required for the operation of the agent's trust account; and
- (c) the administrator or manager may take possession of documents and records forming part of the agent's business and for that purpose may enter business premises of the agent using such force as is reasonably necessary; and
- (d) such other powers as the Commissioner sets out in the instrument of appointment of the administrator or the manager.

Term of appointment of administrator or temporary manager

19. (1) The appointment of an administrator or temporary manager remains in force for such period (not exceeding 12 months) as is specified in the instrument of appointment unless sooner terminated by the Commissioner or the Court.

(2) Subject to an order of the Court to the contrary, the Commissioner may reappoint an administrator.

Appeal against appointment of administrator or temporary manager

20. (1) An agent may, within 28 days after receiving notice of the appointment of an administrator or temporary manager, appeal to the Court against the appointment.

(2) On an appeal, the Court may confirm or annul the appointment.

Keeping of records

21. (1) An agent must keep detailed records of all trust money received by the agent and of any disbursement of, or other dealing with, that money and must compile detailed accounts of those receipts and disbursements that—

- (a) accurately disclose the state of the trust account maintained by the agent; and
- (b) enable the receipt and disposition of trust money to be conveniently and properly audited; and
- (c) comply with all other requirements specified by regulation.

Penalty: Division 5 fine.

(2) In particular, the agent must, in respect of the receipt of trust money—

- (a) make available to the person making payment a receipt that sets out the information specified by regulation in the form specified by regulation; and
- (b) make and retain a copy of the receipt as part of the agent's records.

Penalty: Division 5 fine.

(3) An agent must, at the request of a person who has an interest in trust money, provide that person with a statement setting out details of dealings by the agent with the money.

Penalty: Division 5 fine.

(4) An agent must keep the accounts and records referred to in this section or a corresponding previous enactment in a legible written form, or so as to be readily convertible into such a form, for at least five years.

Penalty: Division 5 fine.

Audit of trust accounts

22. (1) An agent who maintains a trust account must—

- (a) have the accounts and records kept under this Division audited by an auditor in respect of each audit period specified by regulation; and

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(b) lodge with the Commissioner a statement relating to the audit that sets out the information specified by regulation.

(2) An agent, who did not maintain a trust account during a particular audit period, must make and lodge with the Commissioner a declaration, in a form approved by the Commissioner, setting out the reasons for not maintaining a trust account during that period.

(3) An agent who—

(a) fails to have accounts and records audited as required; or

(b) fails to lodge the audit statement or declaration within the time allowed by or under the regulations,

is guilty of an offence.

Penalty: Division 5 fine.

(4) Where an agent fails to lodge the audit statement or declaration within the time allowed by or under the regulations, the Commissioner may, by notice in writing, require the agent to make good the default and, in addition, to pay to the Commissioner the amount fixed by the regulations as a civil penalty for the default.

(5) Where the agent fails to comply with the notice within 28 days after service of the notice, the agent's registration is cancelled.

(6) The Commissioner must notify the agent of the cancellation of the agent's registration.

(7) An agent is not liable to both a civil penalty and a criminal penalty in respect of the same default under this section and, consequently, payment of the civil penalty exonerates the agent from liability to a criminal penalty and payment of a criminal penalty exonerates the agent from liability to the civil penalty.

Appointment of examiner

23. (1) The Commissioner may, at any time, appoint a person—

(a) to examine, either generally or in a particular case, the accounts and records kept under this Division by an agent; and

(b) to examine, either generally or in a particular case, the audit program, working papers and other documents used or prepared by an auditor in the course of auditing the trust accounts of an agent; and

(c) to confer with an auditor in relation to audits of the trust accounts of an agent.

(2) An examiner may, and must if required by the Commissioner to do so, provide the Commissioner with a confidential report as to the state of any accounts or records subject to examination by the examiner.

(3) The Commissioner must, as soon as practicable, cause a copy of a report provided by an examiner to be given or sent by post to the agent.

(4) In this section—

"agent" includes a former agent.

Obtaining information for purposes of audit or examination

24. (1) An auditor employed by an agent to make an audit of the trust accounts of the agent, or an examiner appointed under this Division, may require the agent or any other person in a position to do so—

- (a) to produce all the accounts (including accounts that are not trust accounts) relating to the business of the agent and all documents and records relating to those accounts, including written records that reproduce in a readily understandable form information kept by computer, microfilm or other process; and
- (b) to provide any relevant information relating to the operation of the accounts.

(2) The manager or other principal officer of a bank or other financial institution with which an agent has deposited money, whether in his or her own account or in a general or separate trust account, must, on being required to do so by an auditor or examiner employed or appointed to make an audit or examination under this Division, disclose every such account (including all deposit slips, cancelled cheques and other documents relating to the operation of the account) to the auditor or examiner.

Penalty: Division 5 fine.

(3) A person who is required by this section to produce documents to an auditor or examiner must permit the auditor or examiner to make a copy of the whole, or any part, of those documents.

Penalty: Division 5 fine.

(4) In this section—

"**account**" includes a record required to be kept under this Division in relation to the receipt and disposition of trust money;

"**agent**" includes a former agent.

Banks, etc., to report deficiencies in trust accounts

25. A bank, building society or credit union with which a trust account has been established must, as soon as practicable, and in any event within 14 days, after becoming aware of a deficiency in that account, report the deficiency to the Commissioner.

Penalty: Division 5 fine.

Confidentiality

26. (1) An administrator, temporary manager, auditor or examiner must not divulge information that has come to his or her knowledge in the course of performing functions under this Act or a corresponding previous enactment except—

- (a) to the agent; or
- (b) to the Commissioner; or
- (c) as otherwise required by law.

Penalty: Division 5 fine.

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(2) A person engaged in the administration of this Act, must not divulge information disclosed in a report provided under this Part or a corresponding previous enactment except—

- (a) for the purpose of confidential consideration of the report by the Minister or the Commissioner; or
- (b) as is otherwise necessary for the proper administration of this Act; or
- (c) as is otherwise permitted or required by law.

Penalty: Division 5 fine.

Banks, etc., not affected by notice of trust

27. (1) Subject to subsection (2), a bank, building society or credit union is not affected by notice of a specific trust to which money deposited in a trust account is subject, and is not bound to satisfy itself of the due application of that money.

(2) This section does not relieve a bank, building society or credit union of liability for negligence.

Failing to comply with requirement of administrators, etc.

28. A person must not—

- (a) refuse or fail to comply with a requirement of an administrator, temporary manager, auditor or examiner under this Division; or
- (b) hinder, delay or obstruct an administrator, temporary manager, auditor or examiner in the performance of functions under this Division by altering or destroying relevant documents or by any other means.

Penalty: Division 5 fine.

DIVISION 3—INDEMNITY FUND

Indemnity Fund

29. (1) The Commissioner must maintain an indemnity fund.

(2) The Commissioner may invest money constituting, or forming part of, the indemnity fund in accordance with the regulations.

(3) The indemnity fund comprises—

- (a) the money standing to the credit of the fund kept under Part 8 of the repealed *Land Agents, Brokers and Valuers Act 1973* immediately before the commencement of this Act; and
- (b) interest paid by banks, building societies and credit unions to the Commissioner on trust accounts; and
- (c) money recovered by the Commissioner from an agent in relation to the agent's default; and
- (d) fines recovered as a result of disciplinary proceedings under Part 4; and
- (e) interest accruing from investment of the fund; and

(f) money required to be paid into the fund under this or any other Act.

(4) Money standing to the credit of the indemnity fund may be applied by the Commissioner for any of the following purposes:

- (a) the costs of investigating complaints, and of disciplinary proceedings, against agents or sales representatives or former agents or sales representatives;
- (b) the costs of prosecutions for offences against this Act;
- (c) costs consequent on the appointment of an administrator, temporary manager or examiner under this Act;
- (d) the costs of processing claims under this Division and of paying out those claims to the extent authorised by this Division;
- (e) the costs of administering and insuring the fund;
- (f) the payment of amounts, approved by the Minister, towards the cost of prescribed educational programs conducted for the benefit of agents, sales representatives or members of the public;
- (g) any other purpose specified by or under this or any other Act.

Claims on indemnity fund

30. (1) Subject to this Division, a person who—

- (a) has suffered pecuniary loss as a result of a fiduciary default; and
- (b) has no reasonable prospect of recovering the full amount of that loss (except under this Division),

may claim compensation under this Division.

(2) The amount of a claim cannot exceed the actual pecuniary loss suffered by the claimant in consequence of the fiduciary default less any amount that the claimant has received or may reasonably be expected to recover (apart from this Division) in reduction of that loss.

(3) A person is not entitled to make a claim under this Division where—

- (a) the agent by whom the fiduciary default was committed, or to whom the fiduciary default relates, was required to be registered or licensed under this Act or a corresponding previous enactment; and
- (b) that person knew, or ought to have known, at the time of appointing or instructing the agent, that the agent was not so registered or licensed.

Limitation of claims

31. (1) The Commissioner may, by notice published in a newspaper circulating generally throughout the State, fix a day (not earlier than three months after the publication of the notice) on or before which claims in respect of a fiduciary default, or a series of fiduciary defaults, referred to in the notice, must be made.

(2) A claim that is not made within the time fixed by the notice is barred unless the Court, on application, otherwise determines.

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(3) No action in defamation lies in respect of the publication, in good faith, of the notice.

Establishment of claims

32. (1) A claim for compensation must be made to the Commissioner.

(2) The Commissioner must, on receipt of a claim for compensation—

- (a) give the agent or former agent concerned notice in writing of the claim; and
- (b) allow the claimant and the agent or former agent a reasonable opportunity to appear before the Commissioner personally or by representative to make submissions as to the claim.

(3) The Commissioner must, by notice in writing, inform the claimant and the agent or former agent of the Commissioner's determination of the claim.

Claims by agents

33. (1) An agent who has paid compensation to a person for pecuniary loss suffered in consequence of a fiduciary default committed by a partner or employee of the agent may make a claim for compensation to the Commissioner.

(2) The Commissioner must, on receipt of the claim, if satisfied that—

- (a) all legal or equitable claims in respect of the fiduciary default have been fully satisfied; and
- (b) the claimant acted honestly and reasonably in all the circumstances of the case,

determine the amount of compensation payable to the claimant and, by notice in writing, inform the claimant of the determination.

(3) A person is not entitled to make a claim under this section where—

- (a) the agent by whom the fiduciary default was committed, or to whom the fiduciary default relates, was required to be registered or licensed under this Act or a corresponding previous enactment; and
- (b) that person knew, or ought to have known, at the time of the default, that the agent was not so registered or licensed.

Personal representative may make claim

34. The personal representative of a claimant (including a deceased claimant) is entitled to make the claim on behalf of the claimant or the claimant's estate.

Appeal against Commissioner's determination

35. (1) The claimant or the agent or former agent by whom the fiduciary default was committed or to whom the fiduciary default relates may, within three months after receiving notice of the Commissioner's determination, appeal to the Court against the determination.

(2) Where an appeal is not instituted within the time allowed, the claimant's entitlement to compensation is finally determined for the purposes of this Division.

- (3) On an appeal, the Court may—
- (a) affirm or quash the determination appealed against or substitute a determination that the Court thinks appropriate; and
 - (b) make an order as to any other matter that the case requires (including an order for costs).

Determination, evidence and burden of proof

36. (1) In determining a claim for compensation under this Division, any possible reduction to which the claimant's entitlement may be subject because of insufficiency of the indemnity fund must be disregarded.

- (2) In determining a claim for compensation under this Division—
- (a) an admission or confession may be accepted as evidence of a fiduciary default despite the absence of the person by whom the admission or confession was made; and
 - (b) questions of fact are to be decided on the balance of probabilities.

Claimant's entitlement to compensation and interest

37. (1) Subject to any reduction because of insufficiency of the indemnity fund, a claimant is entitled to payment of the amount of compensation determined under this Division.

(2) A claimant's entitlement to compensation will (to the extent to which it has not been satisfied or discharged) be increased by interest at the rate fixed by regulation from the first anniversary of the lodgment of the claim with the Commissioner until the entitlement is satisfied or discharged, but interest must not be calculated on any component of the claimant's entitlement that is attributable to interest that has already accrued under this subsection.

Rights of Commissioner

38. (1) Where the Commissioner makes a payment (whether in respect of compensation or interest) to a claimant, the Commissioner is, to the extent of the payment, subrogated to the rights of the claimant against a person liable at law or in equity for the fiduciary default in respect of which the payment was made.

(2) However, this section does not confer on the Commissioner any right to recover money from a person whose liability in respect of a fiduciary default does not arise from a wrongful or negligent act or omission on that person's part.

Insurance in respect of claims against indemnity fund

39. (1) The Commissioner may insure the indemnity fund to such extent as the Commissioner thinks fit against claims under this Division.

- (2) The cost of the insurance will be paid from the indemnity fund.

Insufficiency of indemnity fund

40. (1) Where the indemnity fund is insufficient to pay all outstanding amounts to which claimants are entitled, the Commissioner must make proportionate reductions in the amounts paid out in respect of those entitlements.

(2) Where, at the time at which a claimant's entitlement to compensation is determined, other persons have made claims that have not yet been determined, the Commissioner may defer payment of the claimant's entitlement for any period (not exceeding 12 months) in order to allow time for the entitlements of those other claimants to be determined.

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(3) The Commissioner may set aside a part of the indemnity fund as the Commissioner from time to time considers necessary to protect the interests of persons who—

- (a) have made claims against the fund that have not been determined; or
- (b) are likely to make claims against the fund in the future,

and, when determining whether payments to claimants should be reduced, the Commissioner must not take into account a part of the fund set aside by the Commissioner.

(4) If, after a claimant's entitlement to compensation has been determined, the claimant recovers an amount (that was not allowed for in that determination) in respect of the pecuniary loss suffered by the claimant, the claimant's entitlement to compensation is reduced by the amount recovered.

(5) Entitlements in respect of which payments are made under this section are discharged despite the fact that they may not have been satisfied in full.

(6) The Commissioner may, with the approval of the Minister, make payments to a person—

- (a) whose entitlement to compensation has been discharged; or
- (b) whose entitlement to compensation is insufficient because an amount that the person was expected to recover in respect of the pecuniary loss has not been recovered; or
- (c) whose claim is barred,

but a payment so made does not revive or reinstate an entitlement or claim.

Accounts and audit

41. (1) The Commissioner must keep proper accounts of all money received and dealt with under this Division.

(2) The Auditor-General may at any time, and must at least once in every calendar year, audit those accounts.

**PART 4
DISCIPLINE**

Interpretation of Part 4

42. In this Part—

"**agent**" includes—

- (a) a former agent; and
- (b) a person registered as an agent, whether or not carrying on business as an agent; and
- (c) a person formerly registered as an agent;

"**director**" of a body corporate includes a former director of a body corporate;

"**sales representative**" includes a former sales representative.

Cause for disciplinary action

43. (1) There is proper cause for disciplinary action against an agent if—

- (a) registration of the agent was improperly obtained; or
- (b) the agent has acted contrary to an assurance accepted by the Commissioner under the *Fair Trading Act 1987*; or
- (c) the agent or any other person has acted contrary to this Act or the *Land and Business (Sale and Conveyancing) Act 1994* or otherwise unlawfully, or improperly, negligently or unfairly, in the course of conducting, or being employed or otherwise engaged in, the business of the agent; or
- (d) in the case of an agent who has been employed or engaged to manage and supervise an incorporated agent's business—the agent or any other person has acted unlawfully, improperly, negligently or unfairly in the course of managing or supervising, or being employed or otherwise engaged in, that business; or
- (e) events have occurred such that—
 - (i) the agent would not be entitled to be registered as an agent if he or she were to apply for registration; or
 - (ii) the agent is not a fit and proper person to be registered as an agent; or
 - (iii) in the case of an incorporated agent, a director is not a fit and proper person to be the director of a body corporate that is registered as an agent.

(2) There is proper cause for disciplinary action against a sales representative if the sales representative has acted unlawfully, improperly, negligently or unfairly in the course of acting as a sales representative.

(3) Disciplinary action may be taken against each director of a body corporate that is an agent if there is proper cause for disciplinary action against the body corporate.

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(4) Disciplinary action may not be taken against a person in relation to the act or default of another if that person could not reasonably be expected to have prevented the act or default.

(5) This section applies in relation to conduct occurring before or after the commencement of this Act.

Complaints

44. The Commissioner or any other person may lodge with the Court a complaint setting out matters that are alleged to constitute grounds for disciplinary action under this Part.

Hearing by Court

45. (1) On the lodging of a complaint, the Court may conduct a hearing for the purpose of determining whether the matters alleged in the complaint constitute grounds for disciplinary action under this Part.

(2) Without limiting the usual powers of the Court, the Court may during the hearing—

- (a) allow an adjournment to enable the Commissioner to investigate or further investigate matters to which the complaint relates; and
- (b) allow the modification of the complaint or additional allegations to be included in the complaint subject to any conditions as to adjournment and notice to parties and other conditions that the Court may think fit to impose.

Participation of assessors in disciplinary proceedings

46. In any proceedings under this Part, the Court will, if the judicial officer who is to preside at the proceedings so determines, sit with assessors selected in accordance with schedule 1.

Disciplinary action

47. (1) On the hearing of a complaint, the Court may, if it is satisfied on the balance of probabilities that there is proper cause for taking disciplinary action against the person to whom the complaint relates, by an order or orders do one or more of the following:

- (a) reprimand the person;
- (b) impose a fine not exceeding \$8 000 on the person;
- (c) in the case of a person who is registered as an agent—
 - (i) suspend the registration for a specified period or until the fulfilment of stipulated conditions or until further order; or
 - (ii) cancel the registration;
- (d) in the case of a person whose registration is suspended—impose conditions as to the conduct of the person or the person's business as an agent after the end of the period of suspension;
- (e) disqualify the person from being registered under this Act;
- (f) prohibit the person from being employed or otherwise engaged in the business of an agent;
- (g) prohibit the person from being a director of a body corporate that is an agent.

(2) The Court may—

(a) stipulate that a disqualification or prohibition is to apply—

(i) permanently; or

(ii) for a specified period; or

(iii) until the fulfilment of stipulated conditions; or

(iv) until further order;

(b) stipulate that an order relating to a person is to have effect at a specified future time and impose conditions as to the conduct of the person or the person's business until that time.

(3) A fine imposed under subsection (1) is payable to the Commissioner for the credit of the indemnity fund.

(4) If—

(a) a person has been found guilty of an offence; and

(b) the circumstances of the offence form, in whole or in part, the subject matter of the complaint,

the person is not liable to a fine under this section in respect of conduct giving rise to the offence.

Contravention of orders

48. (1) If a person contravenes or fails to comply with a condition imposed by the Court as to the conduct of the person or the person's business, the person is guilty of an offence.

Penalty: Division 3 fine or division 7 imprisonment.

(2) If a person—

(a) is employed or otherwise engages in the business of an agent; or

(b) becomes a director of a body corporate that is an agent,

in contravention of an order of the Court, that person and the agent are each guilty of an offence.

Penalty: Division 3 fine or division 7 imprisonment.

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**PART 5
MISCELLANEOUS**

Delegations

49. (1) The Commissioner may delegate any of the Commissioner's functions or powers under this Act—

- (a) to a person employed in the Public Service; or
- (b) to the person for the time being holding a specified position in the Public Service; or
- (c) to any other person under an agreement under this Act between the Commissioner and an organisation representing the interests of agents or sales representatives.

(2) The Minister may delegate any of the Minister's functions or powers under this Act (except the power to direct the Commissioner).

(3) A delegation under this section—

- (a) must be in writing; and
- (b) may be conditional or unconditional; and
- (c) is revocable at will; and
- (d) does not prevent the delegator from acting in any matter.

Agreement with professional organisation

50. (1) The Commissioner may, with the approval of the Minister, make an agreement with an organisation representing the interests of agents or sales representatives under which the organisation undertakes a specified role in the administration or enforcement of this Act.

(2) The agreement—

- (a) must be in writing and executed by the Commissioner and the organisation; and
- (b) may contain delegations by the Commissioner of functions or powers under this Act or the *Fair Trading Act 1987*; and
- (c) must set out any conditions governing the performance or exercise of functions or powers conferred on the organisation; and
- (d) must make provision for the variation and termination of the agreement by the Commissioner with the approval of the Minister or the organisation.

(3) The Commissioner may not delegate any of the following for the purposes of the agreement:

- (a) functions or powers under Part 2;
- (b) the approval of classes of accounts at banks, building societies or credit unions under Division 2 of Part 3;
- (c) the appointment, reappointment or termination of appointment of a person to administer an agent's trust account or of a temporary manager under Division 2 of Part 3;

- (d) functions or powers under Division 3 of Part 3;
 - (e) power to request the Commissioner of Police to investigate and report on matters under Part 5;
 - (f) power to commence a prosecution for an offence against this Act.
- (4) A delegation by the Commissioner for the purposes of the agreement—
- (a) has effect subject to the conditions specified in the agreement; and
 - (b) may be varied or revoked by the Commissioner in accordance with the terms of the agreement; and
 - (c) does not prevent the Commissioner from acting in any matter.

(5) The Minister must, within six sitting days after the making of the agreement, cause a copy of the agreement to be laid before both Houses of Parliament.

Exemptions

51. (1) The Minister may, on application by a person, exempt the person from compliance with a specified provision of this Act.

- (2) An exemption is subject to the conditions (if any) imposed by the Minister.
- (3) The Minister may, at his or her discretion, vary or revoke an exemption.
- (4) The grant or a variation or revocation of an exemption must be notified in the *Gazette*.

Register

52. (1) The Commissioner must keep a register of persons registered as agents under this Act.

- (2) The Commissioner must record on the register—
 - (a) disciplinary action taken against a person under this Act; and
 - (b) a note of any assurance accepted by the Commissioner under the *Fair Trading Act 1987* in relation to a registered agent.
- (3) A person may inspect the register on payment of the fee fixed by regulation.

Commissioner and proceedings before Court

53. (1) The Commissioner is entitled to be joined as a party to any proceedings of the Court under this Act.

(2) The Commissioner may appear personally in any such proceedings or may be represented at the proceedings by counsel or a person employed in the Public Service.

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False or misleading information

54. A person must not make a statement that is false or misleading in a material particular (whether by reason of the inclusion or omission of any particular) in any information provided, or record kept, under this Act.

Penalty: (a) if the person made the statement knowing that it was false or misleading—division 5 fine;

(b) in any other case—division 7 fine.

Statutory declaration

55. Where a person is required to provide information to the Commissioner, the Commissioner may require the information to be verified by statutory declaration and, in that event, the person will not be taken to have provided the information as required unless it has been verified in accordance with the requirements of the Commissioner.

Investigations

56. The Commissioner of Police must, at the request of the Commissioner, investigate and report on any matter relevant to—

(a) the determination of an application under this Act; or

(b) a matter that might constitute proper cause for disciplinary action under this Act.

General defence

57. It is a defence to a charge of an offence against this Act if the defendant proves that the offence was not committed intentionally and did not result from any failure on the part of the defendant to take reasonable care to avoid the commission of the offence.

Liability for act or default of officer, employee or agent

58. For the purposes of this Act, an act or default of an officer, employee or agent of a person carrying on a business will be taken to be an act or default of that person unless it is proved that the officer, employee or agent acted outside the scope of his or her actual, usual and ostensible authority.

Offences by bodies corporate

59. Where a body corporate is guilty of an offence against this Act, each director of the body corporate is, subject to the general defence under this Part, guilty of an offence and liable to the same penalty as may be imposed for the principal offence.

Continuing offence

60. (1) A person convicted of an offence against a provision of this Act in respect of a continuing act or omission—

(a) is liable, in addition to the penalty otherwise applicable to the offence, to a penalty for each day during which the act or omission continued of not more than one-tenth of the maximum penalty prescribed for that offence; and

(b) is, if the act or omission continues after the conviction, guilty of a further offence against the provision and liable, in addition to the penalty otherwise applicable to the further offence, to a penalty for each day during which the act or omission continued after the conviction of not more than one-tenth of the maximum penalty prescribed for the offence.

(2) Where an offence consists of an omission to do something that is required to be done, the omission will be taken to continue for as long as the thing required to be done remains undone after the end of the period for compliance with the requirement.

Prosecutions

61. (1) Proceedings for an offence against this Act must be commenced within two years after the date on which the offence is alleged to have been committed or, with the authorisation of the Minister, at a later time within five years after that date.

(2) A prosecution for an offence against this Act cannot be commenced except by—

- (a) the Commissioner; or
- (b) an authorised officer under the *Fair Trading Act 1987*; or
- (c) a person who has the consent of the Minister to commence the prosecution.

(3) In any proceedings, an apparently genuine document purporting to be a certificate of the Minister certifying authorisation of, or consent to, a prosecution for an offence against this Act will be accepted, in the absence of proof to the contrary, as proof of the authorisation or consent.

Evidence

62. In any proceedings, a certificate executed by the Commissioner certifying—

- (a) that a person was or was not registered as an agent on a specified date; or
- (b) that a person was or was not registered as a sales representative or manager, or licensed as an agent, under the repealed *Land Agents, Brokers and Valuers Act 1973*;
- (c) as to any matter relating to the appointment of an administrator, temporary manager or examiner,

constitutes proof, in the absence of proof to the contrary, of the matters so certified.

Service of documents

63. (1) Subject to this Act, a notice or document required or authorised by this Act to be given to or served on a person may—

- (a) be served on the person personally; or
- (b) be posted in an envelope addressed to the person—
 - (i) at the person's last known address; or
 - (ii) where the person is a registered agent—at the person's address for service; or
- (c) where the person is a registered agent—be left for the person at the address for service with someone apparently over the age of 16 years; or
- (d) be transmitted by facsimile transmission to a facsimile number provided by the person (in which case the notice or document will be taken to have been given or served at the time of transmission).

(2) The address for service of a registered agent is the address of which the Commissioner has been last notified in writing by the agent as the agent's address for service.

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Annual report

64. (1) The Commissioner must, on or before 31 October in each year, submit to the Minister a report on the administration of this Act during the period of 12 months ending on the preceding 30 June.

(2) The report must contain the audited statement of accounts of the indemnity fund for the period to which the report relates.

(3) The Minister must, within six sitting days after receipt of the report, cause a copy of the report to be laid before each House of Parliament.

Regulations

65. (1) The Governor may make such regulations as are contemplated by, or necessary or expedient for the purposes of, this Act.

(2) Without limiting the generality of subsection (1), the regulations may—

- (a) require registered agents or sales representatives to comply with a code of conduct;
- (b) fix various maximum rates of commission and other charges that may be charged or made by registered agents for specified services;
- (c) regulate charges, payments and reimbursements made by or to a registered agent in connection with specified services;
- (d) fix fees to be paid in respect of any matter under this Act and regulate the recovery, refund, waiver or reduction of such fees;
- (e) exempt (conditionally or unconditionally) classes of persons or activities from the application of this Act or specified provisions of this Act;
- (f) impose a penalty (not exceeding a division 7 fine) for contravention of, or non-compliance with, a regulation.

(3) Regulations under this Act—

- (a) may be of general application or limited application;
- (b) may make different provision according to the matters or circumstances to which they are expressed to apply;
- (c) may provide that a matter or thing in respect of which regulations may be made is to be determined according to the discretion of the Commissioner or the Minister.

(4) The regulations may operate by reference to a specified code as in force at a specified time or as in force from time to time.

(5) If a code is referred to in the regulations—

- (a) a copy of the code must be kept available for inspection by members of the public, without charge and during normal office hours, at an office determined by the Minister; and
- (b) evidence of the contents of the code may be given in any legal proceedings by production of a document apparently certified by the Minister to be a true copy of the code.

SCHEDULE 1

Appointment and Selection of Assessors for Court

(1) The Minister must establish a panel of persons who may sit as assessors consisting of persons representative of agents.

(2) The Minister must establish a panel of persons who may sit as assessors consisting of persons representative of members of the public who deal with agents.

(3) A member of a panel is to be appointed by the Minister for a term of office not exceeding three years and on conditions determined by the Minister and specified in the instrument of appointment.

(4) A member of a panel is, on the expiration of a term of office, eligible for reappointment.

(5) Subject to subclause (6), if assessors are to sit with the Court in proceedings under Part 4, the judicial officer who is to preside at the proceedings on the complaint must select one member from each of the panels to sit with the Court in the proceedings.

(6) A member of a panel who has a personal or a direct or indirect pecuniary interest in a matter before the Court is disqualified from participating in the hearing of the matter.

(7) If an assessor dies or is for any reason unable to continue with any proceedings, the Court constituted of the judicial officer who is presiding at the proceedings and the other assessor may, if the judicial officer so determines, continue and complete the proceedings.

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SCHEDULE 2*Repeal and Transitional Provisions***Repeal**

1. The *Land Agents, Brokers and Valuers Act 1973* is repealed.

Transitional provisions—general

2. (1) A person who held a licence as a land agent under the *Land Agents, Brokers and Valuers Act 1973* immediately before the commencement of this Act will be taken to have been registered as an agent under this Act.

(2) A person who was registered as a manager under the *Land Agents, Brokers and Valuers Act 1973* immediately before the commencement of this Act will be taken to have been registered as an agent under this Act.

(3) An approval, appointment or order in force under the *Land Agents, Brokers and Valuers Act 1973* immediately before the commencement of this Act in relation to an agent or sales representative or former agent or sales representative will be taken to be an approval, appointment or order in force under the corresponding provision of this Act.

(4) A notice given or served under the *Land Agents, Brokers and Valuers Act 1973* in relation to an agent or sales representative or former agent or sales representative has effect as a notice given or served under the corresponding provision of this Act.

(5) A reference in an Act or other instrument to a licensed agent under the *Land Agents, Brokers and Valuers Act 1973* will be taken to be a reference to an agent registered under this Act.

Transitional provisions—mortgage financiers

3. (1) In this clause—

"**mortgage financier**" means a person who—

- (a) is—
 - (i) an agent; or
 - (ii) an associate of an agent; and
- (b) engages in mortgage financing;

"**spouse**" includes a person who is a putative spouse (whether or not a declaration has been made under the *Family Relationships Act 1975* in relation to that person);

"**trust money**", in relation to a mortgage financier, means money received by a mortgage financier in the mortgage financier's capacity as such to which the mortgage financier is not wholly entitled at law and in equity.

- (2) For the purposes of this clause, a person is an associate of another if—

- (a) they are partners; or
- (b) one is a spouse, parent or child of the other; or
- (c) they are both trustees or beneficiaries of the same trust, or one is a trustee and the other is a beneficiary of the same trust; or
- (d) one is a body corporate and the other is a director of the body corporate; or
- (e) one is a body corporate and the other is a person who has a legal or equitable interest in five per cent or more of the share capital of the body corporate; or
- (f) a chain of relationships can be traced between them under any one or more of the above paragraphs.

- (3) This clause applies—

- (a) to trust money received by a mortgage financier before the commencement of this Act; and
- (b) where trust money received by a mortgage financier was lent to another on the security of a mortgage before the commencement of this Act—to trust money received by the mortgage financier (whether before or after that commencement) by way of payment of principal or interest, or both, under that loan.

(4) Part 3 applies to a mortgage financier as if—

(a) a reference in that Part to an agent were a reference to a mortgage financier; and

(b) a reference in that Part to trust money were a reference to trust money to which this clause applies.

(5) The power of the Governor to make regulations under this Act includes power to make regulations requiring mortgage financiers to provide specified information to prospective investors or regulating or making provision with respect to any other matter relating to mortgage financiers.

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SCHEDULE 3

Amendment of District Court Act 1991

(1) The *District Court Act 1991* is amended—

(a) by striking out subsection (2) of section 3;

(b) by striking out paragraph (d) of section 7 and substituting the following paragraph:

(d) the Administrative and Disciplinary Division.;

(c) by striking out subsection (3) of section 8 and substituting the following subsection:

(3) The Court, in its Administrative and Disciplinary Division, has the jurisdiction conferred by statute.;

(d) by striking out from section 20(3) and (4) "Administrative Appeals Division" wherever occurring and substituting, in each case, "Administrative and Disciplinary Division";

(e) by striking out from section 43(3) "Administrative Appeals Division" and substituting "Administrative and Disciplinary Division";

(f) by striking out from section 52 "Administrative Appeals Division" and substituting "Administrative and Disciplinary Division";

(g) by inserting after the present contents of section 52, as amended by this clause (now to be designated as subsection (1)) the following subsection:

(2) The Court, in its Administrative and Disciplinary Division, is bound by the rules of evidence in—

(a) disciplinary proceedings; and

(b) proceedings related to contempt.

(2) A reference in any Act or instrument to the Administrative Appeals Court or to the Administrative Appeals Division of the District Court, is so far as the context permits, to be taken to be a reference to the Administrative and Disciplinary Division of the District Court.

APPENDIX 1

LEGISLATIVE HISTORY

Transitional Provisions

(Transitional provision from Statutes Amendment (Sunday Auctions and Indemnity Fund) Act 1995, Sched.)

Validation of Past Payments out of Fund

(1) Payments out of the indemnity fund maintained under Part 3 Division 3 of the *Land Agents Act 1994* before the commencement of this Act are to be regarded as having been lawfully made if made for a purpose of a kind referred to in section 29 of the *Land Agents Act 1994* as amended by this Act or section 31 of the *Conveyancers Act 1994* as amended by this Act.

(2) Payments out of the fund kept under Part 8 of the repealed *Land Agents, Brokers and Valuers Act 1973* are to be regarded as having been lawfully made if made for any of the following purposes:

- (a) the costs of investigating complaints, and of disciplinary proceedings, against persons regulated under that Act;
- (b) the costs of prosecutions for offences against that Act;
- (c) costs consequent on the appointment of an administrator or examiner under that Act;
- (d) any other purpose specified by or under that Act.

Legislative History

Section 29(4):

substituted by 96, 1995, s. 4

Land Agents Act 1994**APPENDIX 2****DIVISIONAL PENALTIES AND EXPIATION FEES**

At the date of publication of this reprint divisional penalties and expiation fees are, as provided by section 28A of the *Acts Interpretation Act 1915*, as follows:

Division	Maximum imprisonment	Maximum fine	Expiation fee
1	15 years	\$60 000	—
2	10 years	\$40 000	—
3	7 years	\$30 000	—
4	4 years	\$15 000	—
5	2 years	\$8 000	—
6	1 year	\$4 000	\$300
7	6 months	\$2 000	\$200
8	3 months	\$1 000	\$150
9	-	\$500	\$100
10	-	\$200	\$75
11	-	\$100	\$50
12	-	\$50	\$25

Note: This appendix is provided for convenience of reference only.