

South Australia

## **Land Agents (Indemnity Fund-Growden Default) Amendment Act 2004**

An Act to amend the *Land Agents Act 1994* and to make a related amendment to the *Conveyancers Act 1994*.

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**The Parliament of South Australia enacts as follows:**

### **Part 1—Preliminary**

#### **1—Short title**

This Act may be cited as the *Land Agents (Indemnity Fund-Growden Default) Amendment Act 2004*.

## 2—Commencement

This Act will come into operation on 1 September 2004.

## 3—Amendment provisions

In this Act, a provision under a heading referring to the amendment of a specified Act amends the Act so specified.

## Part 2—Amendment of *Land Agents Act 1994*

### 4—Insertion of section 29A

After section 29 insert:

#### **29A—Division of indemnity fund into two parts**

- (1) The indemnity fund is notionally divided into two parts (Part A and Part B)—
  - (a) one part, Part A, is to consist of the balance of the indemnity fund at any particular time, less the amount standing to the credit of Part B at that time;
  - (b) one part, Part B, is to consist of \$13.5 million, as credited to this part of the fund on the commencement of this section, then less any amounts paid from time to time in accordance with the scheme set out in Schedule 2A.
- (2) Part A will be available—
  - (a) for the purposes of this Division; and
  - (b) for the purposes of any other Act that makes provision for payments from the indemnity fund,and any reference in this Division or in another Act that relates to the indemnity fund will be taken to be a reference to Part A of the indemnity fund (unless the contrary intention appears).
- (3) Part B will be available for the purposes of Schedule 2A.
- (4) The Commissioner's powers of investment with respect to the indemnity fund apply to both Part A and Part B.
- (5) This section expires when Schedule 2A expires and, on that expiry, the division of the indemnity fund into two parts will cease.

### 5—Amendment of section 50—Agreement with professional organisation

Section 50(3)—after paragraph (f) insert:

- (g) functions or powers under Schedule 2A.

### 6—Amendment of Schedule 2

Schedule 2, clause 3(4)—before "Part 3" insert:

Division 3 of

## 7—Insertion of Schedule 2A

After Schedule 2 insert:

### **Schedule 2A—Special provisions relating to G.C. Growden Pty Ltd**

#### **1—Interpretation**

(1) In this Schedule—

*eligible capital loss* of an eligible claimant is the qualifying capital investment made by the eligible claimant less any capital amount recovered by the eligible claimant with respect to that investment before the qualifying date and less any other amount that the eligible claimant has received or may reasonably be expected to recover (apart from this Schedule) in reduction of the eligible claimant's pecuniary loss;

*eligible claimant* means a person who—

- (a) has made a qualifying capital investment; and
- (b) has suffered pecuniary loss with respect to that investment as a result of fiduciary default on the part of Growden Investments; and
- (c) as at the qualifying date, has been unable to recover with respect to that loss an amount or amounts equal to or totalling the amount of the qualifying capital investment,

but does not include a person who is (or has at any time been) an associate of G.C. Growden Pty. Ltd.;

*Fund* means Part B of the indemnity fund (see section 29A);

*Growden Investments* means G.C. Growden Pty. Ltd. and includes any associate of G.C. Growden Pty. Ltd. (as in existence at any time);

*prescribed period* means the period commencing on the day on which this Schedule comes into operation and ending on 21 December 2004;

*qualifying capital investment* means—

- (a) any investment of money effected by making a payment to Growden Investments, or to another person on the advice of Growden Investments, on or after 1 June 1995, on the understanding that the money would be lent to a person on the security of a mortgage; or

- (b) any reinvestment of money effected by Growden Investments, or on the advice of Growden Investments, on or after 1 June 1995, where the money was originally paid to Growden Investments, or invested on the advice of Growden Investments, on the understanding that the money would be lent to a person on the security of a mortgage (including in a case where the original payment or investment occurred before 1 June 1995),

but does not include any investment or reinvestment of money that constitutes trust money to which clause 2 of Schedule 2 of the *Conveyancers Act 1994* applies (by virtue of the operation of clause 2(3) of that Schedule);

***qualifying date*** means the date on which this Schedule comes into operation.

- (2) For the purposes of this clause, a person is an associate of G.C. Growden Pty. Ltd. if the person would be an associate of that company under clause 3(2) of Schedule 2 (assuming (if necessary for the purposes of this provision) the continued existence of that person and that company).
- (3) For the purposes of this Schedule, a reinvestment of money within the ambit of paragraph (b) of the definition of ***qualifying capital investment*** in subclause (1) will be taken to be a qualifying capital investment made by the person who originally paid or invested the money.
- (4) For the purposes of this Schedule, fiduciary default on the part of Growden Investments will be taken to include—
  - (a) a defalcation, misappropriation or misapplication of another person's money; or
  - (b) a failure to disclose material facts with respect to the investment of another person's money.
- (5) If a person who has died could reasonably be expected to have been an eligible claimant under this Schedule were he or she still alive, the personal representative of that person will be taken to be an eligible claimant and any compensation recovered by the personal representative under this Schedule will be payable to the person's estate.

## **2—Entitlement to claim compensation**

- (1) Subject to this Schedule, an eligible claimant may claim compensation under this Schedule.
- (2) A claim for compensation under this Schedule by an eligible claimant cannot exceed the eligible claimant's eligible capital loss.

- (3) To avoid doubt, an eligible claimant is not prevented from making a claim under this Schedule by virtue only of the fact that he or she has made a claim under clause 2 of Schedule 2 of the *Conveyancers Act 1994* (but recognising that a claim that gives rise to an entitlement under that clause cannot be the subject of a successful claim under this Schedule).

### **3—Time within which claim must be made**

- (1) A claim for compensation must be made within the prescribed period.
- (2) The Commissioner must, within 21 days after the commencement of this Schedule, by notice published in a newspaper circulating generally throughout Australia, give notice to persons who may qualify as eligible claimants under this Schedule of—
  - (a) the ability to make a claim under this Schedule; and
  - (b) the fact that a claim for compensation must be made within the prescribed period.
- (3) A claim that is not made within the prescribed period is barred for the purposes of this Schedule unless the Court, on application, otherwise determines.

### **4—Establishment of claims**

- (1) A claim for compensation under this Schedule must be made to the Commissioner in a manner and form determined by the Commissioner.
- (2) The Commissioner may require a person making a claim—
  - (a) to furnish further information specified by the Commissioner;
  - (b) to verify, by statutory declaration, information furnished for the purposes of making or establishing a claim.
- (3) The Commissioner must, as soon as practicable after the end of the prescribed period, determine, with respect to each person who has made a claim to the Commissioner in accordance with this Schedule—
  - (a) whether the Commissioner is satisfied that the person is an eligible claimant under this Schedule; and
  - (b) if the claim is accepted on that basis, the amount of the person's eligible capital loss for the purposes of paying compensation under this Schedule.
- (4) The Commissioner must, by notice in writing, inform each person who has made a claim of the Commissioner's determination with respect to that person under subclause (3).

- (5) A person who is dissatisfied with a determination with respect to the person under subclause (3) may, within one month after receiving notice of the Commissioner's determination, appeal to the Court against the determination.

### **5—Entitlement to compensation**

Subject to the provisions of this Schedule, a person whose claim is accepted is entitled to the payment of compensation under this Schedule for the person's eligible capital loss.

### **6—Payment of compensation**

- (1) The payment of compensation will be made by the Commissioner from the Fund.
- (2) Unless the Fund is sufficient to pay all eligible capital losses of all persons whose claims have been accepted, the Commissioner must establish a scheme for the payment of compensation under which payments are made according to the relative amount of each entitlement.
- (3) When the Commissioner makes a payment of compensation to a person under this clause, the Commissioner is, to the extent of the payment, subrogated to the rights of the person against any other person liable at law or in equity for the fiduciary default on the part of Growden Investments in respect of which the payment is made (and any amount recovered under this right of subrogation must be credited to the Fund).

### **7—Recovery of amounts from other sources**

- (1) If a person who is entitled to, or who has received, a payment of compensation under this Schedule recovers from another person or source an amount in respect of the fiduciary default for which compensation is payable under this Schedule—
  - (a) the person must immediately notify the Commissioner of the recovery of that amount; and
  - (b) the person's entitlement to compensation under this Schedule is reduced by the amount recovered; and
  - (c) if the recovery of the amount and any previous payment of compensation under this Schedule results in the person recovering a total amount in respect of a qualifying capital investment that exceeds the person's eligible capital loss, then the person must immediately pay the excess to the Commissioner for crediting to the Fund (and that excess will, until paid, be a debt due to the Crown).
- (2) A person must not fail to comply with subclause (1)(a).  
Maximum penalty: \$10 000.

## **8—Accounts and audit**

- (1) The Commissioner must keep proper accounts of all money received and dealt with under this Schedule.
- (2) The Auditor-General may at any time audit those accounts and in any event must audit those accounts as part of the annual audit of the indemnity fund under Part 3.

## **9—Expiry of Schedule**

- (1) This Schedule will expire on a day to be fixed by proclamation.
- (2) The Governor should not make a proclamation under subclause (1) unless or until the Commissioner has certified that, on the Commissioner's assessment, all eligible capital losses have been fully compensated (whether by the payment of compensation under this Schedule or from other sources).
- (3) The expiry of this Schedule—
  - (a) does not affect any right of subrogation under clause 6(3); and
  - (b) does not affect any requirement to comply with clause 7(1)(a) or any right of recovery under clause 7(1)(c), and any such right or requirement may be exercised or enforced as if this Schedule had not expired.
- (4) Any money received by the Commissioner after the day fixed by the Governor under subclause (1) on account of the operation of this Schedule will be paid into the indemnity fund.
- (5) This clause is in addition to, and does not derogate from, the provisions of the *Acts Interpretation Act 1915*.

# **Part 3—Amendment of *Conveyancers Act 1994***

## **8—Amendment of Schedule 2**

Schedule 2, after clause 2—insert:

### **3—Special provisions relating to Growden Investments**

- (1) A failure on the part of Growden Investments to disclose material facts with respect to the investment of trust money to which clause 2 applies will be taken to be a fiduciary default for the purposes of Part 4.
- (2) Subclause (1) applies with respect to any such failure on the part of Growden Investments (and accordingly the Commissioner must, to the extent that a relevant claim based on a failure on the part of Growden Investments to disclose material facts has been rejected, on application by the claimant, reassess the claim).

- (3) Despite clause 2(4), no interest is payable under section 39(2) with respect to an entitlement to compensation arising from fiduciary default on the part of Growden Investments.
- (4) In this clause—  
*Growden Investments* means G.C. Growden Pty. Ltd. and includes any associate of G.C. Growden Pty. Ltd. (as in existence at any time).
- (5) For the purposes of this clause, a person is an associate of G.C. Growden Pty. Ltd. if the person would be an associate of that person under clause 2 (assuming (if necessary for the purposes of this provision) the continued existence of that person and that company).