

# Agents Financial Administration Bill 2013

## Explanatory Notes

### Short title

The short title of the Bill is the Agents Financial Administration Bill 2013.

### Policy objectives and the reasons for them

The objectives of the Agents Financial Administration Bill 2013 are to:

1. Provide for the repeal of the *Property Agents and Motor Dealers Act 2000* (PAMD Act) and split of the PAMD Act as one of a suite of four Acts for this purpose. Together with three industry-specific Acts which will provide for the licensing and regulation of certain occupations, the Agents Financial Administration Bill 2013 (AFA Bill) will include the provisions of the PAMD Act pertaining to trust accounts and the claim fund, thus providing a group of Acts that will simplify and improve the regulation previously provided by the PAMD Act, creating Acts that are responsive to the needs of the industries they will regulate, and offering red tape reduction.
2. Streamline the claim fund processes to deliver red tape reduction measures for government, industry and consumers.

The reasons for the objectives are outlined below.

#### **Provide for the repeal and split of the *Property Agents and Motor Dealers Act 2000***

The *Property Agents and Motor Dealers Act 2000* (PAMD Act) provides for the licensing and regulation of real estate agents, resident letting agents, pastoral houses, property developers, used motor vehicle dealers, auctioneers and commercial agents, regulates trust accounts, and establishes a claim fund to compensate consumers who suffer financial loss arising from particular conduct of licensees.

The PAMD Act serves a number of important public policy objectives. However, as the PAMD Act regulates a number of industries and includes a range of consumer protection measures, it can be difficult for consumers, industry and government officers to navigate due to its breadth, and over time it has become increasingly cumbersome. It has also been characterised by increasing levels of complex and technical regulatory requirements that in many instances are a disproportionate and ineffective response to the policy problems they are designed to resolve. In addition, the complex nature of the PAMD Act limits its capacity to be responsive to the needs of each industry it regulates.

The Government has committed to growing a four pillar economy in Queensland focused on tourism, agriculture, resources and construction. As part of this commitment, the Government has adopted a specific property and construction strategy in recognition of the importance of

the property and construction sector to the State's economy and the fundamental role it plays in creating the built environment, and providing jobs, affordable housing, and investment and growth opportunities for Queensland. The repeal and split of the PAMD Act aligns with the Government's priorities and its Property and Construction Strategy by demonstrating the Government's commitment to Queensland businesses to have legislation that is appropriately responsive to the needs of each respective industry and strips away unnecessary red tape. This Bill is a component of the Government's achievement of this commitment.

Industry groups will benefit from having legislation and obligations that are specific to their line of business. In addition, industry-specific Acts will mean future legislative reforms will be more responsive to marketplace changes in each industry. This is anticipated to lead to increased industry standards, simplified compliance and increased consumer confidence in the regulated industries without having to increase the regulatory burden on licensees. The PAMD Act will no longer impose a 'one size fits all' approach to regulating the property, used motor dealing, auctioneering and debt collection industries.

The regulated industries support splitting the PAMD Act into industry-specific Acts to simplify the legislation. It is anticipated that this will enhance awareness of regulatory requirements, increase industry standards and simplify compliance activities, consequently resulting in increased consumer confidence in these industries.

### **Streamlining the claim fund processes**

The AFA Bill includes the trust account and claim fund provisions of the PAMD Act, which avoids duplication of these provisions across each of the industry-specific Bills.

The aim of the claim fund is to compensate persons in particular circumstances for financial loss arising from dealings with agents. The AFA Bill maintains the current PAMD Act processes for receiving, determining and paying successful claim applications. This process is time intensive and administratively costly. As a result of an internal review, the Bill introduces amendments to the processes inherited from the PAMD Act so as to streamline the administrative claim process, achieve cost and time savings, and ultimately provide positive benefits for claimants.

## **Achievement of policy objectives**

### ***Split of the *Property Agents and Motor Dealers Act 2000****

The Agents Financial Administration Bill 2013 (this Bill), the Property Occupations Bill 2013, the Motor Dealers and Chattel Auctioneers Bill 2013, and the Debt Collectors (Field Agents and Collection Agents) Bill 2013 will provide for the repeal of the PAMD Act and split the PAMD Act into three industry-specific Acts covered by a common administration Act. Provisions in relation to compliance and inspectorate provisions for these four Bills (and certain other Acts) are provided for in the Fair Trading Inspectors Bill 2013. The Fair Trading Inspectors Bill 2013 consolidates and harmonises inspectors' powers across 14 Acts about fair trading. This structural change will facilitate a modern legislative framework that is more responsive to the individual needs and characteristics of the regulated industry sectors.

Consistent with the PAMD Act, agents regulated by the three industry-specific Bills will have particular financial administration requirements. The AFA Bill provides for the opening,

operation and regulation of trust accounts held by agents regulated under the industry-specific Bills and the establishment of a claim fund to compensate persons in particular circumstances for financial loss arising from dealings with agents, and includes provisions for deciding and paying claims. The Bill contains amendments to some provisions brought across from the PAMD Act to achieve red-tape reduction. For example, the name of the auditor of an agent's trust account will now not have to be notified to the chief executive until the trust account has been opened, rather than upon application for a licence. This change provides a more logical and easier process for agents and auditors alike.

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, under the PAMD Act, 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 an agent's trust account. 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 the point where there have only been two applications since 2006. As agents no longer have difficulty appointing qualified auditors, these provisions have not been continued under the Bill.

#### Streamlining the claim fund processes

The Agents Financial Administration Bill 2013 not only brings across the provisions establishing and regulating the claim fund and claims processes from the PAMD Act, but also contains amendments to the provisions which are intended to streamline the claim fund processes. The changes provide for such red tape reduction measures as more flexibility in the jurisdiction in which a claim may be heard based on the claim's complexity, truncation of the claims process where this is justified on a cost basis, and the inclusion of circumstances where a claim can be paid immediately. The current processes under the PAMD Act are time intensive and administratively costly, and affected consumers can suffer from delays caused by the operation of the legislation. The AFA Bill improves upon the PAMD Act by promoting administrative efficiencies in receiving, determining and paying claims from the claim fund. Significant red tape reduction will be achieved for the government through the introduction of streamlining measures.

The claim fund processes in the AFA Bill are to be streamlined by—

- giving a power for the chief executive to make an immediate payment from the claim fund under emergency or urgent circumstances;

- allowing the chief executive to determine if a claim is valid, with a claimant having the right of review to QCAT for a decision that a claim is invalid;
- excluding financiers from being able to make a claim, as the claim fund is intended to cover consumer losses only;
- providing relief from strict processes between QCAT and the department so that—
  - where an application has been made to QCAT to allow an extension of time, QCAT can go on to determine the claim without referring it back to the department first;
  - modifying the jurisdiction of QCAT for claims such that a strict monetary value for claims is not the arbiter of where the claim can be heard, but the complexity of the claim can be taken into account;
- applying a condensed claim process to claims that are valid but where the cost of following the full process would exceed the value of the claim, or where there are a large number of small claims related to a contravention by one agent;
- reducing duplication of investigation and reporting by inspectors;
- using a receiver's claim investigation to assist with the claim decision rather than further duplicated investigation being required;
- giving the chief executive a choice as to whether reasons need to be given with decisions, although providing an avenue for a party to a claim to seek reasons should they wish;
- allowing the chief executive to directly pay amounts to another government body or agency;
- giving the chief executive discretion to publish decisions, with or without reasons, as a means of assisting other parties making claims, informing people about the conduct of agents, and creating consistency with the approach taken by QCAT;
- authorising the chief executive to make applications to QCAT for reimbursement orders for certain claim fund debts and costs;
- permitting the chief executive to make a submission on an appeal to which the chief executive is not a party; and
- providing direction for the chief executive when the chief executive is directing payments from an agent's trust account.

## **Alternative Ways of Achieving Policy Objectives**

The split of the PAMD Act is only able to be achieved by dividing the Act into industry-specific Acts. To avoid repetition of common provisions relating to trust account requirements and the claim fund, these provisions are best placed in a separate Act.

During the preparation of the four Bills to split the PAMD Act, all submissions and proposals put forward by stakeholders during the public consultation process for the red tape reduction review were considered in detail. Proposals raised by stakeholders that were consistent with the objectives of the review, to reduce red tape and regulation without adversely impacting on consumers, were generally supported and reflected in the provisions of the Bills.

A preliminary impact assessment of the proposals reflected in the Bill as well as alternatives to these proposals, including maintaining the status quo and adopting interstate approaches, was conducted. Maintaining the status quo was not supported as this alternative was considered to be inconsistent with Government priorities and the objectives of the red tape reduction review. The appropriateness of adopting interstate approaches in Queensland was also assessed. However, interstate approaches are largely inconsistent and many were not

considered appropriate for the Queensland regulatory framework. Other Australian jurisdictions also have trust account requirements which provide for similar regulation of agents' handling of trust monies, audit requirements and limitations on payments from trust accounts. However, as the underlying legislation regulating agents differs in each jurisdiction, it is not appropriate to directly adopt trust account regulatory measures from another jurisdiction. For the same reason it is not appropriate to adopt other jurisdictions' legislation for the regulation of the claim fund, even though other jurisdictions also have established claim funds.

As the processes for considering, paying and reviewing claim fund decisions are regulated by legislation currently, streamlining of the claim fund processes can only be achieved through legislative amendment.

## **Estimated Cost for Government Implementation**

The State Government will incur costs in implementing the split of the PAMD Act and in implementing the additional amendments to the existing legislative requirements of the PAMD Act to reduce red tape and regulation for industry.

The split of the PAMD Act into four separate pieces of legislation will impose costs on the State Government. New administrative processes will need to be developed for principal collection agents who wish to open a trust account. A communication and education strategy will have to be conducted with financial institutions to inform them of the new processes required for opening a trust account by collection agents, and to improve the level of compliance with their responsibilities around trust accounts. A change management process will also need to be developed to seamlessly migrate existing licensees into the new licensing, data and business process system.

The repeal of the PAMD Act and the changes to the licensing and trust accounting systems, changes to claims processes and other red tape reduction reforms require amendments to be made to the existing approved forms, information on the Office of Fair Trading website, and other related publications. Staff training costs and changes to the complaint management system are also associated with the implementation of this Bill and the three industry-specific Bills.

Finally, the State Government will incur costs in delivering information and education services to assist stakeholders, including existing licensees, in understanding their rights and obligations following the transition from the PAMD Act.

All expenditure associated with implementing the split of the PAMD Act and the red tape reduction proposals will be met from existing appropriations.

The measures to streamline the claim fund processes would deliver faster assessment and payment timeframes and also deliver cost savings for the government.

## **Consistency with Fundamental Legislative Principles**

The provisions within the Bill are generally consistent with fundamental legislative principles. In general, the fundamental legislative principles affected by the AFA Bill are the same as

those which were identified and addressed in the establishment of the PAMD Act. Potential breaches of fundamental legislative principles are addressed below.

**Rights and liberties of individuals: Consistency with natural justice—right to be heard (*Legislative Standards Act 1991*, section 4(3)(b))**

Clause 42 (Chief executive may give directions about agent's accounts in particular cases) has been identified as a possible breach of the fundamental legislative principle of consistency with natural justice and the right to be heard. Clause 42 gives the chief executive the power to give directions about an agent's accounts if the chief executive has reasonable grounds to believe trust money has been stolen, misappropriated or misapplied. For example, the chief executive may then direct that an amount must not be drawn from a stated account. The equivalent provisions to clauses 42 through to 46 exist in the PAMD Act and have been in place since that Act's passage in 2000.

Justification for the power given to the chief executive is that in the particular circumstances to which clause 42 applies, i.e. theft or misappropriation, there is a valid and justifiable reason for ensuring that no further access to trust moneys is available to an agent reasonably suspected of this behaviour when a notice under clause 42 is given. The stealing or misappropriation of trust money can result in significant consumer detriment as consumers can lose relatively large sums of money. The power granted to the chief executive in this clause is to ensure that, particularly in cases of theft, no further losses occur in this manner, reducing the extent of any financial loss to a consumer or preventing future financial loss to other consumers. Further, clause 45 provides that a person may ask QCAT to review the chief executive's decision.

Clause 42 includes a new, additional circumstance for which this clause may apply, that being where an agent has abandoned their business. Therefore, justification of the extension of circumstances is necessary. Clause 47 (When a receiver may be appointed) already provides for abandonment. While clause 47(2)(c) allows the chief executive to appoint a receiver where it is believed a business has been abandoned, clause 42 provides for more immediate relief from financial loss for a person who has dealt with an agent who has abandoned their business. Clause 42 will also permit the chief executive to prevent an agent who has abandoned their business from accessing the trust account and stealing or misappropriating funds. This will provide immediate protection from additional losses for persons dealing with an agent who has abandoned their business. Not all abandonment is as a result of prior defalcation by an agent, but it is one of the common reasons behind an agent abandoning their business. There are benefits for agents with the inclusion of abandonment as a circumstance in clause 42, too. The addition of abandonment can serve as less of an imposition on an agent as the other alternative for the chief executive, as noted above, is to appoint a receiver under clause 47. This would be also more costly for the agent, as the costs of the receiver's appointment are recoverable from the agent. Further, there is a right of review on a direction by the chief executive under clause 42, but there is no such right for the appointment of a receiver.

**Rights and liberties of individuals: Consistency with natural justice (*Legislative Standards Act 1991*, section 4(3)(b))**

**Proportion and relevance**

Clause 45 (Person may ask QCAT to review chief executive's decision) provides that a person who is dissatisfied with a decision of the chief executive under clause 42, where directions are given about an agent's accounts if the chief executive believes trust money may have been

stolen, misappropriated or misapplied, may apply to QCAT for review of the decision. Under the *Queensland Civil and Administrative Tribunal Act 2009* (QCAT Act), section 22(3), the tribunal may make an order staying the operation of a reviewable decision if a proceeding for the review of the decision has started. However, clause 45(2) specifically provides that in the circumstances to which clause 42 applies, QCAT cannot stay the operation of the decision. This could be considered a breach of the fundamental legislative principle of the provision being consistent with natural justice. It may also be considered that it could breach the fundamental legislative principle that legislative power be proportionate, and that extraordinary power only be conferred for extraordinary or urgent circumstances. Because clause 45(2) only applies where the chief executive believes on reasonable grounds that trust money has been stolen, misappropriated or misapplied, it is justified not to have the chief executive's direction stayed in order to restrict access to trust money and minimise or halt financial losses. These circumstances are also considered to be extraordinary and urgent. Not allowing for the stay of a decision by the chief executive, for example 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 agent as the amounts being dealt with can be significant.

**Rights and liberties of individuals: Consistency with natural justice (*Legislative Standards Act 1991*, section 4(3)(b))**

Clause 91(2)(b) (Chief executive to give respondent notice of claim) provides that the chief executive need not give the respondent to a claim a copy of the notice of claim if the respondent has had a trustee in bankruptcy appointed. This could allow the chief executive to decide the claim without input from the respondent. This has been provided for as a red tape reduction measure to speed up claims by removing processes that are merely duplication. Where a relevant agent has had a trustee in bankruptcy appointed and a claim against the fund has been made in relation to the agent, the normal process would be that the agent's records, including the trust account records, are reconstructed, the trustee would work closely with the agent through the process and then issue a report. The chief executive can then rely on this report without repeating the claims process, as the trustee will have dealt with the parties to the claim already.

**Rights and liberties of individuals: Consistency with natural justice (*Legislative Standards Act 1991*, section 4(3)(b))**

Clause 101(2) (Chief executive's decision binds the parties and no extension of time is allowed) provides that where a party to a claim has not sought a review of the chief executive's decision under section 33(3) of the QCAT Act, that is the extent of review rights. This is justified in that parties to a claim still have a right of review, but once the time for a review right has expired and the chief executive's decision is declared final, there should be no further right of review where that has not been availed upon in the first instance. It means that once a decision has been finalised, the process cannot be held up any further. The purpose of the provision is to ensure that claimants recover their financial losses in a more timely manner.

**Sufficient regard to the institution of Parliament: Appropriateness of delegation of legislative power (*Legislative Standards Act 1991*, section 4(4)(a))**

Clause 113 (Limits on recovery from fund) provides that the limits on a single claim, and on the total amount paid from the fund due to a single person, are to be prescribed by a regulation. This

is to provide for adjustments to be made to the limits, where necessary, by regulation rather than having to amend the limit through an amendment of the primary legislation which would take some considerable time to achieve. 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 over time. In actuality, the amount provided for by regulation has not changed for many years and the limit, as currently set, is very rarely reached or exceeded.

**Rights and liberties of individuals: Consistency with natural justice (*Legislative Standards Act 1991*, section 4(3)(b)) – Reversal of the onus of proof in criminal proceedings without adequate justification**

Clause 140 (Entries in agent's documents) 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.

**Rights and liberties of individuals: Consistency with natural justice (*Legislative Standards Act 1991*, section 4(3)(b)) – Reversal of the onus of proof; Imposition of liability for the acts of others**

Clause 143(3) (Responsibility for acts or omissions of representatives) provides that where an act has been done, or omitted to be done by a person who is a representative of an agent, such act or omission is taken to have been done by the agent unless the agent can prove they could not have prevented the act or omission by the exercise of reasonable diligence. This can be seen as a reversal of the onus of proof, but is justified on the grounds that it follows the general law of agency in that the agent is responsible for the actions of their representatives. The proper performance of an agent's responsibilities involves ensuring that anyone who undertakes those responsibilities on behalf of the agent should have appropriate supervision and the agent must ensure that the functions are performed in accordance with the relevant legislation applying to the functions performed. It is taken as given that an agent applies these standards, and any act or omission by a representative has been done with the knowledge of the agent. It is therefore the responsibility of the agent to show otherwise. The information relating to the exercise of reasonable diligence would be peculiarly within the knowledge of the agent and would otherwise be difficult to establish.

**Rights not to be defamed**

Clause 148 (Public warning statements) allows the Minister or chief executive to make or issue public warning statements identifying individuals who have committed offences against the Bill. These public warning statements may have an adverse effect 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 and to prevent financial loss occurring.



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.

**Sufficient regard to the institution of Parliament: Appropriateness of delegation of legislative power (*Legislative Standards Act 1991*, section 4(4)(a))**

Clause 153 (Regulation-making power) replicates the relevant head 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*.

## Consultation

### *Proposal to split the PAMD Act*

In 2008 the former Service Delivery and Performance Commission (SDPC) finalised its 'Report on the Review of Regulatory Reform (Phase 2) – *Property Agents and Motor Dealers Act 2000*'. The SDPC undertook extensive consultation during its review of the PAMD Act including consultation with industry and the Queensland Consumers Association. The SDPC concluded that a significant reduction in the level of regulation could be achieved without adversely affecting consumers. The reductions were anticipated to be of significant benefit to the businesses affected by the Act and a number of the SDPC recommendations were considered likely to have positive benefits for consumers.

Following this review, draft Bills (the 2010 draft Bills) were developed to implement the industry-supported SDPC recommendation in 2010 to split the PAMD Act. Throughout the development of the 2010 draft Bills, a working group comprised of representatives of key industry associations was consulted. Broad public consultation was also conducted on the 2010 draft Bills. In addition, the former Legal Affairs, Police, Corrective Services and Emergency Services Committee (LAPCSESC) called for public submissions and held two public hearings to inform its examination of the 2010 draft Bills. The LAPCSESC made a number of recommendations including that the Agents Bills 2010 be passed. However, the 2010 draft Bills lapsed upon the dissolution of the 53<sup>rd</sup> Parliament in February 2012.

A comprehensive departmental review of the claims process was also conducted in 2011 with the development of a white paper.

#### *Red tape reduction review of draft Bills to split the PAMD Act*

A comprehensive red tape reduction review of the draft Bills to split the PAMD Act into four separate pieces of legislation was conducted in 2013. The objective of the review was to identify opportunities to reduce red tape and regulation while maintaining effective consumer benefits.

The red tape reduction review was informed by a 6 week public consultation process that commenced in February 2013. The Bills were released on the Office of Fair Trading website, with letters to key industry groups and emails to existing licensees sent notifying stakeholders of the consultation process. Stakeholders were encouraged to consider opportunities for further red tape reduction and make submissions to remove unnecessary legislative obligations. Over 86 stakeholder submissions were received.

Targeted consultation on an exposure draft of the amended Bill was also conducted in October 2013, including internal stakeholder consultation. Feedback on the amendments was positive and further amendments to improve the operation of the provisions and the Bill were subsequently made before this Bill was ready to be introduced into the Legislative Assembly.

#### *Results of consultation*

Peak bodies that have been consulted during the development of the split Bills or in relation to the red tape reduction review of the draft split Bills include the:

- Australian Resident and Accommodation Managers Association
- Auctioneers and Valuers Association of Australia;
- Australian Livestock and Property Agents Association;
- Australian Property Institute;
- Australian Resident Accommodation Managers' Association;
- Institute of Mercantile Agents;
- Motor Trades Association Queensland;
- Property Council of Australia;
- Property Sales Association of Queensland;
- Queensland Consumers Association;
- Queensland Law Society;
- Queensland Tourism Industry Council;
- Queensland University of Technology Property Law Academics;
- Royal Automobile Club of Queensland;
- Real Estate Excellence Academy;
- Real Estate Institute of Queensland;
- Shopping Centre Council of Australia; and
- Urban Development Institute of Australia (Queensland).

Generally speaking, stakeholders strongly support the repeal and split of the PAMD Act into separate pieces of legislation. Strong stakeholder support for the amendments to reduce red tape and regulation was also received when targeted consultation was conducted. It is anticipated that industry will benefit from the red tape reduction amendments as these amendments will reduce costs for business without adversely impacting on consumers.

Key recommendations from the departmental review of the claim fund processes were used to inform the development of amendments to the 2010 draft Agents Financial Administration Bill to facilitate streamlining the claims process.

## **Consistency with legislation of other jurisdictions**

The Bill is specific to the State of Queensland but legislation with similar provisions regulating when and how trust accounts are to be kept and establishing a compensation fund for losses arising from dealings with certain licensed agents have been made by all other Australian jurisdictions.

# Notes on provisions

## Part 1 Preliminary

### Division 1 Introduction

*Clause 1* states that, when enacted, the Bill will be cited as the *Agents Financial Administration Act 2013*.

*Clause 2* provides that the Bill is intended to commence on a day fixed by proclamation. Upon assent, the Act will commence by proclamation on a date that is in line with the *Property Occupations Act 2013*, the *Motor Dealers and Chattel Auctioneers Act 2013* and the *Debt Collectors (Field Agents and Collection Agents) Act 2013* (the Agents Acts), and the *Fair Trading Inspectors Act 2013*, with the commencement date to provide time for industry to carry out necessary implementation processes and for communication processes to be undertaken. Commencement on a date to be set by proclamation will also allow for technical implementation of departmental systems and procedures.

*Clause 3* provides that the Bill binds all persons, and 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, being an accountable officer under the *Financial Accountability Act 2009* or a public service officer, from the application of this Bill in relation to trust moneys for which the prescribed officer is responsible if another Act makes provision for the way the prescribed officer is required to deal with the trust moneys.

*Clause 5* qualifies that the *Fair Trading Inspectors Act 2013* (FTI Act) enacts common provisions for this Act and certain other Acts about fair trading. Clause 5(2) stipulates that inspectors' powers under the FTI Act are in addition to, and do not limit, any powers the inspector has under this Bill.

### Division 2 Object

*Clause 6* sets out the main object of this Act and how this is to be achieved.

*Clause 6(1)* states the main object of the Act is to protect consumers from financial loss in dealings with agents regulated under an Agents Act.

*Clause 6(2)* establishes that the main object is to be achieved by the following three means:

- (a) regulating the way agents establish, manage and audit trust accounts; and
- (b) establishing a claim fund to compensate persons in particular circumstances for financial loss arising from dealings with agents; and
- (c) promoting administrative efficiency for claims made against the claim fund.

### Division 3 Interpretation

*Clause 7* provides that the dictionary in the Schedule defines particular words used in the Act.

*Clause 8* defines an **agent** as being a person who is either a licensee under any of the Agents Acts or a collection agent, and an agent may also be both a licensee and a collection agent.

## **Part 2                    Trust accounts**

### **Division 1                Opening and keeping trust accounts**

*Clause 9* provides that only a principal agent may open an account purporting to be trust account under Part 2 of the Bill. Principal agents, in accordance with the meaning provided by the Dictionary in Schedule 1, include principal licensees and principal collection agents.

*Clause 10* describes the process by which a collection agent may open a trust account.

*Clause 10(1)* requires a collection agent to apply, in the approved form, to the chief executive for an authority to open a trust account before they open the account. Licensed agents are subject to suitability checks prior to being granted a licence. The requirement for a collection agent to apply to the chief executive for an authority to open a trust account provides the opportunity for the chief executive to assess the applicant's suitability, including through a criminal history report.

*Clause 10(2)* requires that the collection agent also includes with the application, payment for a criminal history report as provided under section 106 of the *Debt Collectors (Field Agents and Collection Agents) Act 2013*. Section 106 of the *Debt Collectors (Field Agents and Collection Agents) Act 2013* allows the chief executive to require payment for a criminal history report. Notification of this requirement can be included in the approved form that is the application, be on the department's website, or in a written notice. The chief executive may ask the commissioner of the police service to provide a criminal history report under section 105 of the *Debt Collectors (Field Agents and Collection Agents) Act 2013*.

*Clause 10(3)* provides that if the chief executive considers the applicant is a suitable person to open a trust account, then the chief executive must grant to the collection agent the authority to open the trust account.

*Clause 10(4)* provides that, when deciding whether the applicant collection agent is a suitable person to open a trust account, the chief executive must take into consideration the suitability criteria listed in sections 102 or 103 of the *Debt Collectors (Field Agents and Collection Agents) Act 2013*.

*Clause 10(5)* provides that the chief executive must give written notice of the decision to the applicant. If the application is refused, an information notice about the decision must be given.

*Clause 10(6)* prevents an applicant who has been refused authority to open a trust account from reapplying within 3 months from the date the chief executive gave the applicant the information notice about the refusal under subclause (5)(b). However, subclause (7) provides that subclause (6) does not apply if the applicant is a corporation and, because of a genuine sale, no person who was a shareholder of, or held a beneficial interest in, the corporation, or was in a position to control or influence the affairs of the corporation when the refused

application was made is now a shareholder of, or holds a beneficial interest in the corporation, or is in a position to control or influence the affairs of the applicant corporation.

*Clause 11(1)* provides that an agent, being a principal agent, must only open a general trust account or a special trust account at the office or branch of an approved financial institution within Queensland.

Note—A special trust account is a trust account that is created under clause 17 of this Bill, in which an amount is held for investment at the direction of both parties to a sale.

Before opening the trust account, clause 11(2) requires the agent to give the manager or other officer in charge of the financial institution's office or branch, for an agent that is licensee, a copy of their licence, and for a principal collection agent, a copy of their authority to open a trust account granted under clause 10.

Where a principal collection agent keeps a trust account and then also becomes a principal licensee, and intends to use the trust account for transaction money received as part of the licensed activities, the agent must give a copy of their licence to the manager or other officer in charge of the financial institution's branch where the trust account is held. The agent has seven days from the date they receive their licence to provide the copy of their licence.

*Clause 12(1)* requires that an agent opening a general trust account must ensure that the name of the account includes the words 'trust account'.

*Clause 12(2)* provides that if the trust account being opened is a special trust account established under clause 17, then the licensee opening that account must ensure the account's name includes the words 'special trust account'.

*Clause 13* provides that if an agent opens a general trust account or a property agent opens a special trust account, if the agent changes the name of a general or special trust account or closes a general or special trust account, the agent must provide written notice of this event to the chief executive within 2 months of the event happening. The written notice must specify—

- whether the account is a general trust account or a special trust account,
- the name of the financial institution where the account is or was kept,
- the name of the account,
- the identifying number of the financial institution, commonly known as the BSB number, and
- the account number.

*Clause 14* permits the chief executive, on behalf of the State, to enter into an agreement with a financial institution about the keeping of general trust accounts by agents, subject to the Minister's prior approval. The agreement may provide for the payment of interest on the whole or part of amounts that are held in agents' general trust accounts to the consolidated fund, informing the chief executive of amounts held in agents' general trust accounts, auditing agents' general trust accounts, and other things concerning agents' general trust accounts.

*Clause 14(4)* permits a financial institution to pay interest to the consolidated fund under such an agreement.

## **Division 2                      Payments to trust accounts**

*Clause 15* provides that clauses 16 and 17 of the Bill apply if an amount is received by an agent for a transaction, or an amount is received by an agent with a written direction for its use. An example of an amount received with a written direction for its use is where an agent receives an amount from a property owner who has listed the property for sale with the agent, with a written direction from the owner to use the amount for advertising or marketing of the property.

*Clause 15(2)* defines an ‘amount’ received by an agent for a transaction to include deposit and purchase monies for the transaction. An ‘amount’ does not include an amount payable to the agent that is a refund of an expense for which the agent was authorised to incur, did incur, and for which the agent holds a receipt.

*Clause 16* provides that before the end of the first business day after receiving an amount, the agent must pay the amount to the agent’s general trust account or, where the parties to the transaction have agreed to invest the money under clause 17(1), invest it in accordance to directions under clause 17(2), that is, into an account that is established as, and named, a special trust account.

For example, if an agent collects an amount that is rent for an owner’s property on a Saturday, they must pay this amount to the agent’s general trust account before the end of the first business day after the Saturday, that is, on the following Monday if that day is not a public holiday. The amount must be paid into the general trust account before the money can be paid to the owner, meaning that it cannot be paid directly to the owner without first banking it to the general trust account.

*Clause 17* applies where a property agent under the *Property Occupations Act 2013*, has received an amount for a sale and the date the sale is to be completed is either stated directly in the contract or is able to be ascertained on the day the contract is entered into, and that date is more than 60 days after the amount is received. Also, when the amount is received there must also be a direction from all parties to the sale that the amount is to be invested.

*Clause 17(2)* requires that when all these circumstances are met, the agent must pay the amount as required by the written direction to a special trust account for the investment of the amount. The special trust account must be opened for the investment of the amount in a branch of a financial institution that is within the state of Queensland.

*Clause 18* provides that an agent must not pay to a trust account an amount other than an amount that must be paid to the account under clause 16 or 17.

However, clause 18(2) permits, for circumstances where an agent receives an amount that consists of both trust money and non-trust money that can not be divided, the agent must pay the whole amount into the agent’s general trust account and draw the non-trust money amount from the account within 14 days after the money becomes available for drawing.

For example, this may occur where a property agent receives a single cheque that covers both rent and services that have been provided by the property agent. The amount for services provided by the property agent is non-trust money, but because it has been paid as a single

amount with rent, the total must first be banked into the agent's general trust account. From the date the funds clear, the agent has 14 days to draw the services component out of the trust account.

*Clause 19* provides that an agent who is a licensee and holds more than 1 licence is not required to keep a general trust account for each licence. Also, where a collection agent is also a licensed agent under an Agents Act or becomes licensed, the collection agent may use one general trust account for activities performed as a collection agent and for activities performed under the licence.

*Clause 20* protects trust account money by providing that an amount paid, or required to be paid, to a trust account cannot be used by the agent to pay a debt to the agent's creditor, and cannot be attached or taken in execution under a court order or process by an agent's creditor.

### **Division 3                      Payments from trust accounts**

*Clause 21* requires an amount paid to a trust account to be kept in the account until it is paid out in accordance with this Bill and in a way permitted by this Bill.

*Clause 22* provides for the circumstances and way in which an agent is permitted to draw from a trust account a transaction fee or transaction expenses in relation to a particular transaction. The agent must be authorised to draw the amount and the amount must be drawn against the transaction fund for the transaction. The agent is authorised to draw the amount when the expense becomes payable.

*Clause 22(3)* provides that after the transaction is finalised, the agent is authorised to draw an amount from the transaction fund to pay the person entitled to the amount. The agent may also pay someone else the amount in accordance with written direction from the person entitled to the amount. The amount that can be drawn is equal to the difference between the balance of the transaction fund and the total of the agent's transaction fee and any outstanding transaction expense. For example, an amount of rent received to which the owner is entitled, minus the amount of the agent's transaction fee and any outstanding transaction expense yet to be paid, may be withdrawn from the general trust account and paid to the owner. *Clause 22(3)(b)* provides that after that amount has been paid, the agent's transaction fee may be drawn from the transaction fund.

*Clause 22(4)* provides that if a dispute about the transaction arises, the transaction is not taken to be finalised until the agent is authorised to pay out the transaction fund under clause 26. Clause 26 provides circumstances under which the agent may pay out an amount that has been disputed under clause 25.

*Clause 22(5)* provides the timeframes by which amounts must be paid. After the transaction is finalised and the agent is authorised to draw the amount, the agent must pay the amount to the person entitled to it, or to someone else in accordance with the person's written direction. If the person entitled to the amount asks for the balance in writing, the agent must pay the amount within 14 days after receiving the request. If no request is made in writing, then the agent is required to pay the balance to the person within 42 days after the transaction is finalised.

*Clause 22(6)* defines certain terms used in the clause.



## **Division 4                    Other trust account obligations**

*Clause 23* sets out an agent's obligation to account to clients for all amounts received by the agent in relation to a transaction, including an amount that is mentioned in subsection (2)(c). When the agent accounts to a client, the account must be in writing and state—

- the amounts received for the transaction; and
- how the amounts were or are to be paid out; and
- the source and amount of any rebate, discount, commission or benefit that the agent received for any expenses the agent was authorised by the client to incur, or for referring the client to someone else for services in connection with the transaction.

If the client asks in writing for the account, the agent must give the written account within 14 days after receiving the written request. If the client has not asked, in writing, for the account, the agent must give the written account to the client within 42 days after the transaction is finalised.

*Clause 24* sets out the duties of managers and principal officers of an office or branch of a financial institution where trust money has been deposited. These duties are required irrespective of whether the trust money has been deposited into a trust account or into another account. The manager or principal officer must—

- allow an inspector, on the inspector's signed written demand, to inspect and copy any documents relating to a relevant account;
- inform the chief executive immediately an agent's trust account is overdrawn;
- inform the chief executive immediately there is insufficient money in an agent's trust account to meet a cheque drawn on the account, and include with the information to the chief executive the amount for which the cheque is drawn and the amount in the account.

Clause 24(2) includes definitions for certain terms used in the clause. For the purposes of clause 24, an agent also includes a former licensee, and a person who is not licensed but who acts as a licensee.

## **Division 5                    Disputes about trust money**

*Clause 25* provides that the division, Division 5, applies if an agent is holding transaction funds in a trust account, and, before the transaction fund is paid out in accordance with the Bill, the agent receives written notice from a party to the transaction that ownership of the fund, or part of it, is in dispute. This is known as the amount in dispute.

*Clause 25(2)* specifically excludes an agent acting for a party to the transaction from the definition of "party".

*Clause 26* prohibits an agent from paying out an amount in dispute unless the agent receives written notice from all parties that the dispute has been resolved and nominating the person who is entitled to the amount in dispute, or that legal proceedings have begun in a court to determine the ownership of the amount. If the agent does not receive written notice within 30 days of being notified of the dispute, the agent may deal with the amount under clause 28.

*Clause 27* provides that if the agent receives written notice from all parties to the dispute and the written notice states the person who is entitled to the amount in dispute, then the agent must pay the amount in dispute immediately to the person named in the notice, or in accordance with that person's direction.

If, however, the agent receives written notice under clause 26(a)(ii) that a legal proceeding has been started in a court, the agent must pay the amount in dispute immediately to the court in which the proceeding was started.

*Clause 28* applies if the agent has not received written notice about resolution of the dispute by being informed by the parties as to who is entitled to the amount in dispute or received written notice about the start of legal proceedings about the amount in dispute, within 30 days of having received notice of the dispute.

After the end of the 30 day period allowing for a notice under clause 26, the agent has seven days in which to give all parties to the transaction a written notice. The written notice must state either that the agent will, within 30 days, pay the amount in dispute to a stated person whom the agent believes is entitled to receive it if the agent does not receive a notice under clause 26. Alternatively, the agent's written notice may state that the agent cannot decide who is entitled to the amount in dispute and that the agent is keeping the amount in the agent's trust account until a notice under clause 26 is received by the agent. This would mean that the parties to the transaction either have to resolve the dispute and decide who is entitled to receive the amount, or start legal proceedings for the court to decide.

Where the agent has provided written notice to the parties under subclause (2)(a) naming the person the agent believes is entitled to the amount, if the agent has not received a notice under clause 26 within 30 days after giving the notice, then the agent may pay the amount to the person the agent has named in the notice.

## **Part 3                    Audit requirements**

### **Division 1                Preliminary**

*Clause 29* defines "auditor" for the purposes of the Bill.

### **Division 2                Provisions about auditors**

*Clause 30* requires an agent to appoint an auditor to audit the trust account within 1 month of opening the trust account. The agent must provide certain information to the chief executive within 1 month of appointing the auditor. The agent must give to the chief executive written notice of the auditor's name and address, and provide evidence that the auditor has accepted the appointment.

*Clause 31* provides for the steps that must be taken by an agent and the agent's auditor if the auditor resigns or the agent ends the auditor's appointment. Clause 31 also provides for the notice requirements for an agent if their auditor dies.

*Clause 32* permits the chief executive to report on a matter about a qualified 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 an agent's trust accounts, or has failed to properly perform an auditor's functions under this Bill.

### **Division 3            Audit of trust accounts**

*Clause 33* provides definitions for division 3.

*Clause 34* requires an agent's trust accounts to be audited for each audit period, as defined, during which the agent carried on business as an agent and operated a trust account. If the agent has not operated a trust account for an audit period, the agent need not have the trust account audited for that period if the agent gives the chief executive a statutory declaration that the agent did not operate a trust account during the audit period.

*Clause 35* sets out the time within which an agent must have the agent's trust accounts audited and file the auditor's signed original audit report with the chief executive.

*Clause 36* provides for the functions of an auditor.

*Clause 37* requires an auditor to give written notice to the chief executive immediately if the auditor cannot report that a particular trust account has been satisfactorily kept, or if the auditor finds, on an unannounced examination of an agent's trust accounts, an irregularity that ought to be brought to the chief executive's attention.

What constitutes an irregularity for the purposes of this clause will depend on the circumstances, and the regulator will rely to an extent on the auditor's professional judgment to determine whether a particular situation would require immediate notification to the chief executive. While not an exclusive list, the following are issues that should be brought to the chief executive's attention—

- pre-drawing commission;
- an overdrawn trust account;
- an overdrawn trust ledger;
- suspected unlicensed trading;
- failing to bank trust monies;
- overcharging expenses or commissions;
- failure to pay bonds;
- failure to pay trust creditors;
- shortfalls identified in trust account cash book reconciliations;
- significant (systemic) non-compliance with trust record-keeping.

*Clause 38* permits an auditor to ask an agent to produce a general account of the agent, or give information about the agent's accounts, if the auditor considers it necessary to enable the auditor to decide whether an agent's trust accounts have been kept satisfactorily. If the agent refuses, the auditor must immediately report the refusal in writing to the chief executive.

*Clause 39* provides that if an agent who is required to keep a trust account ceases to be a principal agent, within 2 months of ceasing the agent must have the agent's trust accounts audited and file the auditor's signed original audit report with the chief executive. Subsection (2) gives guidance as to what the start and end days of the audit period should be.

*Clause 40* requires an auditor who audits an agent's trust account to give the agent an original signed audit report. Subclause (2) provides the matters that must be included in an auditor's audit report.

## **Part 4                    Directions about trust accounts and appointing receivers and special investigators**

### **Division 1                Definitions**

*Clause 41* provides definitions for part 4.

### **Division 2                Giving directions about agents' accounts**

*Clause 42* provides that the chief executive may decide to give a direction, as provided under subclause (2), if the chief executive believes on reasonable grounds that an agent, or a person in charge of an agent's business, or an employee of an agent has, or may have, stolen, misappropriated or misapplied trust money, or an agent has abandoned the agent's business.

If one of these events is believed to have occurred, the chief executive may give a signed, written direction under subclause (2).

The signed, written direction must be given to each holder of the account and to the financial institution where the account is kept, it must state the account to which the direction relates, and state the conditions under which the account may be operated if the chief executive has directed this under subclause (2).

*Clause 43* provides that if the chief executive has given a direction about an agent's account under clause 42(1)(a), after that direction has been given to the holder of an account, the holder must not sign a cheque or other instrument drawn on an account stated in the direction unless the cheque or instrument has first been signed by the chief executive or a person authorised by the chief executive to do so.

*Clause 44* provides restrictions on financial institutions after a direction has been given to the financial institution about an agent's accounts by the chief executive. Until the direction is withdrawn, the financial institution must not pay a cheque or other instrument drawn on any account stated in the direction unless the cheque or instrument is also signed by the chief executive. The financial institution must also not give effect to another transaction on any account stated in the direction where that transaction is not authorised because of the direction. These restrictions apply to the financial institution whether or not a copy of the direction has been given to anyone else, other than the financial institution.

Subclause (3) explains that the chief executive's written approval under clause 42(2)(b) may be evidenced by the chief executive's signature on the cheque or other instrument.

*Clause 45* provides that if a person is dissatisfied with a decision of the chief executive made under clause 42(1), the person may apply to QCAT to have the decision reviewed.

Normally, under the QCAT Act, section 22(3), the tribunal may make an order staying the operation of a reviewable decision if a proceeding for a review of the decision has started.

However, despite this, clause 45(2) specifically provides that in the circumstances to which clause 42 applies, QCAT cannot stay the operation of the decision. Because clause 45(2) only applies where the chief executive believes on reasonable grounds that trust money has been stolen, misappropriated or misapplied, it is appropriate not to have the chief executive's decision stayed so as to restrict access to trust money and minimise or halt financial losses. Not allowing for the stay of a decision by the chief executive, for example 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 agent as the amounts being dealt with can be significant.

*Clause 46* provides that a direction given by the chief executive under clause 42 may be withdrawn at any time. The chief executive must immediately give a notice that the direction has been withdrawn to all persons who were given the direction. The direction stops having effect when the notice is given.

### **Division 3            Receivers**

#### **Subdivision 1        Appointment**

*Clause 47* provides for when the chief executive may appoint a receiver. If the chief executive believes, on reasonable grounds, a defalcation has or may have been committed in relation to an agent's trust account, clause 47 establishes when a receiver may be appointed in the circumstances where the agent consents to the appointment and when no such consent has been given. If an agent consents to the appointment, the chief executive may appoint a receiver. If the agent does not consent, the chief executive may give written notice to the agent stating that the chief executive proposes to appoint a receiver on the ground that a defalcation has or may have been committed in relation to the agent's trust account and outlining the facts and circumstances forming the basis for this ground. The notice must invite the agent, within a stated time of at least 21 days, to show, in writing, why the appointment should not be made. If, after considering any written representations given by the agent within the stated time, the chief executive considers the ground for appointment still exists, the chief executive may make the appointment.

Subclause (2) lists the circumstances under which the chief executive may immediately appoint a receiver.

*Clause 48* sets out the trust property over which a receiver may be appointed.

*Clause 49* provides for who may be appointed as a receiver. A person is able to be appointed as both a receiver and a special investigator over the same trust property.

*Clause 50* provides for how the chief executive must appoint a receiver. The chief executive must appoint a receiver by signed notice. A copy of the appointment notice must be given to the receiver and the agent as soon as practicable after it has been signed by the chief executive. If the agent is a corporation, the corporation is required to give notice of the receiver's appointment to each 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 51* provides for the functions of a receiver. Subclause (2) provides that a receiver must comply with parts 2 and 3 of the Bill in carrying out their functions. Subclause (2) provides that references to an agent in parts 2 and 3 of the Bill are references as if they are to a receiver.

*Clause 52* permits a receiver to ask a person to give the receiver information or documents about receivership property that the receiver reasonably requires. The person must give the receiver the information or documents unless the person has a reasonable excuse.

*Clause 53* provides for the receiver to take possession of receivership property, and the receiver must give a receipt for the property as soon as practicable. Subclause (3) allows a person who would be entitled to the property if it were not in the receiver's possession to inspect the property or take a copy of it, if it is a document. Subclause (4) provides that the receiver must return receivership property that the receiver is satisfied is not required to the agent or other person who has the right to it.

The receiver may take or enter into possession of receivership property despite a lien or other security over the property. The receiver's taking of the property or entering into possession of the property does not affect a person's claim to the lien or other security.

*Clause 54* 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 appropriate jurisdiction with reference to the amount or value of the receivership property, for an order for possession of the property.

*Clause 55* provides for enforcement of an order made by a court for possession of receivership property by the receiver.

*Clause 56* prohibits a person from withdrawing an amount or making a payment from an account with the intent of defeating a receiver's functions. A person is also prohibited from destroying, concealing or moving receivership property over which a receiver has been appointed or giving it to another person or placing it under another person's control. The restriction on moving receivership property over which a receiver has been appointed from one place to another place is partly to prevent receivership property from being removed from where the receiver can account for the property and can be related to the act of concealing property that is also prohibited under this clause.

*Clause 57* provides that a receiver may deal with receivership property in the same way that an agent may have lawfully dealt with the property. Subclause (2) does not limit how a receiver may deal with receivership property, but lists some of the things a receiver may do.

*Clause 58* 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 59* requires a receiver to give notice to persons who may have a claim against receivership property. Clause 59 provides how the receiver may give notice and the timeframes that must be given for a claim. Subclause (4) provides what information a claimant must give about a claim against receivership property. The claim is taken to have been made on the day it is given to the receiver, even if the claimant is unable to state all of the particulars in subclause (4). Subclause (6) permits the receiver to require the claimant to verify the claim, or part of the claim. An example of how a claimant can verify a claim is through a statutory declaration.

*Clause 60* requires a receiver to give a person who wishes to make a claim reasonable access, free of charge, to documents held by the receiver to assist the person to provide particulars and grounds for the claim.

*Clause 61* provides for the process a receiver must adopt in deciding claims.

*Clause 62* applies if the receiver has given notice to claimants against receivership property under clause 59(1) and complied with clause 61 in deciding the claim.

The 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 a copy of the final claims report prepared under clause 61(7).

*Clause 63* applies to receivership property that consists of money in the receiver's possession.

The receiver must give the receivership money to the chief executive if the receiver has not dealt with it under this division of the Bill and the chief executive, by written notice, asks for it. When the money is given to the chief executive, it must be paid into the consolidated fund and be paid from the claim fund in the following order—

- to reimburse claims paid from the claim fund in relation to the agent;
- to pay unsatisfied claims against the claim fund in relation to the agent;
- to pay the remuneration and costs of a receiver appointed under clause 46;
- to pay the remuneration and costs of a special investigator appointed under clause 69;
- to pay claims by the agent against the money.

### **Subdivision 4      Recovery of receivers' remuneration and costs**

*Clause 64* provides that the agent in relation to whom the receiver was appointed is liable to reimburse the chief executive for any amount paid, including an amount paid from the fund, for the receiver's remuneration and costs. If the agent is a corporation, the executive officers of the corporation when the event happened for which the receiver was appointed by the chief executive are liable for the reimbursement. If more than 1 person is liable to reimburse the chief executive, the liability of the persons is joint and several. The chief executive may recover the amount liable to be reimbursed as a debt.

Before taking action to recover the amount of the debt, the chief executive must give a letter of demand to each person liable for the reimbursement. The letter of demand must require the

person to pay the amount to the chief executive within 1 month after receipt of the letter of demand.

### **Subdivision 5      Ending receivership**

*Clause 65* states when a receiver's appointment ends.

*Clause 66* 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 63.

If the chief executive appoints a new receiver within 14 days of the end of a receiver's appointment, the former receiver must give the receivership property to the new receiver as soon as reasonably practicable, or comply with a direction by the chief executive if the chief executive gives the former receiver a direction about how to deal with the receivership property.

If a new receiver is not appointed within 14 days of the end of the appointment, the former receiver must give the receivership property to the agent or other person who has the right to it.

However, the chief executive may direct the former receiver to destroy any part of the receivership property that consists of documents, or give the documents to the chief executive, if the documents have not been given to the person who is entitled to them. The former receiver must comply with any direction given by the chief executive in relation to the documents, unless the former receiver has a reasonable excuse.

*Clause 67* requires the receiver to give the chief executive a report about the receivership when the chief executive directs the receiver to do so. The report must contain any information reasonably required by the chief executive. A report must also be given when the receiver's appointment ends. The report must contain a copy of the final claims report if that has not been given to the chief executive, and must also include any other information reasonably required by the chief executive.

Subclause (4) provides that the receiver is not entitled to be paid for the receivership until the reports required under clause 67 have been given to the chief executive.

### **Subdivision 6      Miscellaneous**

*Clause 68* provides that a receiver of a deceased agent, in performing the functions of a receiver, is not to be taken as the deceased agent's personal representative.

*Clause 69* provides that receivership property cannot be levied on, or taken, or attached under a court judgment.

### **Division 4            Special investigators**

*Clause 70* provides that if the chief executive considers an agent's trust account has not been kept as required under this Bill, the chief executive may appoint a special investigator over the trust account by written notice. The notice must state the agent's name, identify the trust account in question, state the terms on which the special investigator is appointed and their



functions and powers. A copy of this notice must be given to the agent. The chief executive may appoint a person as a special investigator only if satisfied the person is appropriately qualified to perform the functions of a special investigator. An inspector may be appointed as a special investigator.

*Clause 71* provides for the functions of a special investigator.

*Clause 72* permits the chief executive to give a special investigator any or all of the power that may be given to an inspector under the *Fair Trading Inspectors Act 2013*, by signed notice. These powers end when the special investigator's appointment ends.

*Clause 73* requires the agent, over whose trust account the special investigator is appointed, to comply with the special investigator's lawful requests, unless the agent has a reasonable excuse. Any failure to comply with a request must be advised to the chief executive.

*Clause 74* requires the 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 75* provides that the agent is liable to reimburse the chief executive for an amount paid by the chief executive for any amount, including an amount paid from the fund, for the investigator's remuneration and costs. If the agent is a corporation, the executive officers of the corporation when the event happened for which the special investigator was appointed by the chief executive are liable for the reimbursement. If more than 1 person is liable to reimburse the chief executive, the liability of the persons is joint and several. The chief executive may recover the amount liable to be reimbursed as a debt.

Before taking action to recover the amount of the debt, the chief executive must give a letter of demand to each person liable for the reimbursement. The letter of demand must require the person to pay the amount to the chief executive within one month after receipt of the letter of demand.

*Clause 76* states when a special investigator's appointment ends.

## **Part 5                      Jurisdiction of QCAT**

*Clause 77* provides that QCAT has the following jurisdiction for this Bill—

- to hear and decide claims against the fund referred by the chief executive under clause 95(1)(b) (chief executive may refer a claim to QCAT to decide) and applications for reimbursement orders under part 8, division 4;
- to review a decision of the chief executive under clause 45(1) or for which an information notice is given under clause 10(5)(b) (about a decision to refuse an application by a collection agent to open a trust account), clause 90 (about a decision not to deal with a claim) or clause 102 (about a decision under clause 100(1));
- to decide whether to extend the time within which to make a claim or seek review of a decision of the chief executive under clause 122.

## **Part 6**                    **Claim fund**

*Clause 78* establishes the claim fund. The Treasurer must transfer amounts to the fund from time to time, to meet claims against the fund or the remuneration and costs of a receiver or special investigator that are payable from the fund, for any particular financial year.

Accounts for the fund must be kept as part of the departmental accounts of the department. Amounts that are transferred to the fund must be deposited in a departmental account held at a financial institution, but do not have to be held in a separate account from other deposit amounts of the department.

*Clause 79* provides that the claim fund must be used to pay the amount of all claims allowed against the fund.

Other amounts that are permitted to be paid from the fund are—

- the remuneration and costs of a receiver appointed under clause 47, a special investigator appointed under clause 70, or
- a special payment by the chief executive under part 8, division 2 of this Bill.

The Treasurer is also given the power to transfer an amount from the fund to the consolidated fund.

## **Part 7**                    **Claims against the fund**

### **Division 1**                **Preliminary**

*Clause 80* provides definitions for part 7.

*Clause 81* defines what constitutes a purchase of a non-investment residential property.

### **Division 2**                **Persons who may claim**

*Clause 82* provides that a person may make a claim against the claim fund if that person has suffered financial loss because of any of the following—

- a contravention of clauses 21 or 22 of this Bill, being about payments from trust accounts;
- stealing, misappropriation or misapplication by a relevant person, of property entrusted to the person as agent for someone else in the person's capacity as a relevant person;
- the contravention by a relevant person of certain sections of the *Debt Collectors (Field Agents and Collection Agents) Act 2013*, the *Motor Dealers and Chattel Auctioneers Act 2013*, and the *Property Occupations Act 2013*;
- the failure of a motor dealer to ensure that a person who is a buyer of a used motor vehicle sold by or for the motor dealer gained clear title to the vehicle at the time property in the vehicle passed to the buyer, whether or not the motor dealer contravened the obligation to guarantee title;
- the failure of a chattel auctioneer to ensure that a person who is a buyer of a used motor vehicle sold by the chattel auctioneer gained clear title to the vehicle at the time

property in the vehicle passed to the buyer, whether or not the auctioneer contravened the obligation to guarantee title;

- a contravention of certain sections of the *Land Sales Act 1984* by a licensee under the *Property Agents Act 2013* appointed by the owner of land to which the *Land Sales Act 1984* applies, or by a relevant person employed by the licensee.

For the purposes of clause 82, and all of part 7, a relevant person means an agent, an agent's employee or agent, or a person carrying on business with the agent, or a person having charge or control, or apparent charge or control, of an agent's registered office or business.

For claims against the claim fund for financial loss relating to a non-investment residential property purchase by a person because of, or arising out of, a marketeering contravention, the only loss claimable is a capital loss that has been realised, as calculated under clause 110.

*Clause 83* permits a person to make a claim against the claim fund even if the person has made another claim for the loss against a receiver and the receiver has not considered that other claim or has refused that other claim.

*Clause 84* provides for when a person cannot claim from the fund generally. A person cannot make a claim against the fund because of or arising out of the stealing, misappropriation or misapplication by a relevant person of an amount that was directed to be invested under clause 17 in a special trust account.

The clause provides that the following persons cannot make a claim against the fund for financial losses—

- a seller of livestock who has agreed with a relevant person for the sale to be conducted under a del credere payment system;
- a relevant person who suffers financial loss in the course of performing an activity or carrying on a business as a relevant person;
- a person holding a licence under a corresponding law where the licence is similar to a licence under any of the Agents Acts, who suffers financial loss in the course of performing an activity or carrying on business under the licence;
- a financier who incurs financial loss acting in the capacity of a financier;
- a person who suffers financial loss because the person guaranteed a motor dealer's obligations under a financial arrangement made by the motor dealer;
- a person who suffers financial loss because of a failure to disclose or make effective disclosure under section 158 of the *Property Occupations Act 2013*;
  - Note: with the removal of licensing for property developers, a financial loss suffered under section 268 of the repealed PAMD Act is specifically outside the claim fund provisions, meaning a claim cannot be made for such a loss.
- a person who suffers financial loss because of, or arising out of the person's dealings with a property developer or a property developer's employees and there is a marketeering contravention relating to the purchase of a residential property, other than a non-investment residential property.

*Clause 85* provides for the general time limit for making a claim against the fund, other than a claim because of, or arising out of, a marketeering contravention relating to the purchase of a non-investment residential property.

A claim may be made by a person for financial loss due to the happening of an event only if the claim is made within the earlier of either 1 year after the person became aware they had suffered a loss, and 3 years after the happening of the event.

However, if the person starts a court proceeding to recover the financial loss within the time permitted by clause 85(2), the person may make a claim against the fund within 3 months after the court proceeding ends. This does not limit the time allowed under subclause (2) to make a claim.

*Clause 86* provides for the time limit for making a claim against the fund for a capital loss because of, or arising out of, a marketeering contravention relating to the person's purchase of a non-investment residential property. The claim can only be made if the person gives the chief executive notice in the approved form that the person intends to make a claim and the notice has been given within 1 year after the contract date and the person makes the claim within 6 years after the contract date. The particulars included on the approved form must include those required under clause 88(2)(a) to (e).

The QCAT Act does not apply to enable QCAT to extend the time permitted to make a claim under clause 86(1).

*Clause 87* provides that a claim given to the chief executive by a receiver is taken to have been made within the time limit for making a claim.

### **Division 3            Making and dealing with claims**

*Clause 88* applies to a claim against the fund other than a claim for loss because of, or arising out of, a marketeering contravention relating to the purchase of a non-investment residential property. Clause 88 outlines what information must be provided to the chief executive in the approved form. The claim is taken to have been made on the day the claim is given to the chief executive. This will be the date of the claim even if the claimant is unable to state all the particulars mentioned in subclause (2). The chief executive may require the claimant to verify the claim or part of the claim.

Subclause (5) provides that if the claim is not made within the time allowed under clause 85, the chief executive must give the person a notice, in the approved form, informing the claimant that the claim is out of time and the claimant may apply to QCAT for an extension of time in which to make the claim. This must be done within 14 days after being given the notice by the chief executive.

*Clause 89* applies to a claim against the fund for a capital loss because of, or arising out of, a marketeering contravention relating to the purchase of a non-investment residential property. The claim is required to be made to the chief executive in the approved form and state the realised capital loss that is being claimed. The claim is of no effect if it does not substantially comply with subclause (2).

If the purchase of the non-investment residential property was by more than one person, only one claim can be made, by one of the purchasers or by two or more of the purchasers jointly.

*Clause 90* provides that, if the chief executive considers a person has no grounds for making a claim under part 7 of this Bill, the chief executive may decide not to deal with the claim. If

this is the case, the chief executive must give the person an information notice that complies with section 157(2) of the QCAT Act.

*Clause 91* requires the chief executive to give notice of a claim, known as a claim notice, to the respondent, accompanied by a copy of the claim. A claim notice does not have to be given to the respondent if the chief executive is reasonably satisfied, for a corporation—that a liquidator, controller, administrator or receiver under the Corporations Act has been appointed, or a trustee in bankruptcy has been appointed.

The respondent may give the chief executive any information relevant to the claim, but the information must be given within 14 days after the claim notice is given to the respondent.

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

Clause 91 does not apply to a claim given to the chief executive by a receiver.

*Clause 92* 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 the 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, and a copy of a notice given to the executive officers under subclause (2) and information about when the notice was given.

*Clause 93* provides that under this clause, the settlement period is the period of time being a 28 day period after the claim notice is given to the respondent.

If the claim has not settled in the settlement period, within 30 days after the end of the settlement period the claimant may give the chief executive written notice that the claimant wants to proceed with the claim.

If, however, the claimant does not give written notice to the chief executive within 30 days after the end of the settlement period, the chief executive may treat the claim as having been withdrawn.

*Clause 94* permits the chief executive to direct an inspector to investigate a claim that has not settled. If an inspector investigates a claim, the inspector must prepare a report about the claim and give a copy of the report to the chief executive. The chief executive must then give a copy of the report to both the claimant and the respondent. If the inspector's report is about

a claim to be decided by QCAT, a copy must be given to the principal registrar of QCAT. Whether or not a copy of the report is given to either of the parties or to QCAT, the chief executive may also give documents relating to the claim to the parties and to QCAT.

## **Division 4            Deciding claims**

### **Subdivision 1        Who decides claim**

*Clause 95* provides that the chief executive may decide a claim or refer the claim to QCAT to decide. The claim would be referred to QCAT if the chief executive considers the claim could be more effectively or conveniently decided by QCAT because of, for example, the nature and complexity of the claim, or QCAT has already examined the facts of the claim for another purpose, such as considering an extension of time application. The chief executive may refer the claim to QCAT to decide if the chief executive considers it would be appropriate for the claim to be decided by QCAT.

Subclause (2) permits QCAT to decide the claim if QCAT has heard an application to extend the time within which to make a claim under clause 122.

### **Subdivision 2        Procedure for chief executive to decide claims**

*Clause 96* applies to a claim to be decided by the chief executive. The chief executive must invite, in writing, the claimant and the respondent to give the chief executive written comments about the inspector's report prepared under clause 94 where an inspector has investigated a claim that has not settled. The written comments from the parties must be given within 14 days after the chief executive has notified the parties in writing under this clause. If the chief executive receives comments from a party to the claim, the chief executive must provide each other party with a copy of the comments and invite the parties to give the chief executive any further comments within 14 days of the chief executive having given notice about the comments.

*Clause 97* 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, or 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 98* permits the chief executive, by written notice, to ask a person to give the chief executive information in the person's knowledge or a document or copy of a document about a matter. The notice must include the time in which the information or document is to be given and the way in which the information or document is to be given. The time granted and the way in which the information or document is to be given must be reasonable.

The chief executive is only permitted to ask for this information or document if it is reasonably required to decide the claim.

A person must comply with the request for information or document from the chief executive under subclause (1) unless the person has a reasonable excuse. It is a reasonable excuse for a person to not provide the information if doing so might incriminate the person.

*Clause 99* 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. The chief executive is also permitted to consider and decide a claim in the absence of any comments or submissions by a respondent if no notice of the claim was required to be given under clause 91(2) due to the chief executive's being reasonably satisfied that, for a corporation, a liquidator, controller, administrator or receiver under the Corporations Act has been appointed, or a trustee in bankruptcy has been appointed.

*Clause 100* provides the decisions the chief executive may make in relation to a claim. The chief executive is to decide the claim without a hearing and may decide to allow the claim, either wholly or partly, or the chief executive may decide to reject the claim. For the chief executive to decide to allow the claim, this must only be if the chief executive is satisfied, on the balance of probabilities, that the person may make a claim under division 2 (persons who may claim) and has suffered financial loss because of an event included under division 2.

The chief executive, when deciding the claim, must have regard to the following—

- the parties' comments given under clause 95(2) where the chief executive has invited them to give written comments about the inspector's report;
- any information or document that has been given under the requirement in clause 97 about a stated matter;
- any report prepared by an inspector under clause 93 following a direction by the chief executive to an inspector to investigate a claim.

If the chief executive decides to allow the claim, wholly or partly, the chief executive must take into account any amount the claimant might reasonably have received or 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 Occupations Act 2013* under sections 188, 204 or 228. In allowing a claim, the chief executive must decide the amount of the claimant's financial loss and name the person who is liable for that loss.

*Clause 101* provides that if no application for review of the chief executive's decision is made within the time allowed under section 33(3) of the QCAT Act, the chief executive's decision is binding on the claimant and the respondent, and the amount paid to the claimant from the fund may be recovered by the chief executive as a debt owing to the chief executive by the respondent named in the decision, and the respondent may not subsequently challenge the correctness of the decision or the amount payable.

The time allowed under section 33(3) of the QCAT Act for a reviewable decision of the chief executive is within 28 days of the day an applicant is notified of the chief executive's decision, or if the applicant has applied to the chief executive for a written statement of reasons for the decision, the time allowed is within 28 days of the earlier of the day the written statement of reasons is given to the applicant and the day by which the written statement is required to be given to the applicant by the chief executive under section 158 of the QCAT Act (usually 28 days). If the applicant has applied to QCAT for an order under section 159 of the QCAT Act that the chief executive give the applicant a statement of reasons and the Tribunal has made the order, the time allowed is the earlier of the day the written statement of reasons is given to the applicant, and the day by which the written

statement of reasons is required to be given to the applicant under the order. If the Tribunal does not make an order, the time allowed is the day the applicant is notified of the Tribunal's decision to not make the order.

Clause 122 of the Bill, and section 61 of the QCAT Act do not apply to enable QCAT to extend the time within which a person may seek a review under section 33(3) of the QCAT Act.

*Clause 102* requires the chief executive to give the parties an information notice that complies with section 157(2) of the QCAT Act, for the chief executive's decision about allowing the claim or rejecting the claim.

The information notice, to comply with the QCAT Act, must state—

- the decision;
- the reasons for the decision;
- that the person has a right to have the decision reviewed by the Tribunal;
- how the person may apply for a review by the Tribunal and the period within which the application must be made;
- any right the person has to have the operation of the decision stayed under section 22 of the QCAT Act.

However, the information notice does not need to include written reasons for the chief executive's decision.

In addition to the information to be included in the information notice listed above, the information must include the following—

- if reasons for the decision are not included, the parties may ask the chief executive to give written reasons for the decision under section 158 of the QCAT Act; and
- if the decision is that an amount 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 from the fund, and if more than one person is named as being liable, the liability of the persons named is joint and several; and
- that if no application is made to have the decision reviewed with the time allowed under section 33(3) of the QCAT Act and explained above, the decision is binding on the parties and if the decision is to allow the claim and authorise payment from the fund, the respondent named in the decision as liable, is liable to reimburse the fund to the extent of the amount paid to the claimant from the fund.

*Clause 103* allows a party who is dissatisfied with the chief executive's decision to allow the claim or to reject the claim, in whole or in part, to apply to QCAT for a review of the decision. Subclause (2) lists who may be a party to the review, even if they are not the party seeking the review—

- the claimant;
- the chief executive;
- the person named by the chief executive as being liable for the claimant's financial loss.

*Clause 104* permits the chief executive to publish a decision made under this division of the Bill, with or without the reasons for the decision. The chief executive may publish the decision in any way the chief executive considers appropriate.



This will provide consistency with the QCAT approach, as it is usual for decisions made by QCAT to be published, usually on the Supreme Court website. If the chief executive wishes to publish a decision, a likely place would be on the department's website.

## **Division 5                    QCAT proceedings**

*Clause 105* provides the decisions QCAT may make in relation to a claim. The Tribunal may decide to allow the claim, either wholly or partly, or the Tribunal may decide to reject the claim. For the Tribunal to decide to allow the claim, this must only be if the Tribunal is satisfied, on the balance of probabilities, that the person may make a claim under division 2 (persons who may claim) and has suffered financial loss because of an event included under division 2.

If the Tribunal decides to allow the claim, wholly or partly, the Tribunal must take into account any amount the claimant might reasonably have received or 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 Occupations Act 2013* under sections 188, 204 or 228. In allowing a claim, the Tribunal must decide the amount of the claimant's financial loss and name the person who is liable for that loss.

*Clause 106* provides the orders that QCAT may make on hearing a claim against the fund—

- an order allowing the claim, either wholly or partly, or an order rejecting the claim;
- an order stating that a named person is liable for a claimant's financial loss, and stating the amount of the loss;
- an order about recovery of an amount payable for a claim;
- an order that no amount is to be reimbursed to the fund for a claim.

QCAT may make an order that no amount is to be reimbursed for the fund for a claim by the respondent if QCAT is satisfied that any of the following have been appointed for the respondent—

- for a corporation, a liquidator, controller, administrator or receiver under the Corporations Act;
- a trustee in bankruptcy.

*Clause 107* provides that where a proceeding in QCAT involves a claim against the fund and the chief executive is not a party to the proceeding, QCAT must give its final decision to the chief executive under the QCAT Act, section 121(1)(b), and if the Tribunal has given written reasons for its decision, the Tribunal must give a copy of the reasons to the chief executive also.

If a party to the proceeding appeals the final decision or applies for leave to appeal the final decision, QCAT must give the chief executive written notice of the appeal, and, if leave to appeal has been applied for, a copy of the application.

*Clause 108* removes doubt by declaring that when section 131(2) of the QCAT Act refers to a person in relation to a person being able to enforce a final monetary decision of the Tribunal by filing in the registry of a court of competent jurisdiction, the reference to 'a person' includes the chief executive.

## **Division 6 Deciding financial loss for non-investment residential property**

*Clause 109* provides that division 6 of part 7 applies if the chief executive or QCAT is deciding a claimant's financial loss for realised capital loss because of, or arising out of, a marketeering contravention relating to the purchase of a non-investment residential property.

*Clause 110* is subject to clause 111, but provides that the financial loss that has been suffered by a claimant is the amount of the difference between the contract price or value for the property paid by the claimant and the contract price or value for the sale of the property by the claimant, this latter event being known as the on-sale. The loss is only realised if the on-sale has been completed.

*Clause 111* requires the chief executive or QCAT to decide whether the contract price or value for the on-sale by the claimant reasonably reflected the property's market value when the contract was entered into.

If the chief executive or QCAT decides that it was not a reasonable reflection of the property's market value when the on-sale contract was entered into, the chief executive or QCAT must fix what the reasonable market value of the property was when the on-sale contract was entered into, and then that fixed market value becomes the contract price or value for the on-sale by the claimant in clause 110(1).

## **Part 8 Payments from the fund**

### **Division 1 Payment and recovery of claims**

*Clause 112* provides that if a claim is allowed by the chief executive under clause 100, or allowed by QCAT under clause 105, or on a review of the chief executive's decision, the chief executive must authorise payment of the claim from the fund. The amount of the payment must be the amount decided by the chief executive or QCAT.

A payment from the fund for a claim allowed by the chief executive 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.

A payment from the fund for claims decided by QCAT, including on a review of the chief executive's decision, 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 in these circumstances from the fund is taken to be in full settlement of the claim against the fund.

If the chief executive is satisfied all or part of the amount of the claim relates to an amount the agent has failed to pay to a relevant government agency on behalf of a client, for example, a tenant's bond has not been paid to the Residential Tenancy Authority, the chief executive may make all or part of the payment, as appropriate, to the relevant government agency instead of to the claimant.

*Clause 113* 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 114* 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 their financial loss, whether it is received before or after the claim is paid.

## **Division 2           Special payments**

*Clause 115* permits the chief executive to make a payment from the claim fund to an account if the chief executive has given a direction under clause 42 because the chief executive—

- believes trust money has, or may have, been stolen, misappropriated or misapplied, and
- is satisfied there are, or it is likely that there will be, a significant number of claims against the fund as a result of the alleged conduct, and
- believes an immediate payment from the fund to an account is necessary to substantially mitigate loss to the fund.

This payment, known as a special payment, must not exceed the amount the chief executive believes has been stolen, misappropriated or misapplied.

## **Division 3           Liability for payments**

*Clause 116* applies if a person is named in the chief executive's decision or QCAT's order as being liable for the claimant's financial loss and an amount, under clause 112 has been paid from the fund in settlement of the claimant's claim.

Clause 116 also applies if a person is the holder of a trust account under part 4 and the chief executive has made a special payment in relation to it under clause 115.

A person to whom either of these circumstances applies is the responsible person for the amount.

Subclause (4) provides that each of the following persons is jointly and severally liable to reimburse the fund to the extent of the amount paid from the fund for the claim or special payment—

- the responsible person;
- if the responsible person is a corporation, each person who was an executive officer of the corporation when the relevant event mentioned in clause 82 happened.

The chief executive may recover as a debt an amount for which a responsible person is liable to reimburse the fund. Before taking action to recover the amount of the debt, the chief executive must give a letter of demand to the debtor, named as being liable to reimburse the fund. The letter of demand must require the debtor to pay the amount to the chief executive within 28 days after receiving the letter.

#### **Division 4                    Applications for reimbursement orders**

*Clause 117* provides that the chief executive may apply, as provided under the QCAT Act, to QCAT for an order that the respondent reimburse the fund or the chief executive in the following circumstances—

- for a claim against the fund, where the chief executive has wholly or partly allowed a claim under clause 100 and the responsible person liable to reimburse the fund under clause 116 has failed to do so as required under a letter of demand given under clause 116(6); or
- where the chief executive has made a special payment under clause 115 and the person who is the holder of the account under part 4 has not reimbursed the fund as required under a letter of demand given to the respondent under clause 116(6); or
- where a person is liable to reimburse the chief executive for a receiver's remuneration and costs and has not done so as required under a letter of demand given to the person under clause 64(4); or
- a person is liable to reimburse the chief executive for an investigator's remuneration and costs and has not done so as required under a letter of demand given to the person under clause 75(4).

For division 4, a respondent is a person mentioned in subclause (1)(a)(ii), (b), (c) or (d).

The application to the tribunal must be accompanied by the following documents—

- if the application relates to the reimbursement of a claim against the fund, a copy of the information notice given under clause 101;
- a copy of the letter of demand given under clause 64(4), 75(4) or 116(6);
- a statutory declaration by the chief executive stating the amount paid from the fund in settlement of the claim, or as a special payment, or the amount paid to a receiver or investigator for remuneration and costs; and the amount of any payment received from the respondent in satisfaction of the claim, reimbursement of the special payment or amount paid to the receiver or investigator.

*Clause 118* requires the chief executive to give a copy of the application and the required documents to the respondent. The chief executive must also advise the respondent that QCAT will make a reimbursement order if QCAT is satisfied that a letter of demand was sent to the respondent under clause 64(4), 75(4) or 116(4) and the respondent has not paid the stated amount within the time allowed under the letter of demand, and, for an application pertaining to a reimbursement of a claim against the fund, the matters stated in subclause (2) apply. These matters are—

- under the chief executive's decision, the respondent is liable to reimburse the fund in a stated amount; and
- in information notice under clause 102 was given to the respondent when the claim was allowed; and

- the respondent did not apply to QCAT under clause 103 to have the decision reviewed.

The chief executive must also advise the respondent that the respondent may make written submissions for QCAT's consideration about when and in what way the respondent intends to satisfy the amount paid in settlement of the claim, for reimbursement of a special payment or to a receiver or investigator.

*Clause 119* requires QCAT to consider an application for a reimbursement order and any written submissions made by the respondent for the application.

QCAT must make a reimbursement order if satisfied that the respondent has not paid the stated amount within the time allowed under the letter of demand, and, if the application relates to the reimbursement of a claim against the fund, QCAT must also be satisfied that the following matters apply—

- the chief executive has made a decision about a claim against the fund; and
- under clause 116 the respondent is liable to reimburse the fund in a stated amount; and
- the respondent did not apply to QCAT to have the chief executive's decision reviewed under clause 103 or the decision has been reviewed by QCAT with the respondent being liable to reimburse an amount to the chief executive or the fund; and
- written notice of the chief executive's decision, a copy of the decision and an information notice under clause 102 was given to the respondent.

If QCAT makes a reimbursement order, the order must state that the respondent is liable to pay to the chief executive a stated amount within a stated period.

## **Division 5                    Other reimbursements to fund**

*Clause 120* requires the chief executive to pay to the consolidated fund an amount recovered in satisfaction of an amount paid from the fund.

*Clause 121* 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 a 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 dealt with by the chief executive (for example, the chief executive may sell the thing).

If a claimant who has received a payment from the fund but is entitled to less than the amount of the payment following a decision by QCAT on review of the chief executive's decision about the claimant's claim or a decision on appeal against a decision by QCAT about the claimant's claim, the difference in the amount the claimant is entitled to following the review or appeal and the amount originally paid for the claim is also an overpayment and the claimant must reimburse the overpayment.

The chief executive may recover the overpayment or the amount the claimant received for the thing as a debt.

## **Part 9 Other matters for proceedings relating to fund**

*Clause 122* 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. However, QCAT must be satisfied that, for a claim, the application is made within the time mentioned in the notice given under clause 88(5)(b), that being within 14 days after being given the notice, or, for a review of a decision of the chief executive, the application is made within 42 days after the person is given notice of the decision to be reviewed.

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

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

There is no appeal against the decision of QCAT on an application to extend time. To remove any doubt, section 61 of the QCAT Act does not apply to proceedings to which clause 122 applies.

*Clause 123* permits the chief executive to make submissions, including submissions about liability for the claimant's financial loss, in a proceeding before QCAT or a court involving a claim against the fund, whether or not the chief executive is a party to the proceeding.

*Clause 124* requires a decision or order involving the claim fund to be published under section 125 of the QCAT Act.

## **Part 10 Injunctions and undertakings**

### **Division 1 Injunctions**

*Clause 125* provides that the District Court may grant an injunction if it is satisfied that the respondent has engaged, or is proposing to engage, in conduct that constitutes, or would constitute—

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

*Clause 126* permits an application for an injunction to be made by the chief executive or by a person aggrieved by the respondent's conduct.

*Clause 127* permits an injunction to be granted by the District Court against a person under Part 10 at any time.

For Part 10, the person is known as the respondent.

*Clause 128* provides that the District Court may exercise the power to grant an injunction to restrain a respondent from engaging in conduct whether or not it appears to the court that the respondent 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 conduct of that kind.

The District Court may also exercise the power to grant an injunction requiring a respondent to do an act or thing whether or not it appears to the court that the respondent 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 129* 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 130* provides that if the chief executive applies for an injunction under Part 10, no undertaking as to damages or costs may be required or made.

## **Division 2                      Undertakings**

*Clause 131* 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 this Bill, to give the person a written notice that—

- states the act or omission that the chief executive believes is the contravention; and
- asks the person to give the chief executive a written undertaking that the person will not continue or repeat the act or omission.

If the person gives the undertaking, the chief executive accepts the undertaking, and the person stops the conduct where the contravention is conduct consisting of a series of acts or omissions, offence proceedings for the contravention cannot be started against the person unless the chief executive withdraws the undertaking under clause 133.

*Clause 132* provides that, without limiting clause 131, the chief executive may accept an undertaking given by a person 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, or that corrective advertising will be published, or that compliance training will be undertaken.

*Clause 133* provides that an undertaking accepted by the chief executive may be varied or withdrawn at any time by the person who gave it, but only with the chief executive's agreement. Also, the chief executive may vary or withdraw an undertaking at any time if the chief executive believes, on reasonable grounds, that before the undertaking was accepted—

- the person who gave the undertaking had contravened this Bill in a way the chief executive was not aware of; and
- had the chief executive known about the other 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. Where the chief executive varies or withdraws, or agrees to the variation or withdrawal of, the undertaking, the chief executive must give the person who gave the undertaking a written notice of the variation or withdrawal of the undertaking. The variation or withdrawal of the undertaking then takes effect when the written notice is given to the person.

*Clause 134* provides that the chief executive may apply to the District Court for an order to enforce an undertaking if the chief executive believes, on reasonable grounds, that a person bound by an undertaking has breached its terms.

Subclause (2) provides a list of the orders the court may make if the court is satisfied that the person has contravened the term of an undertaking. The court may make one or more orders as listed.

The chief executive can apply to the court for an order that all or part of 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 135* requires the chief executive to keep a register of undertakings. The register must include a copy of each undertaking given to the chief executive by a person under Part 10. The register may be kept in any way the chief executive considers appropriate, and the information contained in the register may be published 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. If a fee is prescribed, the fee may be paid in advance or in arrears under an arrangement approved by the chief executive.

## **Part 11                    General contraventions, evidentiary matters and legal proceedings**

### **Division 1                General contraventions**

*Clause 136* prohibits a person from operating on a trust account unless the person is an agent who is the holder of the account, or is a person employed by the agent and has the agent's authorisation to operate on the trust account, or is a person otherwise permitted under this Bill to operate on the trust account.



*Clause 137* prohibits a person from knowingly making false or misleading statements in a material particular to the chief executive or a public service employee.

*Clause 138* prohibits a person from giving a document they know to contain false or misleading information in a material particular to the chief executive or a public service employee. However, subclause (1) of this clause does not apply to a person if, when they give the document, they inform the chief executive or public service employee, to the best of their ability, as to how the document is false or misleading and they give the correct information that they have been able to, or can, reasonably obtain.

A person must not make an entry in a document that is required or permitted to be made or kept under this Bill knowing the entry to be false or misleading in a material particular.

## **Division 2                    Evidentiary matters**

*Clause 139* provides that, for a proceeding under this Bill, the appointment or power of an inspector must be presumed unless a party, by reasonable notice, requires proof of the appointment or proof of the power to do anything under this Bill.

Subclauses (3) and (4) provide for what is evidence of certain signatures and matters.

*Clause 140* provides that an entry in a book kept by or belonging to an agent or found in the agent's premises, is evidence that the entry has been made by or with the authority of the agent.

## **Division 3                    Proceedings**

*Clause 141* permits 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 142* 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 two or more years' imprisonment) is 200 penalty units or one 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 143* 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 144* permits the chief executive to appeal against any decision of QCAT or the appeal tribunal on the ground of error of law.

*Clause 145* provides that a court may, in addition to any other penalty it might impose, order that a licensee's licence be suspended for a stated period, or cancelled if the licensee has been convicted of an offence under the Bill.

If the court orders that a licensee's licence be cancelled and the licensee is an individual, the court must also order that the licensee is disqualified for a stated period or permanently from either or both of the following—

- holding a licence under an Agents Act (licence suspension or licence cancellation); or
- performing a debt collection activity as authorised under section 19 of the *Debt Collectors (Field Agents and Collection Agents) Act 2013* in the carrying on of a business either alone or with others.

The court may also order that a person convicted of an offence under this Bill be disqualified from holding a licence under an Agents Act for a stated period or permanently.

The court may make an order under subclause (1) or (4) on the chief executive's application, or on its own initiative. If an order is made by the court under this clause on the court's own initiative, the court must cause a copy of the order to be given to the chief executive.

*Clause 146* provides for how a charge involving a false or misleading statement, representation or entry, or false or misleading information should be stated.

## **Part 12    General**

*Clause 147* applies in relation to an activity performed by an appointee for an agent. For this clause, an appointee means an appointee within the meaning provided in section 6(1) of the *Debt Collectors (Field Agents and Collection Agents) Act 2013*, section 7(1) of the *Motor Dealers and Chattel Auctioneers Act 2013*, and section 6(1) of the *Property Occupations Act 2013*.

Subclause (2) provides that Parts 2 and 3 of this Bill apply to an appointee as if the appointee were an agent. This means that an appointee must comply with the trust account requirements and the audit requirements of this Bill.

*Clause 148* 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 indentifying 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, or many consumers could suffer financial loss. The chief executive could issue a public warning statement to alert consumers so as 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 agents to non-compliant behaviours. The public exposure of non-compliant agents also provides a compliance incentive to other agents 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 149* provides that nothing in the Bill is intended to affect or limit any civil remedy a person may have against an agent or other person in relation to any matter.

*Clause 150* provides that nothing in the Bill limits the application of the *Criminal Proceeds Confiscation Act 2002*.

*Clause 151* 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 special payments under clause 115 or power to make public warning statements under clause 147.

*Clause 152* provides that the chief executive may approve forms for use under this Bill.

*Clause 153* provides the head of power for the making of regulations by the Governor in Council for this Bill.

## **Part 13 Transitional provisions**

*Clause 154* sets out the definition of 'commencement' for Part 13, being the day this clause commences.

*Clause 155* provides for the transitional arrangements for the claim fund under the repealed Act. Rights and liabilities related to the claim fund under the repealed Act (the former fund) are taken to be rights and liabilities of the claim fund under the Bill (the current fund). A claim that has been made against the former fund and not finished before the commencement, continues as if it were a claim against the current fund. A person who could have claimed against the former fund but who did not make the claim before commencement, may make the claim against the current fund under this Bill, if the time allowed for bringing the proceeding under the repealed Act has not expired.

A proceeding to recover an amount paid out of the former fund started by the chief executive before commencement is taken to have been started by the chief executive under this Bill, as if the amount had been paid out of the current fund. If the chief executive could have started a proceeding to recover an amount paid out of the former fund—had the repealed Act not been repealed—but has not started the proceeding, the chief executive may start the proceeding as if the amount had been paid out of the current fund.

This Bill applies to a proceeding under subclauses (4) or (5), with necessary changes.

*Clause 156* continues the appointments of existing special investigators appointed under the repealed Act.

*Clause 157* provides transitional arrangements for QCAT reviews of chief executive decisions begun under section 483 or 501 of 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 hear, or continue to hear, and decide the review of the chief executive's decision under the repealed Act as if that Act had not been repealed.

Subclause (4) applies if a person could have applied under section 483 or 501 of the repealed Act for a review of a decision of the chief executive but the person has not applied before the commencement. Subclause (4) provides that the person may apply for a review of the decision as if that Act had not been repealed.

*Clause 158* applies to a proceeding that has, or could have, been started under the repealed Act because of an event that happened before the commencement, if the proceeding is about an event for which a legal proceeding can be started under this Bill.

Subclause (2) 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 if the time allowed for bringing the proceeding has not expired. The proceeding may be started under this Bill.

*Clause 159* provides for the continuation of injunctions granted under the repealed Act by providing that an injunction granted under the repealed Act, and in force immediately before the commencement, 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 certain conduct that constituted a contravention or attempted contravention of the repealed Act, or was otherwise involved in certain contraventions of the repealed Act.

*Clause 160* provides for the continuation of undertakings granted under the repealed Act and in force immediately before the commencement, by providing that an undertaking provided by a person under the repealed Act is a valid undertaking under this Bill according to its terms. The provisions of this Bill relating to undertakings apply to an undertaking continued under this clause.

Subclause (3) provides for the granting of an undertaking if the chief executive reasonably believes that a person has, before the commencement, contravened or been involved in a contravention of the repealed Act. Clause 131 applies as if a reference in clause 131 were a reference to the repealed Act.

*Clause 161* 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 continued in existence and is taken to be the register of undertakings to be kept under this Bill.

*Clause 162* provides that a financial institution that was an approved financial institution under the repealed Act immediately before commencement, continues from the commencement to be an approved financial institution for this Bill.

*Clause 163* provides for the transitional arrangements for agreements with financial institutions under the repealed Act. An agreement about the keeping of general trust accounts entered into between the chief executive and a financial institution under the repealed Act and that is in force immediately before the commencement, is taken to be an agreement about the keeping of general trust accounts entered into between the chief executive and the financial institution from the commencement under this Bill.

*Clause 164* provides for the transitional arrangements for trust accounts held by agents under the repealed Act. A trust account operating under the repealed Act is taken to be a trust account under this Bill.

*Clause 165* provides for the transitional arrangements for auditors and approved auditors under the repealed Act.

For an approved auditor, appointed under section 394 of the repealed Act (the PAMD Act), if immediately before commencement the approved auditor was appointed as an approved auditor for a stated licensee, the approved auditor's appointment continues under the repealed Act. The provisions under chapter 12, part 2, division 2 of the repealed Act continue to apply to the approved auditor until the auditor's appointment ends.

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 the point where there have only been two applications since 2006. As agents no longer have difficulty appointing qualified auditors, the provisions dealing with approved auditors have not been continued under the Bill.

Subclause (4) applies to an auditor other than an approved auditor. For such an auditor appointed for a licensee under the repealed Act, from commencement, the auditor is taken to be an auditor under this Bill as if the person had been appointed as an auditor by the agent under clause 30 of this Bill.

*Clause 166* provides for the transitional arrangements where a person has applied to the chief executive to be an approved auditor for a licensee and the application had not been decided immediately before commencement. The application is to be decided under the repealed Act as if the Act had not been repealed. If the application is approved under section 394 of the repealed Act, the person is taken to be an auditor under this Bill.

*Clause 167* 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 168* provides for the transitional arrangements for disputes about trust money arising prior to the commencement of the Bill and not resolved before the commencement. A dispute about trust money under the repealed Act is taken to be a dispute under this Bill. For clause 168(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 169* provides that a receiver appointed by the chief executive under the repealed Act and whose appointment is in force immediately before the commencement, 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, from the commencement, to be in possession of the property under this Bill.

*Clause 170* 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 171* provides that proceedings for alleged offences against particular provision of the repealed Act, as listed by the clause, 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 172* 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 delegation under this Bill.

## **Schedule 1      Dictionary**

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