

State Penalties Enforcement Amendment Regulation (No. 1) 2014

Explanatory notes for SL 2014 No. 277

made under the

State Penalties Enforcement Act 1999

General Outline

Short title

State Penalties Enforcement Amendment Regulation (No. 1) 2014

Authorising law

Section 165 of the *State Penalties Enforcement Act 1999*

Policy objectives and the reasons for them

The purpose of the *State Penalties Enforcement Amendment Regulation (No.1) 2014* (the Regulation) is to amend the *State Penalties Enforcement Regulation 2014* to facilitate effective compliance and enforcement of the following new Acts and regulations:

- *Agents Financial Administration Act 2014*
- *Agents Financial Administration Regulation 2014*
- *Debt Collectors (Field Agents and Collection Agents) Act 2014*
- *Debt Collectors (Field Agents and Collection Agents) Regulation 2014*
- *Motor Dealers and Chattel Auctioneers Act 2014*
- *Motor Dealers and Chattel Auctioneers Regulation 2014*
- *Property Occupations Act 2014*
- *Property Occupations Regulation 2014*
- *Fair Trading Inspectors Act 2014.*

The Regulation is necessary because as of 1 December 2014, the *Agents Financial Administration Act 2014*, *Debt Collectors (Field Agents and Collection Agents) Act 2014*, *Motor Dealers and Chattel Auctioneers Act 2014*, and the *Property Occupations Act 2014* (the Agents Acts) together with the *Agents Financial Administration Regulation 2014*, *Debt Collectors (Field Agents and Collection*

Agents) Regulation 2014, Motor Dealers and Chattel Auctioneers Regulation 2014, and the Property Occupations Regulation 2014 (the Agents Regulations) will repeal and replace the *Property Agents and Motor Dealers Act 2000* (the PAMD Act) and related subordinate legislation, with a new, industry-focused regulatory framework.

The Regulation amends the *State Penalties Enforcement Regulation 2014* to remove infringement notice offences made redundant by the repeal and replacement of the PAMD Act, and to prescribe appropriate infringement notice offences and penalties for the Agents Acts and Agents Regulations.

In addition to setting out infringement notice offences and penalty units for the infringement notice offence, the *State Penalties Enforcement Regulation 2014* prescribes authorised persons for the service of a penalty infringement notice for an offence. At present, inspectors and persons authorised to enforce particular fair trading legislation are either appointed under a specific Act, or under the *Fair Trading Act 1989*.

However, when the *Fair Trading Inspectors Act 2014* commences on 1 December 2014, it will provide consolidated compliance and inspectorate provisions for a number of Acts about fair trading (identified as 'primary Acts'), including provisions relating to the appointment of inspectors. Therefore, inspectors appointed under the *Fair Trading Inspectors Act 2014* need to be provided with authority to issue penalty infringement notices for the enforcement of the primary Acts, which include the Agents Acts as well as the:

- *Introduction Agents Act 2001*
- *Manufactured Homes (Residential Parks) Act 2003*
- *Residential Services (Accreditation) Act 2002*
- *Retirement Villages Act 1999*
- *Second-hand Dealers and Pawnbrokers Act 2003*
- *Security Providers Act 1993*
- *Tourism Services Act 2003*.

The Regulation amends the *State Penalties Enforcement Regulation 2014* so that properly appointed inspectors may issue infringement notices for the purposes of compliance and enforcement of the primary Acts.

As the *Fair Trading Inspectors Act 2014* amends several primary Acts by removing offence sections which are currently prescribed in the *State Penalties Enforcement Regulation 2014* as infringement notice offences, the Regulation includes consequential amendments to remove or update specific infringement notice offences included in the *State Penalties Enforcement Regulation 2014*.

Similarly, the *Property Occupations Act 2014* amends the *Body Corporate and Community Management Act 1997* by removing sections which define offences that are currently prescribed in the *State Penalties Enforcement Regulation 2014* as infringement notice offences. The Regulation will make consequential amendments to the *State Penalties Enforcement Regulation 2014* to remove these infringement notice offences and the associated penalty units.

Achievement of policy objectives

Agents Acts and Regulations

The Regulation amends the *State Penalties Enforcement Regulation 2014* to achieve the stated objectives by replacing existing infringement notice offences that have been prescribed for the purposes of the PAMD Act (and seven pieces of related subordinate legislation), with infringement notice offences for the equivalent provisions provided for in the Agents Acts and Agents Regulations.

Generally speaking, the prescribed infringement notice offences provided for in the Regulation are consistent with those that were prescribed for equivalent provisions of the PAMD Act and related subordinate legislation. However, the infringement notice fines have increased for some of the prescribed infringement notice offences when compared to the equivalent provision of the PAMD Act. In addition, a number of new penalty infringement notice offences have been prescribed in the Regulation to facilitate enforcement of new offences in the Agents Acts and Agents Regulations.

Where infringement notice fines have increased compared to equivalent provisions of the PAMD Act, the penalty units that have been set are generally compliant with the principles for prescribing penalty infringement notice offences¹ and are considered necessary to reflect the severity and seriousness of the offence.

In addition, infringement notice fines for offences relevant to unlicensed activity, misuse of licenses, or failing to have appropriately licensed persons in charge have increased to ensure that penalties exceed the yearly cost of the relevant licence. This removes the possibility that non-compliance with important legislative requirements might represent a lower cost than obtaining the appropriate licence.

While infringement notice fines have generally been set in accordance with the general rule for prescribing penalty infringement notice offences, some of the fines exceed the general rule. However, in these cases, the infringement notice fines are generally consistent with those that currently apply for equivalent offences under the PAMD Act.

With respect to the *Agents Financial Administration Act 2014*, infringement notice fines have increased for the following offences (when compared to the fines for equivalent offences under the PAMD Act) to a level that is consistent with the general principles:

- who may open trust account (section 9)
- application and grant of authority to open a trust account—collection agents (section 10(1))
- requirements for opening and keeping trust accounts (sections 11(1), 11(2), and 11(4))
- account's name (sections 12(1) and 12(2))
- notice of account's opening, closing or name change (section 13(2))

¹ The Queensland Legislation Handbook 6.10.

- dealing with amount on receipt (section 16)
- investments—property agents (section 17(2))
- no other payments to trust account (sections 18(1) and 18(2))
- when payments may be made from trust accounts (sections 21(1) and 21(2))
- permitted drawings from trust accounts (sections 22(1) and 22(5))
- accounting to clients (section 23(1))
- where amount must be paid if notice given (section 27)
- dealing with amount if no notice (section 28(2))
- agent must appoint auditor and notify chief executive (sections 30(1) and 30(2))
- steps to be taken if auditor's appointment ends (sections 31(2), 31(3) and 31(4))
- time for audit (section 35(2))
- auditor's advice to chief executive (section 37)
- auditor may ask agent to produce other accounts (section 38(3))
- audit on ceasing to be principal agent (section 39(2))
- audit reports (section 40(1))
- obstructing receivers (section 58)
- agent must comply with special investigator's lawful requests (section 73(1))
- requiring information (section 98(3))
- false or misleading statements (section 137(1))
- false or misleading documents (section 138(1) and 138(3)).

For the *Agents Financial Administration Act 2014*, the infringement notice offence penalty units for requiring information (section 98(3)) was increased to a level that exceeded the general guidelines. However, this was considered justified given its importance to the effective enforcement of the *Agents Financial Administration Act 2014* and trust account related matters.

The *Agents Financial Administration Regulation 2014* defines a number of offences which are comparable in effect (though not identical to) trust account offences provided for in the PAMD Act or the *Property Agents and Motor Dealers Regulation 2001*. These offences carry maximum penalties of 10 penalty units. Consistent with the infringement notice fines that are currently prescribed for these offences in the *State Penalties Enforcement Regulation 2014*, the Regulation also prescribes an infringement notice fine of 2 penalty units for the prescribed infringement notice offences.

While this places the infringement notice fine above the level recommended in the Queensland Legislation Handbook, the level is justified as a means of maintaining the status quo with the infringement notice fine prescribed for the equivalent offences of the PAMD Act. In addition, the penalty unit level ensures the ongoing capacity to issue penalty infringement notice offences for a variety of trust account matters as a deterrence measure, which is anticipated to minimise costs to Government by reducing claims against the claim fund.

With respect to offences provided for in the *Debt Collectors (Field Agents and Collection Agents) Act 2014*, infringement notice fines have increased to a level that is consistent with the general rule for the following prescribed infringement notice offences, when compared to the equivalent offences under the PAMD Act:

- field agent to be in charge of regulated business (sections 21(1) and 21(2))
- acting as debt collector (sections 30(1) and 30(2))
- offence to sell, lend or hire out licence etc. (sections 135(1) and 135(2)).

With respect to the offences provided for in the *Motor Dealers and Chattel Auctioneers Act 2014*, infringement notice fines have increased to a level that is consistent with the general rule, for the following prescribed infringement notice offences, when compared to the equivalent offences under the PAMD Act:

- offence to sell, lend or borrow licence (sections 50(1) and 50(2))
- acting as motor dealer (section 119(1))
- employment of persons in motor dealer business (section 121 (1), 121(2))
- licensee to be in charge of chattel auctioneer's business at a place (section 124(3))
- acting as chattel auctioneer (section 149(1), 149(2))
- offence to sell, lend or borrow registration certificate (section 175(1), 175(2))
- pretending to be motor salesperson (section 190(1)).

The infringement notice fines for several of the penalty infringement notice offences above also bolster elements of the Act that are designed to prevent identified participants in criminal organisations from holding or obtaining licenses. These are the offences contained in provisions dealing with:

- acting as motor dealer (section 119(1))
- employment of persons in motor dealer business (sections 121(1) and 121(2))
- offence to sell, lend or borrow registration certificate (sections 175(1); and 175(2))
- pretending to be motor salesperson (section 190(1)).

With respect to the offences provided for in the *Property Occupations Act 2014*, infringement notice fines have increased to a level that is consistent with the general rule for the following prescribed infringement notice offences, when compared to the equivalent offences under the PAMD Act:

- offence to sell, lend or borrow licence (sections 65(1) and 65(2))
- who must be in charge of a resident letting agent's business at a place (sections 85(1), 85(2), 85(3), 85(4) and 85(5))
- acting as property agent (sections 97(1) and 97(2))
- employment of persons in real estate business (sections 98(2) and 98(3))
- acting as resident letting agent (section 100(1)).

New penalty infringement notice offences have been prescribed for sections of the *Debt Collectors (Field Agents and Collection Agents) Act 2014* (section 111), *Motor Dealers and Chattel Auctioneers Act 2014* (section 191), and the *Property Occupations Act 2014* (section 169) that require principal licensees to keep a trust account, consistent with the equivalent provisions of the *Agents Financial Administration Act 2014*.

Prescribing these additional offences as penalty infringement notice offences will provide inspectors who find people to be in breach of the important trust account keeping provisions with an alternative to prosecution through the court system.

Fair Trading Inspectors Act 2014

The *Fair Trading Inspectors Act 2014* provisions underpin enforcement of not only the Agents Acts, but also the nine other primary Acts and it is crucial that infringement notice fines set for penalty infringement notice offences relevant to the activities of inspectors are sufficient to support the effective enforcement of the primary Acts. The following penalty infringement notice offences have been prescribed for the *Fair Trading Inspectors Act 2014*, and the penalty units set in accordance with the general rule provided for in the Queensland Legislation Handbook guidelines:

- failure to comply with direction (section 36(1))
- offence to contravene help requirement (section 40(1))
- offence to contravene other seizure requirement (section 45)
- offence to interfere (sections 46(1) and 46(2))
- offence to contravene document production requirement (section 58(1))
- offence to contravene document certification requirement (section 59(1))
- offence to contravene information requirement (section 61(1))
- giving inspector false or misleading information (section 68(1)).

The Regulation also amends the *State Penalties Enforcement Regulation 2014* to ensure inspectors appointed under the *Fair Trading Inspectors Act 2014* are defined as authorised persons for the service of infringement notices relevant to offences provided for in the Agents Acts, Agents Regulations, and the other primary Acts and relevant subordinate legislation.

The *Fair Trading Inspectors Act 2014* removes or renumbers offence provisions of several primary Acts that are currently prescribed as infringement notice offences under the *State Penalties Enforcement Regulation 2014*. The relevant primary Acts are the *Introduction Agents Act 2001*, the *Residential Services (Accreditation) Act 2002*, the *Retirement Villages Act 1999*, the *Second-Hand Dealers and Pawnbrokers Act 2003*, and the *Security Providers Act 1993*.

Accordingly, the Regulation amends the *State Penalties Enforcement Regulation 2014* to remove or update references to the relevant primary Act offence provisions.

Body Corporate and Community Management Act 1997

The Regulation amends the *State Penalties Enforcement Regulation 2014* to remove reference to particular offence provisions of the *Body Corporate and Community Management Act 1997* that have been repealed through the *Property Occupations Act 2014*.

Consistency with policy objectives of authorising law

The Regulation is consistent with the policy objectives of the *State Penalties Enforcement Act 1999* as it will maintain the integrity of fines as a viable sentencing or punitive option for offenders of particular provisions provided for in the legislation listed above.

Inconsistency with policy objectives of other legislation

The Regulation is not inconsistent with the policy objectives of other legislation.

Benefits and costs of implementation

Implementing the regulation will prescribe new infringement notice offences or changed infringement notice fine amounts in relation to a range of new legislation, enabling agencies to effectively enforce compliance with the relevant Acts, particularly where prosecution for an offence is not considered appropriate.

Amendments to remove existing infringement notice offences that are no longer relevant and to update references in the *State Penalties Enforcement Regulation 2014* will ensure that it remains up to date.

Consistency with fundamental legislative principles

The Regulation is consistent with fundamental legislative principles.

Consultation

The Office of Fair Trading and the Department of Housing and Public Works were consulted on amendments relevant to the legislation the respective agencies administer. The Department of the Premier and Cabinet and Queensland Treasury and Trade were also consulted. No outstanding issues have been identified.

The Office of Best Practice Regulation (OBPR) within the Queensland Competition Authority was also consulted and did not raise any issues about the Regulation. OBPR also confirmed that a Regulatory Impact Statement is not required.