

2003

LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

AGENTS BILL 2003

EXPLANATORY STATEMENT

**Circulated by authority of the
Attorney-General
Mr Jon Stanhope MLA**

Agents Bill 2003

Explanatory Statement

This explanatory statement relates to this Bill as introduced into the ACT Legislative Assembly.

Overview of Bill

The Agents Bill replaces the *Agents Act 1968* and is the outcome of the first major revision of this legislation since 1968. The Bill introduces a level of consumer protection noticeably absent from the old legislation. The former Agents Act dealt primarily with the relationship between a principal and an agent. There was limited scope for the disciplinary system to assist consumers with their complaints against the conduct of agents.

The licensing and registration of real estate, stock and station, business, travel and employment agents will now be undertaken by the commissioner for fair trading instead of the Agents Board, as the commissioner already carries out this role for other service industries in the ACT.

The Bill simplifies and streamlines the licensing and registration process by creating a one step process for licensed agents, replacing the old registration system. The scope of the regulatory scheme has been extended to embrace salespeople who conduct the majority of residential real estate, stock and station and business transactions in the Territory. Real estate, stock and station and business agents, including their employees, will now be required to meet flexible entry level competence standards, be of good character and undertake continuing professional development throughout their careers.

Auctioneers of real property will no longer be required to be licensed by the Magistrates Court, but will now be licensed as real estate or stock and station agents by the commissioner for fair trading.

For the first time, consumers will be able to have their grievances with agents dealt with by the consumer and trader tribunal that will include the Agents Board's disciplinary jurisdiction and membership. Consumers will now be able to complain to the commissioner for fair trading who will investigate every complaint and refer a matter to the Tribunal, if appropriate.

Stronger enforcement measures have been introduced to ensure the integrity of agents' trust accounts holding consumers' money. Agents who provide financial investment advice to people intending to buy real property will now be required to provide specified information or warnings to consumers in circumstances where they are providing general financial advice, as an incidental part of selling real estate.

New offences have been included in the Bill. It will now be an offence for an agent to quote unrealistically high or low estimated prices for real estate. In the past, sellers have been misled by an expectation of obtaining a higher price and buyers have been out of pocket (having paid out for building inspections and the like) in the expectation that the property

might sell at the lower price quoted by the agent. Now the commissioner for fair trading can require an agent to justify the estimated selling price of residential property.

Agents' agreements between agents and sellers must now be in writing. Oral agreements will no longer be acceptable. Sellers of properties will be protected from being disadvantaged by unscrupulous agents. This measure will enable homeowners to better understand their rights and obligations under agency agreements.

Agents must now disclose any relationship with a person to whom the agent refers a client or prospective buyer, or benefits that might accrue to them or other people through a real estate transaction, aside from commissions, in dealing with their clients.

A consumer compensation fund will continue to operate to protect consumers in the event of a financial collapse of a licensed real estate, stock and station or business agent. Consumers of travel agents' services will continue to be able to claim against the Travel Compensation Fund in the event of the financial collapse of a travel agent.

A Register of licensed agents and registered salespersons in the ACT and details of disciplinary action taken against agents will be maintained by the ACT Office of Fair Trading. This reform creates a greater degree of transparency and openness in the disciplinary process for agents, and provides useful information to assist consumers with their choice of appropriately licensed agents or registered salespeople.

The ACT Office of Fair Trading's inspectors will be given power by regulation to serve spot fines on agents who have committed an offence under the legislation.

The Bill does not alter substantially the licensing and other requirements for travel and employment agents.

The object of this Bill is to repeal and re-enact the *Agents Act 2003* with the following modifications:

- (a) the issue of licences and certificates of registration under the proposed Act will now be undertaken by the Commissioner for Fair Trading;
- (b) licences will be issued on the basis of entry-level competence, good character and continuing professional development;
- (c) licences will be renewable annually;
- (d) all salespersons employed by licensed real estate, stock and station and business agents will need to be registered;
- (e) auctioneers of real property will no longer be licensed by the Magistrates Court and will now be licensed as real estate agents;
- (f) the commissioner for fair trading will be able to grant exemptions from the requirement that there be a licensee in charge at each place of business under a licence;
- (g) requirement of licensees to properly supervise their business;
- (h) at least one of the directors of a corporate licensee must be licensed;
- (i) simplified and modernised disciplinary provisions are introduced, including provision for consumers to have their grievances considered by the commissioner for fair trading. Where grounds for disciplinary action exist, the commissioner will refer matters to the newly constituted Consumer and Trader Tribunal;

- (j) grounds for disciplinary action by the Consumer and Trader Tribunal are set out in the proposed Act;
- (k) a register of licensed agents and registered salespersons and disciplinary action taken will be maintained;
- (l) misleading advertisements and statements as to the estimated selling price of residential property are prohibited;
- (m) agency agreements between agents and sellers must be in writing;
- (n) a prohibition against recovery of commission where an agency agreement is not in writing and not provided to the client within 48 hours, with provision for a court to permit recovery of commission in some cases;
- (o) all benefits received by a licensee will be required to be disclosed in the relevant agency agreement;
- (p) provision is made for the prescription by regulation of standard form agency agreements and a requirement that approved information be provided to consumers prior to entry into an agency agreement;
- (q) provision is made for the disclosure of specified information or warnings to the client by a real estate agent who provides financial or investment advice;
- (r) circumstances in which a licensee is required to declare a beneficial interest in a property transaction are included;
- (s) provision is made for the prescription by regulation of rules of conduct for agents;
- (t) stronger enforcement measures to protect clients' trust moneys;
- (u) a strengthening of the conditions attaching to interest paid by banks to the Government's consumer compensation fund on agents' trust accounts holding consumers' money;
- (v) penalty levels for offences are revised;
- (w) the language of the proposed Act is modernised and simplified, redundant provisions are removed and various changes of a minor or statute law revision nature are made.

This Bill also contains savings, transitional and consequential provisions.

Strict Liability Offences

Most of the offences in the Bill are strict liability offences. A strict liability offence under section 23 of the Criminal Code means that there are no fault elements for any of the physical elements of the offence. Essentially, this means that conduct alone is sufficient to make the defendant culpable. However, under the Criminal Code, all strict liability offences will have a specific defence of mistake of fact. Clause 23(3) of the Criminal Code makes it clear that other defences may still be available for use in strict liability offences.

Strict liability offences do not have a mental element, or mens rea. However, the actus reus, the physical actions, do have a mental element of their own, for example, voluntariness. For this reason, the general common law defences of insanity and automatism still apply as they go towards whether a person has done something voluntarily, as well as whether they intended to do the act.

Outline of Provisions.

PART 1 Preliminary

Clause 1 Name of Act

This clause sets out the name of the Act as the *Agents Act 2003*.

Clause 2 Commencement

The Act will commence on the date decided by the Minister and notified in the Legislation Register.

Clause 3 Dictionary

This clause explains that the dictionary at the end of the Act is part of the substantive provisions of the Act.

Clause 4 Notes

This clause makes it clear that the notes in the Act are explanatory only and do not form part of the substantive provisions of the Act. By contrast, where the Act includes an example, the example is part of the substantive provisions of the Act having regard to section 132 of the *Legislation Act 2001*.

Clause 5 Offences Against Act – application of Criminal Code etc

This clause explains that the Criminal Code applies in relation to offences against the Act.

Clause 6 Application of Act

This clause exempts certain persons, a trustee company and an entity under the regulations from the requirement to hold a licence under the Act.

PART 2 Key Concepts

Clause 7 Meaning of *fair trading* legislation

This clause makes it clear that this Act forms part of the wider body of fair trading and consumer protection legislation.

Clause 8 Carrying on business as real estate agent

This clause defines the concept of who a real estate agent is and what activities constitute a service provided by a real estate agent for the purposes of the Act. The definition has been extended to include agents acting for buyers/lessees of land.

Clause 9 Carrying on business as stock and station agent

This clause defines the concept of who a stock and station agent is and what activities constitute a service provided by a stock and station agent for the purposes of the Act. The definition has been extended to include agents acting for buyers of rural land or livestock.

Clause 10 Carrying on business as business agent

This clause defines the concept of who a business agent is and what activities constitute a service provided by a business agent for the purposes of the Act. The definition has been extended to include agents acting for buyers of businesses or professional practices or any share or interest in the goodwill or stock of a business or professional practice.

Clause 11 Carrying on business as travel agent

This clause defines the concept of who a travel agent is and what activities constitute a service provided by a travel agent for the purposes of the Act.

Clause 12 Carrying on business as employment agent

This clause defines the concept of who an employment agent is and what activities constitute a service provided by an employment agent for the purposes of the Act.

Clause 13 Employees not taken to carry on business as agents

This clause makes it clear that employees of agents who carry out the duties of agents in the course of their employment, are not to be regarded as carrying on the business of an agent.

Clause 14 Silent partners not taken to carry on business as agents

This clause makes it clear that a non-active member of a partnership is not to be regarded as carrying on business as an agent.

Clause 15 Publishers of advertisements not agents

This clause makes it clear that publishers of advertisements relating to a business carried on, or to be carried on, or a service provided, or to be provided by an agent, are not to be regarded as carrying on business as an agent.

PART 3 Licensing of Agents**Div 3.1 Agents to be licensed****Clause 16 Application of div 3.1**

This clause makes it clear an administrator appointed under the Act is not required to be licensed.

Clause 17 Meaning of *licensed* for div 3.1

This clause explains that a person is not licensed to carry on business as an agent if their licence has been suspended.

Clause 18 Real estate agents must be licensed

The purpose of this clause is to prevent a person from carrying on business as a real estate agent, or pretending to be a licensed real estate agent, if the person is not licensed under the Act. It is not an offence if the person provides a service that may be provided under another licence or is an employee of a licensed agent. The offence is a strict liability offence carrying a maximum penalty of 100 penalty units, imprisonment for 12 months or both to reflect the serious nature of the offence.

Clause 19 Stock and station agents must be licensed

The purpose of this clause is to prevent a person from carrying on business as a stock and station agent, or pretending to be a licensed stock and station agent, if the person is not licensed under the Act. It is not an offence if the person provides a service that may be provided under another licence or is an employee of a licensed agent. The offence is a strict liability offence carrying a maximum penalty of 100 penalty units, imprisonment for 12 months or both to reflect the serious nature of the offence.

Clause 20 Business agents must be licensed

The purpose of this clause is to prevent a person from carrying on business as a business agent, or pretending to be a licensed business agent, if the person is not licensed under the Act. It is not an offence if the person provides a service that may be provided under another licence or is an employee of a licensed agent. The offence is a strict liability offence carrying a maximum penalty of 100 penalty units, imprisonment for 12 months or both to reflect the serious nature of the offence.

Clause 21 Travel agents must be licensed

The purpose of this clause is to prevent a person from carrying on business as a travel agent, or pretending to be a licensed travel agent, if the person is not licensed under the Act. This is a strict liability offence carrying a maximum penalty of 100 penalty units, imprisonment for 12 months or both to reflect the serious nature of the offence.

Clause 22 Employment agents must be licensed

This clause seeks to prevent a person from carrying on business as an employment agent, or pretending to be a licensed employment agent if the person is not licensed under the Act. The offence carries a maximum penalty of 100 penalty units, imprisonment for 12 months or both to reflect the serious nature of the offence.

Clause 23 Unlicensed agents cannot recover fees etc

This clause prohibits a person from initiating a proceeding to recover a commission, fee or reward for a service carried out by the person, as an agent, if the person was not licensed when the service was provided.

Division 3.2 Eligibility, qualifications and disqualification for licences

Clause 24 Eligibility for licences

This clause sets out specific criteria that a person, a corporation or an individual in a partnership must meet to satisfy the commissioner for fair trading to become eligible to hold a licence. The imposition of market entry criteria is an important safeguard of industry standards in the public interest.

Clause 25 Qualifications for licences

This clause explains that the necessary qualifications required for the issuing of a licence can be prescribed by regulation. In addition, the clause makes it clear that the regulations may permit a person to be granted an agent's licence with conditions, if the person does not have any stated qualifications.

Clause 26 Additional eligibility grounds for travel agents

This clause explains that an applicant for a travel agent's licence must meet additional eligibility requirements, and satisfy the commissioner for fair trading to become eligible for a travel agent's licence. These additional eligibility grounds are necessary as part of the national, uniform regulatory scheme for travel agents.

Clause 27 People disqualified from being licensed

This clause sets out specific events and circumstances that will preclude a person from obtaining a licence. However, there is provision for the commissioner for fair trading to license a person, if the commissioner is satisfied that the person took all reasonable steps to avoid the bankruptcy, winding up or administration mentioned in paragraphs (1)(b) and(c).

Division 3.3 Licence procedures and details

Clause 28 Advertising intended licence applications

The purpose of this clause is to alert the public to the applicant's intention to apply for a specific licence thereby giving the public an opportunity to speak up if they have any concerns about this person carrying on business as an agent in the Territory.

Clause 29 Licence applications

This clause requires a person applying for a licence to place an advertisement in an ACT daily newspaper 10 business days before lodging their application with the commissioner for fair trading. It also requires an applicant to advise the commissioner of the address of their intended main place of business on becoming licensed.

Clause 30 Objections to licences

The purpose of this clause is to give the public an opportunity to lodge an objection, in writing, to a person's application for an agent's licence with the commissioner for fair trading before the application is considered. In the interests of natural justice, the objector must give a copy of the objection to the applicant within 10 business days after the advertisement was published.

Clause 31 Further information for licence applications

The purpose of this clause is to facilitate the commissioner's proper consideration of an application.

Clause 32 Information about licence applications

The purpose of this clause is to ensure that the commissioner is not constrained in any way from making appropriate enquiries about a licence.

Clause 33 Decisions on licence applications

This clause makes it clear that the commissioner for fair trading must grant or refuse an application for a licence within 12 weeks after receipt of the application. Failure to do so within the prescribed period means that the commissioner has decided not to issue the licence. Where the commissioner requests further information or a document under section 31, the 12 week period within which the commissioner must either issue or refuse to issue the licence, is extended a further 12 weeks to accommodate the receipt and consideration of the additional information.

Clause 34 Licence conditions

This clause makes it clear that conditions can be imposed on a licence by regulation or by the commissioner for fair trading. The commissioner can place a condition on a licence when it is issued or at any other time, and can amend or omit a condition placed on the licence at any time. This clause provides flexibility for the executive and the commissioner to control the market behaviour of salespersons in the public interest, but only in appropriate circumstances.

Clause 35 Term of licences

This clause makes it clear that a licence is valid up to one year from the date of its issue or last renewal.

Clause 36 Renewal of licences

This clause sets out the renewal process for agents seeking to renew their licences.

Clause 37 Continuation of existing licences until the renewal applications decided

The purpose of this clause is to protect the interests of consumers in circumstances where an agent may have failed to renew a licence within the relevant period for renewal, leaving consumers exposed to financial harm.

Clause 38 Licence certificates

This clause allows the commissioner for fair trading to issue a replacement licence if satisfied that the licence has been lost, stolen damaged or destroyed. A fee may be charged for this service.

Clause 39 Surrender of licence

This clause makes provision for a licensee to surrender the licence by writing to the commissioner.

Division 3.4 Disciplinary action against agents

Clause 40 Meaning of *agent* for div 3.4

This clause makes it clear that disciplinary action can be taken against a former agent for wrongful acts committed while they were licensed.

Clause 41 Grounds for disciplinary action - agents

This clause sets out the grounds upon which disciplinary action may be taken against a person who is or was the holder of a licence.

Clause 42 Commissioner may refer matter to tribunal - agents

This clause enables the commissioner for fair trading to apply to the consumer and trader tribunal where a ground for disciplinary action exists in relation to a licensed agent. Consumers of agents' services can lodge their grievances with the commissioner for fair trading for investigation. The commissioner will investigate the merits of the complaint, and decide whether or not to refer the matter to the tribunal for disciplinary action against the agent.

Clause 43 Disciplinary action tribunal may take – agents

This clause sets out the various forms of disciplinary action that the consumer and trader tribunal may take against a licensed or former licensed agent. The tribunal may also take other disciplinary action against agents as prescribed in the *Consumer and Trader Tribunal Act 2003*. The Tribunal may:

- cancel or suspend the agent's licence; and
- if cancelling a licence, disqualify the agent from being licensed for a stated period or indefinitely;
- order the person to pay an amount to the Territory or someone else; or
- reprimand the person; or
- order the person to give a written undertaking; or

- direct the commissioner to
 - place a condition on the person’s licence; or
 - remove or amend a condition placed on the person’s licence; or
- give the person directions.

PART 4 Registration of salespeople

Division 4.1 Salespeople to be registered

Clause 44 Meaning of *registered* for div 4.1

This clause makes it clear that a person whose registration has been suspended cannot continue operating as a registered salesperson.

Clause 45 Real estate salespeople must be registered

This clause makes it a strict liability offence for a real estate salesperson not to hold a certificate of registration, and pretend to be employed by a licensed real estate agent. The offence carries a maximum penalty of 50 penalty units, imprisonment for six months, or both.

Clause 46 Stock and station salespeople must be registered

This clause makes it a strict liability offence for a stock and station salesperson not to hold a certificate of registration, and pretend to be employed by a licensed stock and station agent. The offence is a strict liability offence carrying a maximum penalty of 50 penalty units, imprisonment for six months, or both.

Clause 47 Business salespeople must be registered

This clause makes it a strict liability offence for a business salesperson not to hold a certificate of registration, and pretend to be employed by a licensed business agent. The offence carries a maximum penalty of 50 penalty units, imprisonment for six months, or both.

Clause 48 Salespeople must be registered to recover fees etc

The purpose of this clause is to ensure that unregistered salespersons are prohibited from benefiting from relevant services provided while unregistered.

Division 4.2 Eligibility, qualifications and disqualification for registered salespeople

Clause 49 Eligibility for registration

This clause sets out specific criteria that a person must meet to satisfy the commissioner for fair trading to become eligible to hold a certificate of registration. The imposition of market entry criteria on salespeople is necessary to safeguard industry standards, in the public interest.

Clause 50 Qualifications for registration

This clause explains that the necessary qualifications required for the issuing of a registration certificate can be prescribed by regulation. In addition, the regulations may provide flexibility to permit a person to be granted an agent's licence with stated conditions, if the person does not have any stated qualifications.

Clause 51 People disqualified from being registered

This clause sets out specific events and circumstances that will preclude a person from being registered. However, there is provision for the commissioner for fair trading to register a person, if the commissioner is satisfied that the person took all reasonable steps to avoid the bankruptcy, winding up or administration, mentioned in paragraphs (1)(b) and(c). There is flexibility for the commissioner to ignore a contravention of a registration condition, in appropriate circumstances.

Division 4.3 Registration procedures and details**Clause 52 Advertising of intended registration applications**

The purpose of this clause is to alert the public to the applicant's intention to apply for registration giving them an opportunity to speak up if they have any concerns about the applicant working for a licensed agent in the Territory.

Clause 53 Registration applications

This clause requires a person applying for registration to place an advertisement in an ACT daily newspaper 10 business days before lodging their application with the commissioner for fair trading.

Clause 54 Objections to registration

The purpose of this clause is to give the public an opportunity to lodge an objection, in writing, to a salesperson's application for registration with the commissioner for fair trading, before the application is considered. In the interests of natural justice, the objector must give a copy of the objection to the applicant within 10 business days after the advertisement was published.

Clause 55 Further information for registration applications

The purpose of this clause is to facilitate the commissioner's proper consideration of an application for registration.

Clause 56 Information about registration applications

The purpose of this clause is to ensure that the commissioner is not constrained in any way from making proper enquiries about a registration application.

Clause 57 Decisions on registration applications

This clause makes it clear that the commissioner for fair trading must grant or refuse an application for registration within 12 weeks after receipt of a valid application. Failure to do so within the prescribed period means that the commissioner has decided not to issue the licence. If the commissioner requests further information or a document under section 55, the 12 week period recommences on the day the requirement is made and ends on the day the requirement is complied with.

Clause 58 Registration conditions

This clause makes it clear that conditions may be imposed on a registration by regulation or by the commissioner for fair trading. The commissioner can place a condition on a registration when it is issued or at any other time, and can amend or omit a condition placed on the registration certificate at any time. This clause provides flexibility for the executive and the commissioner to control the market behaviour of salespersons in the public interest, but only in appropriate circumstances.

Clause 59 Term of registration

This clause makes it clear that registration is valid for up to one year from the date of its grant or last renewal.

Clause 60 Renewal of registrations

This clause sets out the renewal process for salespersons seeking to renew their registration.

Clause 61 Continuation of existing registrations until renewal applications decided

The purpose of this clause is to protect the interests of consumers in circumstances where a salesperson may have failed to renew a registration within the relevant period for renewal, leaving consumers exposed to financial harm.

Clause 62 Registration certificates

This clause allows the commissioner for fair trading to issue a replacement certificate of registration if satisfied that the certificate has been lost, stolen damaged or destroyed. A fee may be charged for this service.

Clause 63 Surrender of registration

This clause makes provision for a registered salesperson to surrender the registration by writing to the commissioner.

Division 4.4 Disciplinary action against registered salespeople

Clause 64 Meaning of *registered salesperson* for div 4.4

This clause makes it clear that a former registered salesperson is also subject to the disciplinary jurisdiction for registered salespeople for the purposes of division 4.4.

Clause 65 Grounds for disciplinary action – salespeople

This clause sets out the grounds upon which disciplinary action may be taken against a person who is or was registered under the Act.

Clause 66 Commissioner may refer matter to tribunal – salespeople

The clause enables the commissioner for fair trading to apply to the consumer and trader tribunal where a ground for disciplinary action exists in relation to a registered salesperson. Consumers of services provided by a registered salesperson can lodge their grievances with the commissioner for fair trading for investigation. The commissioner will investigate the merits of the complaint, and decide whether or not to refer the matter to the tribunal for disciplinary action against the salesperson.

Clause 67 Disciplinary action tribunal may take – registered salesperson

This clause sets out the various forms of disciplinary action that the consumer and trader tribunal may take against a registered or former salesperson. The tribunal may also take other disciplinary action against salespersons as prescribed in the *Consumer and Trader Tribunal Act 2003*. The Tribunal may:

- cancel or suspend the person’s registration and
- if cancelling a registration disqualify the person from being registered for a stated period, or indefinitely;
- order the person to pay an amount to the Territory or someone else; or
- reprimand the person; or
- order the person to give a written undertaking; or
- direct the commissioner to
 - place a condition on the person’s licence; or
 - remove or amend a condition placed on the person’s licence; or
- give the person directions.

PART 5 Conduct of licensed agents and registered salespeople

Division 5.1 Licensed agent’s main place of business

Clause 68 Main place of business

The purpose of this clause is to enable the commissioner for fair trading to be able to contact an agent, when necessary.

Division 5.2 Management of licensed agent's business

Clause 69 Each place of business to have licensed agent in charge

This clause provides that each place of business must have a licensed agent in charge of the day-to-day operation of that business, except if the person has been exempted under section 71 of the Act. The purpose of this provision is to ensure that businesses run by agents are properly managed on a daily basis to protect the interests of consumers. A breach of this provision is a strict liability offence carrying a maximum penalty of 100 penalty units. This clause does not apply to licensed travel or employment agents.

Clause 70 Licensed agent to be in charge of one place of business

The purpose of the clause is to ensure that businesses run by licensed agents are properly managed to protect the interests of consumers. This clause does not apply to licensed travel or employment agents.

This clause makes it a strict liability offence for a licensed agent to be responsible for the day-to-day management of more than one place of business. It is also an offence for a licensed agent employed to be responsible for the daily management of another licensed agent's place of business who provides services for more than one licensed agent at the same place, and these agents are not in partnership. This offence carries a maximum penalty of 100 penalty units.

Clause 71 Licensed agent to be in charge of business – exemptions

This clause provides the commissioner for fair trading with a discretionary power to exempt a licensed agent, in writing, from the statutory requirements in sections 69 and 70. Regulations may prescribe the matters to be considered by the commissioner in exercising the discretion to exempt, amend or revoke an exemption. This clause does not apply to licensed travel or employment agents.

Clause 72 Licensed agent must not share commission etc with unlicensed person

This clause provides that a licensed agent may not enter into an agreement or an arrangement with an unlicensed person or act in conjunction with an unlicensed person (other than an employee of the agent's business) where the unlicensed person is entitled to a share of the commission, fee, gain or reward payable to the licensee in respect of any transaction. The offence carries a maximum penalty of 50 penalty units. An offence under this clause is a strict liability offence carrying a maximum penalty of 50 penalty units. This clause does not apply to licensed travel or employment agents.

Clause 73 Agreements between licensed agents to share commission etc

This clause provides that licensed agents may not share a commission, fee or reward, if the agreement for a service carried out is not in writing and signed by both agents and contains any terms (if any) prescribed by regulation. The agency agreement is only void to the extent to which the agreement contravenes this clause. The purpose of this clause is to make agreements between agents in respect of the same property transparent. This is a strict

liability offence carrying a maximum penalty of 50 penalty units. This clause does not apply to licensed travel or employment agents.

Clause 74 Duty to notify failures to account

This clause provides that a licensee must notify the commissioner for fair trading of a failure to account by an employee of the licensed agent within five business days after finding out about the failure. The purpose of this clause is to inform the commissioner of the failure to account for trust money at the earliest possible time, so that appropriate action can be taken to protect consumers' money held on trust by the agent. This is a strict liability offence carrying a maximum penalty of 50 penalty units. This clause does not apply to licensed travel or employment agents.

Division 5.3 Employment of salespeople

Clause 75 Licensed agent may only employ licensed agent or registered salesperson

This clause makes it a strict liability offence for a licensed real estate, stock and station or business agent to employ people to provide agency services who are not licensed or registered under the Act. The offence carries a maximum penalty of 50 penalty units. This clause does not apply to licensed travel or employment agents.

Clause 76 Employee must tell employer about disqualification

This clause requires an employee of a licensed agent to tell the licensed agent that they have been disqualified from being licensed or registered within five business days after they become aware of it. This is a strict liability offence carrying a maximum penalty of 50 penalty units. This clause does not apply to licensed travel or employment agents.

Division 5.4 Conflicts of interest

Clause 77 Agents must not act for buyer and seller of land

This clause makes it a strict liability offence for an agent to act on behalf of both the buyer and seller of the same land at the same time. Where an agent acts for both a buyer and seller of the same land at the same time, the agency agreement entered into will be void as being an illegal agreement. The offence carries a maximum penalty of 100 penalty units to reflect the serious nature of the offence.

Division 5.5 Advertisements and other statements

Clause 78 When is a statement *published*?

This clause sets out practical examples of when a statement will be acknowledged as being published for the purposes of Division 5.5.

Clause 79 False or misleading advertisements

This clause makes it an offence for an agent to knowingly or recklessly publish an advertisement containing a statement about the agent's business that is false or misleading in

a material way. This offence carries a maximum penalty of 100 penalty units to reflect the serious nature of the offence.

Division 5.6 Land - further provisions

Clause 80 Meaning of *benefit*, *estimate* and *selling price* for div 5.6

This clause explains the meaning to be attributed to several terms used in Division 5.6. For example, *benefit* means receiving a financial or other benefit; giving an *estimate* in relation to the price of land includes an opinion or belief held by the agent; and the *selling price* of land includes the selling price range.

Clause 81 Meaning of *pre-contract information* for div 5.6

This clause explains what the term *pre contract information* means for the purposes of division 5.6 and provides examples of relationships and people who may receive a benefit, referred to throughout the clause.

Clause 82 Meaning of *beneficial interest* and *obtains a beneficial interest* for div 5.6.

This clause explains what the term *beneficial interest* means in relation to land, and what the term *obtains a beneficial interest* means if it is obtained by certain individuals or bodies.

Clause 83 Agents giving financial and investment advice

This clause makes it a strict liability offence for an agent to give financial and investment advice to a consumer in connection with the sale or purchase of land, without informing the consumer of the information and warnings prescribed by the regulations.

The purpose of this clause is to ensure that agents who give general financial investment advice provided as an incidental part of selling real estate, must inform consumers that the advice is general advice which has not been prepared taking into account the individual circumstances of the person to whom it is given. Agents must also advise consumers that they should consult an appropriately licensed person to obtain such advice, and inform them of any conflicts of interest that may exist where the agent is also acting for the vendor or developer. The regulation will prescribe a maximum penalty of 200 penalty units to reflect the serious nature of the offence.

The provision of financial investment advice without proper caution and warnings is a serious matter. The details of offences can only be set out in regulations as they are likely to change in response to marketplace practices.

Clause 84 Agents must disclose certain information

This clause makes it a strict liability offence for an agent acting for a buyer or seller of land not to disclose the pre-contractual information to the buyer or seller contained in section 81 before the buyer or seller enters into a contract for the purchase or sale of the land.

The purpose of this clause is to place a buyer and seller of land in a position to be able to make an informed decision before entering into the transaction by being aware of any relationships that may exist between the agent and other people, or any benefits the agent, or anyone else, may receive from the transaction. This offence carries a maximum penalty of 200 penalty units to reflect the serious nature of the offence. The agent will not commit an offence if the agent can produce a written acknowledgement from the buyer or seller that the pre-contract information was given to them before they entered into the contract in relation to the land.

Clause 85 Salespeople must disclose certain information

This clause makes it a strict liability offence for a salesperson employed by an agent who is acting for a buyer or seller of land, not to disclose pre-contractual information contained in section 81 before the buyer or seller enters into a contract for the purchase or sale of the land. The purpose of this clause is to place a buyer or seller of land in a position to be able to make an informed decision before entering into the contract by being aware of any relationships that may exist between the salesperson and other people, or any benefits the salesperson, or anyone else, may receive from the transaction. This offence is a strict liability offence and carries a maximum penalty of 200 penalty units to reflect the serious nature of the offence. The salesperson will not commit an offence if the salesperson can produce a written acknowledgement from the buyer or seller that the pre-contractual information was given to them before they entered into the contract in relation to the land.

Clause 86 Agents must not obtain beneficial interest in land

This clause prohibits an agent who acts for a seller of land to obtain a beneficial interest in the land, or be in any way involved with any person mentioned in section 82 in obtaining a beneficial interest in the land. This is a strict liability offence carrying a maximum penalty of 200 penalty units, imprisonment for two years or both to reflect the serious nature of the offence. It is not an offence where the agent discloses all relevant circumstances surrounding the interest to the seller, and the seller consents in writing to the obtaining of the interest before it is obtained and any commission or reward payable to the agent in relation to the transaction by which the interest is obtained.

Clause 87 Salespeople must not obtain beneficial interest in land

This clause prohibits a salesperson, employed by an agent who acts for a seller of land, from obtaining a beneficial interest in the land or be in any way involved with any person mentioned in section 82 in obtaining a beneficial interest in the land. This is a strict liability offence carrying a maximum penalty of 100 penalty units, imprisonment for one year or both to reflect the serious nature of the offence. It is not an offence where the salesperson discloses all relevant circumstances surrounding the interest to the seller, and the seller consents in writing to the obtaining of the interest before it is obtained, and any commission or reward payable to the salesperson in relation to the transaction by which the interest is obtained.

Clause 88 False representations to sellers or buyers

This clause makes it an offence for an agent, or a registered salesperson employed by an agent who is acting for a seller, to knowingly make a dishonest representation about the

estimated selling price of the land to a seller or a buyer or in an advertisement or any other publication. The offence carries a maximum penalty of 100 penalty units.

Clause 89 Requirement to substantiate selling price estimates

This clause permits the commissioner for fair trading to require an agent or salesperson to substantiate any estimate of the selling price of land made by the agent or salesperson to a seller or buyer of land or in an advertisement or other publication. It is an offence if the person who has been given a notice fails to comply with the notice within the prescribed period. This is a strict liability offence and carries a maximum penalty of 100 penalty units.

Division 5.7 Travel agents - further provisions

Clause 90 Meaning of *compensation scheme* for div 5.7

This clause defines the term *compensation scheme* which has been established under the national Travel Compensation Fund Trust Deed (the ‘trust deed’) to compensate certain people who deal with travel agents.

Clause 91 Participation in compensation scheme

This clause makes it clear that a person wishing to carry on business as a travel agent must be a participant in the travel compensation fund, having paid the requisite fees, and comply with any requirement imposed on the agent by the board of trustees under the trust deed. If a licensed agent stops being a participant of the travel compensation fund, the agent’s licence will automatically be suspended until the agent becomes a participant, or the licence is surrendered or cancelled.

The purpose of this clause is to ensure that travel agents contribute to the Travel Compensation Fund set up to protect consumers of travel agents’ services in circumstances where a travel agent’s business fails, exposing consumers to financial loss.

Clause 92 Powers of travel agents board of trustees

This clause makes it clear that the board of trustees of the Travel Compensation Fund has the powers set out in the trust deed by virtue of this Act.

Clause 93 Legal action by travel agents board of trustees

This clause makes it clear that the board of trustees may sue and be sued in the name of the Travel Compensation Fund.

Clause 94 Rights of travel agents board of trustees

This clause makes it clear that the board of trustees may stand in the shoes of a person who receives compensation from the compensation scheme as a result of an act or omission of a licensed travel agent and sue any party to the wrongful act. Where the board of trustees stands in the shoes of a person who dealt with an unlicensed travel agent, the board may

enforce the rights against the provider of the service to which the act or omission relates as if the provider of the service was in partnership with the unlicensed agent.

Clause 95 Dealings with unlicensed travel agents

This clause makes it an offence for a person carrying on a business to knowingly give another person goods or services for disposal, or authority to dispose of goods or services, and the disposal of the goods or services would constitute the second person carrying on business as an unlicensed travel agent. For it to be an offence, the first person must know that the second person is not a licensed travel agent. One example might be an airline authorising an unlicensed travel agent to sell its airline tickets. This offence carries a maximum penalty of 100 penalty units.

Division 5.8 Employment agents - further provisions

Clause 96 Employment agent must only take fee from employer

This clause makes it a strict liability offence for a licensed employment agent to charge a fee from a person seeking employment. This clause is particularly designed to assist unemployed people using an employment agent to get a job. The clause does not apply to employers seeking to have work carried out or a model or performer.

Division 5.9 Other offences

Clause 97 Lending licence certificate

This clause prohibits a licensed agent from letting out, hiring or lending the agent's licence to someone else or letting someone else use the licence. This is a strict liability offence carrying a maximum penalty of 100 penalty units to reflect the serious nature of the offence. The agent's licence is automatically cancelled if the agent is convicted of the offence.

Clause 98 Lending registration certificate

This clause prohibits a registered salesperson from letting out, hiring or lending the person's certificate of registration to someone else or letting someone else use the salesperson's certificate of registration. This is a strict liability offence carrying a maximum penalty of 100 penalty units to reflect the serious nature of the offence. The salesperson's registration is automatically cancelled if the salesperson is convicted of the offence.

PART 6 Agency Agreements

Clause 99 Application of pt 6

This clause makes it clear that this part does not apply to commercial, business or industrial agents' agreements.

Clause 100 No commission or expenses without agency agreement

This clause makes it clear that a licensee is not entitled to any commission or expenses from a person for, or in connection with, services performed by the licensee in the capacity of

licensee for or on behalf of the person, unless the services were performed pursuant to a written agreement.

The clause also makes it clear that a licensed agent engaging in a transaction is not entitled to any expenses from a person for or in connection with services performed by the licensee unless the licensee has disclosed all rebates, discounts or commissions that the licensee will or may receive in respect of those expenses.

The agency agreement must also comply with any applicable requirements of the regulations and a copy of the agreement must be served by the licensee on that person within 48 hours after the agreement was signed. The purpose of this clause is to remove, as far as possible, any uncertainty about the nature of the transaction between the agent and the principal and provide for full disclosure in the agency agreement with the principal, of any financial benefits the agent may receive from the transaction.

PART 7 Trust accounts

Division 7.1 Definitions for part 7

Clause 101 Meaning of *licensed agent* for part 7

This clause defines what a *licensed agent* means for the purposes of Part 7. The term *licensed agent* used in Part 7 only applies to licensed real estate, stock and station or business agents, as travel and employment agents do not hold consumers' money on trust. The term *licensed agent* also includes an unlicensed agent who still holds trust money received while licensed, and the personal representative of an agent who died holding trust money, and the liquidator of a company holding trust money.

Clause 102 What is *trust money*?

This clause defines what constitutes trust money for the purposes of the Act. The definition excludes trust money received as bond money under the *Leases (Commercial and Retail) Act 2001*.

Clause 103 Trust account details

This clause defines what *trust account details* means for the purposes of Part 7.

Division 7.2 Trust money and trust accounts

Clause 104 Meaning of *ADI business day* for div 7.2

This clause defines an ADI business day as a day when the branch of the authorised deposit-taking institution where the trust account is kept is open for business.

Clause 105 Opening trust accounts

This clause makes it clear that a licensed agent must keep a trust account at an ACT ADI in the name of the agent, or the business name or the partnership name and must tell the ADI

that it is a trust account for the purposes of this Act. The agent must also give to the commissioner in writing details of every trust account held by the agent within two business days after the day the agent becomes licensed or opens the new trust account. The purpose of this clause is to protect consumers' money held on trust by licensed agents.

Clause 106 Closing trust accounts

This clause makes it a strict liability offence for a licensed agent to close a trust account and not tell the commissioner in writing of the closure within 10 business days after the day the account is closed. The offence carries a maximum penalty of 100 penalty units to reflect the serious nature of the offence.

Clause 107 Dealing with trust money

This clause makes it a strict liability offence for a licensed agent to deal with a person's trust money contrary to their instructions. The licensed agent also commits an offence if they receive trust money and fail to pay the money into a trust account by the next business day after they receive the money. The offence carries a maximum penalty of 100 penalty units. Trust money cannot be used in any way other than in accordance with the instructions of the person who owns the trust money.

Clause 108 Agents to notify of overdrawn trust accounts

This clause makes it a strict liability offence for a licensed agent not to notify the commissioner for fair trading, in writing, within five business days, about an overdrawn trust account. This offence carries a maximum penalty of 100 penalty units.

Clause 109 Interest on trust accounts

This clause makes it clear that interest earned on trust accounts is to be paid to the Territory.

Division 7.3 Periodic returns and quarterly statements

Clause 110 Monthly returns by authorised deposit-taking institutions

This clause requires an ADI to give to the commissioner for fair trading, within 14 days after the end of the month, a written report setting out the name of the agent and the ADI account number of each trust account kept with the ADI and the amount of interest paid to the Territory in that month. This is a strict liability offence carrying a maximum penalty of 100 penalty units.

Clause 111 Quarterly statements by agents

This clause requires a licensed agent to prepare each quarter a trust bank account reconciliation statement together with a list of names of clients and the amounts owed to each of the clients at the end of the quarter. These quarterly statements must be given to the auditor who audits the trust account. The purpose of this clause is to protect the integrity of trust accounts in the public interest. A breach of this provision will be dealt with by the consumer and trader tribunal as a disciplinary matter.

Division 7.4 Audit of trust accounts

Clause 112 Meaning of *qualified auditor* for div 7.4

This clause defines *qualified auditor* as a person who is qualified under section 114 (Qualifications for auditors).

Clause 113 Audit Period

This clause permits the commissioner for fair trading to determine by written notice to a licensed agent, a fixed audit period for the agent, otherwise the audit period is the financial year.

Clause 114 Qualifications for auditors

This clause allows the Minister to decide the qualifications necessary for auditors under this Act. This decision is a disallowable instrument that must be notified and presented to the Legislative Assembly under the *Legislation Act 2001*.

Clause 115 Requirement for audit

This clause makes it a strict liability offence for a former licensed agent or the personal representative of a licensed agent holding trust money during an audit period not to have had that person's records relating to the trust money audited by a qualified auditor, within three months after the end of the audit period or any longer period allowed by the Minister in writing. This is a strict liability offence carrying a maximum penalty of 50 penalty units.

Clause 116 If no trust money held during audit period

This clause requires a licensed agent to inform the commissioner for fair trading by way of a statutory declaration if they have not held any trust money during an audit period.

Clause 117 Audit obligations of partners

This clause only requires one member of a partnership to comply with the requirements in division 7.4 dealing with the audit of trust accounts.

Clause 118 Auditor reports

This clause sets out the duties of an auditor.

Division 7.5 Unclaimed trust money**Clause 119 Unclaimed trust money held by licensed agent**

This clause requires a licensed agent to give to the commissioner for fair trading a statement about unclaimed money held by the agent more than three years before 1 July of any year by 31 July of that year. [Under the former Act, unclaimed moneys were those moneys held for more than six years].

Clause 120 Trust money held by former licensed agents

This clause requires a former licensed agent to give to the commissioner for fair trading a statement about any money held on trust at the time the agent ceased to be licensed, within three months of becoming unlicensed.

Clause 121 Trust money held by personal representatives of licensed agents

This clause requires a personal representative of a licensed agent who has died to give to the commissioner for fair trading a statement about any money held on trust at the time of the agent's death, within three months after becoming the agent's personal representative.

Clause 122 Contents of statements

This clause defines what details a statement must contain for the purposes of Division 7.5 of Part 7.

Clause 123 Duties of commissioner in relation to unclaimed money in trust accounts

The purpose of this clause is to give an opportunity to people on whose behalf trust money is held to step forward and claim the money within three months after notification of the notice in a daily ACT newspaper, or where the person fails to claim the trust money, inform them that the person holding the money will be required to pay it to the public trustee.

Clause 124 Payment of unclaimed money to public trustee

This clause sets out the process for the payment of unclaimed moneys to the public trustee where the person whose money has been held on trust has failed to claim the money. The clause makes it a strict liability offence for a former licensed agent or a personal representative of a licensed agent not to comply with a notice issued by the commissioner requiring them to pay to the public trustee any unclaimed money being held by them. The offence carries a maximum penalty of 20 penalty units.

Clause 125 Applications to recover money

This clause allows a person to apply to the commissioner for fair trading for payment of money paid to the public trustee. The application must be in writing setting out details of the applicant and the claim.

Clause 126 Decisions on recovery applications

This clause sets out the process by which the commissioner for fair trading must consider and decide an application to recover money from the public trustee. The public trustee must pay to the applicant the amount decided by the commissioner.

PART 8 Records**Division 8.1 Record keeping****Clause 127 What records must be kept**

This clause makes it a strict liability offence for a licensed or former licensed agent not to keep detailed records of every transaction the agent conducts as a licensed agent, and records prescribed by regulation, for a period of three years beginning on 30 September that next follows when the record is made. This is a strict liability offence carrying a maximum penalty of 50 penalty units.

Clause 128 Where records must be kept

This clause makes it a strict liability offence for a licensed agent not to keep a record under section 127 at the agent's main place of business or another place agreed in writing by the commissioner. This is a strict liability offence carrying a maximum penalty of 50 penalty units.

Clause 129 Presumption that records made by licensed agent

This clause creates a presumption that any record kept at a licensed agent's main place of business is taken to have been made by the agent or under the agent's authority, unless the contrary is proved.

Clause 130 Receipts

This clause requires licensed agents who hold money on trust to provide a receipt to the person who gives the agent trust money and to keep a copy of the receipt. Travel and employment agents are also required to provide receipts for other money held in relation to the agent's business. Receipts are not required if the money is credited to a licensed agent's account electronically or is paid into a trust account.

Division 8.2 Freezing accounts

Clause 131 Definitions for div 8.2

This clause defines the term *account*, as a trust account, or any other account which is not a trust account, but in which trust money is held. The term *agent* means a licensed agent, a former licensed agent or the personal representative of a licensed agent. The term *direction* means a direction under section 132 of the Act.

Clause 132 Commissioner may freeze accounts

This clause allows the commissioner for fair trading to give a direction under the Division if it appears to the commissioner that a licensee, the person in charge of a licensee's business at a place, or a licensee's employee has, or may have stolen, misappropriated or misapplied trust money. The commissioner's written direction may direct that no amount be withdrawn from a stated account without the commissioner's written approval, a stated account be operated only in accordance with stated conditions, or all or a stated part of the amount to the credit of a specified account be paid to the commissioner.

Clause 133 Institutions to comply with directions

This clause makes it a strict liability offence for a financial institution not to comply with a written direction of the commissioner under section 132(1)(a) (b) or (c). The offence carries a maximum penalty of 200 penalty units to reflect the serious nature of the offence.

Clause 134 Accounts to be operated only in accordance with directions

This clause makes it a strict liability offence for a person under direction to sign a cheque or other instrument drawn on the account in contravention of the direction. This offence carries a maximum penalty of 100 penalty units.

Clause 135 Commissioner may operate accounts

This clause permits the commissioner for fair trading to operate an account where a direction is in force if the account must be operated and the account holder is unable or unwilling to operate it. The commissioner must give a certificate to the authorised deposit-taking institution notifying it that the operation of the account will be under this section.

Clause 136 Notification of withdrawal of stop directions

This clause requires the commissioner for fair trading to notify each entity, in writing, of the withdrawal of a stop direction.

Clause 137 No liability for complying with stop directions

This clause removes any liability on a person who complies with a stop direction.

PART 9 Appointment of administrators**Clause 138 Definitions for Part 9**

This clause defines the meaning of *administrator* as an administrator appointed under section 139.

Clause 139 When administrators may be appointed

This clause sets out the circumstances in which the commissioner for fair trading may in writing appoint a person to administer a licensed or former licensed agent's business where the agent's licence has been suspended or cancelled.

Clause 140 Agents not to be involved in business under administration

This clause makes it clear that when an administrator is appointed for an agent, the agent must not have any involvement in the direction or management of the agent's business, unless the administrator agrees in writing to this effect

Clause 141 Notice to authorised deposit-taking institutions

This clause requires the commissioner for fair trading to give written notice of the appointment of a receiver or administrator of a licensed agent's trust money to the person in charge of the branch of the ADI where the trust account is held. The Commissioner must also revoke, in writing, the authority of the agent to withdraw money from the trust accounts and give a copy of the revocation to the ADI.

Clause 142 Functions of administrators

This clause sets out the functions of an administrator appointed by the commissioner for fair trading. The administrator can exercise all of the agent's functions in relation to the agent's business and must fulfil the agent's obligations under this Act.

Clause 143 Remuneration of administrators

This clause makes it clear that an administrator who is not a public servant is entitled to be paid by the Territory the remuneration that the commissioner decides and any expenses incurred in carrying out the administration. Any amount paid by the Territory is a debt recoverable from the agent.

PART 10 Consumer compensation fund

Div 10.1 Establishment of compensation fund

Clause 144 Consumer compensation fund

The purpose of this clause is to establish a consumer compensation fund for the protection of consumers of agents' services.

Clause 145 Compensation fund money

This clause makes it clear that moneys paid into the fund will come from interest gained on agents' trust accounts holding consumers' money, and licence and registration fees paid by agents and salespeople respectively, required to be licensed and registered under the Act.

Clause 146 Application of compensation fund money

This clause makes it clear that the fund may be used to pay claims under division 10.2 including costs, allowed or established against the fund and any other amount payable out of the fund under this Act.

Division 10.2 Claims against the compensation fund

Clause 147 Definition for div 10.2

This clause makes it clear that this division does not apply to a travel agent or employment agent, as these agents do not hold trust moneys on behalf of consumers of their services.

Clause 148 Application of div 10.2

This clause makes it clear that claims against the compensation fund can be made by consumers against real estate, stock and station or business agents, but only for conduct that occurred when the agent was licensed.

Clause 149 Entitlement to claim compensation

This clause allows people who suffer financial loss because of a failure to account by a licensed agent to claim compensation from the fund for the loss. However, the claimant is only entitled to the actual loss suffered, less any other amount recoverable from another source other than the fund.

Clause 150 Notice inviting claims

The purpose of this clause is to inform people who are entitled to make a compensation claim of the opportunity to do so, where a licensed agent has failed to account for funds.

Clause 151 Claims for compensation

This clause sets out the process to be followed by a person who is entitled to make a claim against the consumer compensation fund.

Clause 152 Requirement to give information and produce documents

This clause sets out requirements that the commissioner for fair trading may request a claimant for compensation to meet to assist the commissioner's proper consideration of the claim.

Clause 153 Requirement to begin proceeding

The purpose of this clause is to protect the corpus of the consumer compensation fund by requiring claimants to initiate proceedings for the recovery of money from the licensed agent to whom the claim relates, or anyone else liable for the loss, before claiming against the consumer compensation fund.

Clause 154 Decision on claims

This clause makes it clear that the commissioner for fair trading must consider and decide a claim for compensation under clause 151, unless a notice is issued under clause 152 dealing with the provision of further information or documents, or clause 153 requiring the claimant to pursue recovery of the loss from the agent or another person who is liable for the loss.

Clause 155 Payment of compensation

This clause makes it clear that the chief executive of the Department of Justice and Community Safety must pay from the consumer compensation fund administered by the department, the actual amount of the financial loss suffered by a claimant decided by the commissioner, but not until all claims received have been decided by the commissioner, and the commissioner is satisfied that there is sufficient money in the fund to pay out all claims.

Clause 156 Interim payment of compensation

This clause makes provision for a claimant to be paid an interim payment of compensation on hardship grounds or as prescribed under the regulations.

Clause 157 Insufficiency of compensation fund

This clause makes it clear that where there is insufficient money in the fund to pay all claimants entitled to be compensated from the fund, the chief executive must divide the amount in the fund among the claimants and pay them the proportionate amount. The balance owing must be paid out of future accumulations of the fund.

Clause 158 Availability of compensation fund

This clause makes it clear that claims for compensation can only be paid out of the consumer compensation fund.

Clause 159 Subrogation

This clause means that the Territory can stand in the shoes of the person who has a claim against the licensed agent to whom the claim for compensation was made and assume all of the legal rights of that person.

PART 11 Administration**Clause 160 Register**

The purpose of this clause is to provide an opportunity for the public to inspect the register which will be maintained by the ACT Office of Fair Trading. Access to this information will empower consumers to make informed decisions before engaging an agent to provide a service.

Clause 161 Register information

This clause sets out the content of information to be kept in the register which will contain details of all licensed agents and registered salespersons including:

- each licence and registration;
- prosecutory action under the Act and the outcome;
- disciplinary action taken against an agent or salesperson by the consumer and trader tribunal;
- the appointment of an administrator;
- an application for a licence or registration which has been refused;
- conditions placed on a licence or registration by the commissioner or the tribunal;
- any exemption under section 71 (licensed agent to be in charge of business);
- an audit period for a licensed agent fixed by the commissioner under section 113(1);
- and
- anything else prescribed under the regulations.

Clause 162 Money received under Act

This clause makes provision for the Minister to decide the amount of money to be paid into the fund to meet likely claims against the fund during each financial year. Purposes for which trust money not paid into the fund can be used must be prescribed by regulation.

Clause 163 Use of excess trust money

This clause makes provision for trust money not paid into the consumer compensation fund under section 162 to be used for purposes prescribed under the regulations.

Clause 164 Disclosure of information

This clause makes it a strict liability offence for a person to disclose information obtained by a person in connection with this Act. The offence carries a maximum penalty of 50 penalty units. The purpose of this clause is to protect the integrity and the confidentiality of information obtained in the course of administering the Act. Information about licensed agents and registered salespeople contained in the Register for public inspection has been excluded.

Clause 165 Protection from liability

This clause provides legal protection from civil or criminal liability for the commissioner for fair trading and an investigator in the performance of their duties and functions under the Act.

PART 12 Notification and review of decisions**Clause 166 Definition of *reviewable decision* for part 12**

This clause explains what a *reviewable decision* means.

Clause 167 Notice of reviewable decisions

This clause sets out the process to be followed where the commissioner for fair trading or the chief executive make a reviewable decision.

Clause 168 Review of reviewable decisions

This clause sets out who may apply to the Consumer and Trader Tribunal for review of a reviewable decision and the time limit for review.

PART 13 Miscellaneous**Clause 169 False or misleading statements**

This clause makes it a criminal offence for a person to make a false or misleading statement, or omit anything that would cause the statement to be misleading, in a material particular, in relation to an application for the issue or amendment of a licence or a registration certificate. The offence carries a maximum penalty of 100 penalty units, imprisonment for one year or both. The person also commits an offence if the person is reckless as to whether the statement is false or misleading or omits anything without which the statement is misleading, in relation to an application for the issue or amendment of a licence or a registration certificate. This offence carries a maximum penalty of 50 penalty units, imprisonment for six months or both.

Clause 170 Alternative verdict for offence against s 169

This clause provides that if, on a prosecution for deliberately making a false statement, a court is not satisfied that the false statement has been made deliberately, but is satisfied that it has been made recklessly, it may convict of the lesser charge (of recklessly making a false

statement), if the defendant has been given an opportunity to present his arguments about the matter.

Clause 171 Rules of Conduct

This clause makes it clear that regulations may prescribe rules of conduct to be observed by licensed agents and registered salespersons. Breach of a rule of conduct is a ground of review with the consumer and trader tribunal.

Clause 172 Review of disqualifications

This clause establishes a review right with the consumer and trader tribunal for a disqualified person or the commissioner for fair trading.

Clause 173 Evidentiary certificates

This clause makes it clear that in a proceeding under the Act, a licensing or registration certificate signed by the commissioner for fair trading is admissible as evidence in a Court.

Clause 174 What is a *corresponding law*

This clause describes what is a corresponding law for the purposes of section 27(1)(h) of this Act.

Clause 175 Displacement of Corporations legislation

This clause makes it clear that neither the *Corporations Act* nor the *ASIC Act*, part 3 will apply in relation to an administrator.

Clause 176 Determination of Fees

This clause allows the Minister to determine fees for the purposes of the Act.

Clause 177 Approved forms

This clause gives the commissioner for fair trading power to approve forms for the Act which must be used for a particular purpose.

Clause 178 Regulation-making power

This clause permits the executive to make regulations for the Act.

PART 14 Transitional provisions

Division 14.1 Definitions

Clause 179 Definitions for Part 14

This clause defines the word *board* as mentioned in the former *Agents Act 1968*; *commencement day* to be the day on which section 6 of the Act commences; and *repealed Act* to be the *Agents Act 1968*.

Division 14.2 Licensed agents under repealed Act

Clause 180 Licensed agents under repealed Act generally

The purpose of this clause is to provide a six month transitional period to ensure that agents who are licensed immediately before commencement day will continue to be licensed until their applications are decided or in any other case six months after commencement day.

Clause 181 Suspended licensed agents under repealed Act

This clause explains what will happen in circumstances where an agent's licence has been suspended under the repealed Act when this Act commences.

Clause 182 People disqualified from holding licence under repealed Act

This clause explains what will happen when an agent has been disqualified by the board under the repealed act when this Act commences. Where an agent has been disqualified, for a period stated by the board, from holding an agent's licence under the repealed Act, the person is taken to be a disqualified person for the duration of the disqualification under this Act. A decision of the board about a person's disqualification or the period of disqualification is taken to be an order of the consumer and trader tribunal. The tribunal may review a period of disqualification.

Clause 183 Former licensed agents

This clause makes it clear that licensed agents under the repealed Act who were not licensed immediately before the commencement of this Act, are taken to be former licensed agents under this Act. The disciplinary provisions in this Act apply to former licensed agents.

Division 14.3 Registered agents under repealed Act and employees

Clause 184 Registered agents under repealed Act generally

This clause makes it clear that during the temporary period, registered real estate, stock and station and business agents under the repealed Act will be regarded as licensed real estate, stock and station and business agents under this Act.

Clause 185 Employees need not have qualifications for 2 years

This clause makes it clear that salespeople employed by licensed real estate, stock and station and business agents, prior to the commencement of this Act, have six months grace to apply for registration under the Act, noting that former employees have been given two years grace to obtain their appropriate qualifications. Salespeople who are employed after the commencement of the Act will need to be qualified to be eligible for registration.

Division 14.4 Other provisions about the repealed Act

Clause 186 Register

This clause makes it clear that registers under the repealed Act are taken to be part of the register under this Act.

Clause 187 Board property

This clause makes it clear that when this Act commences, any property belonging to the Agents Board vests in the Territory.

Clause 188 Proceedings and evidence

This clause facilitates a smooth transition from the repealed Act to this Act of any proceedings that may have started before the commencement date of this Act. It also makes provision for any admissible evidence for or against the board to be admissible for or against the relevant entity as set out in the clause. In addition, orders made in a proceeding by or against the board, before the commencement day, may be enforced by or against the relevant entity.

Clause 189 Pending licence applications

This clause makes it clear that a notice published under the repealed Act within 10 business days before the commencement day is taken to have been published under this Act. Also, an application for a licence under the repealed Act not decided by the board immediately before commencement day will be treated as an application under section 28 of this Act. Where the board had agreed to issue an agent's licence under the repealed Act, but it had not been issued before commencement day, the commissioner must issue the agent's licence under this Act.

Clause 190 Trust accounts

This clause makes it clear that a person who was required to do something under the repealed Act is still required to carry out their obligations when the new Act commences.

Clause 191 Administrative accounts

This clause makes it clear that moneys held in the statutory interest account and the agents administration account under the repealed Act immediately before the commencement day will be taken to be trust money held by the Territory to which the *Financial Management Act 1996* applies. This money will be transferred to a trust banking account maintained by the chief executive of the Department of Justice and Community Safety.

Clause 192 Agents fidelity guarantee fund

This clause makes provision for moneys held in the agents fidelity guarantee fund under the repealed Act to be transferred to the consumer compensation fund on commencement day of this Act. Other provisions explain what will happen when the former Act is repealed and the new Act commences.

Clause 193 Compensation claims – entitlement and beginning

This clause makes provision for a claimant who was entitled to claim compensation under the fidelity fund to claim compensation for the same amount against the consumer compensation fund.

Clause 194 Compensation claims – board

This clause makes it clear that a requirement to furnish information or produce a document under the repealed Act not complied with by the commencement day is taken to have been made by the commissioner for fair trading under sections 152 or 153. Similarly, a determination of the board under the repealed Act is taken to be a decision of the commissioner under section 154 (Decision on claims).

Clause 195 Compensation payments

This clause makes it clear that any amount payable to a claimant from the consumer compensation fund must be reduced by any amount paid to the claimant under the repealed Act for the same claim.

Clause 196 Disciplinary proceedings

This clause makes provision for the consumer and trader tribunal to deal with any disciplinary matters notified by the registrar to the board or an agent that were current under the repealed Act on commencement of this Act.

Clause 197 Surrender of licences

This clause makes it clear that an application for the surrender of a licence under the repealed act, but not yet decided before commencement day, can be dealt with under this Act.

Clause 198 Administrators

This clause continues the appointment of an administrator appointed under the repealed Act under the new Act.

Division 14.5 Auctioneers

Clause 199 Licensed auctioneers

This clause makes it clear that licensed auctioneers who sell land by auction under the repealed Act will be taken to hold a conditional real estate agent's licence from the date of commencement until 30 June 2004.

Division 14.6 Modification and expiry of pt 14

Clause 200 Regulations modifying pt 14

This clause makes provision for matters not adequately dealt with in this Part to be modified by regulation.

Clause 201 Expiry

This clause provides that Divisions 14.1 to 14.6 and the heading to division 14.7 will expire two years after the day they commence.

Division 14.7 Agents' records

Clause 202 Keeping of agents' records

The purpose of this clause is to ensure that records kept under the repealed *Agents Act 1968* are preserved for three years by agents who were licensed under that Act.

Clause 203 Expiry of pt 14

The purpose of this clause is to ensure that clause 202 (the keeping of agents' records) has its full effect.

PART 15 Repeals and consequential amendments

Clause 204 Auctioneers Act 1959, s 16 relocation

This clause facilitates the relocation of section 16 of the *Auctioneers Act 1959* on repeal to the *Fair Trading Act 1992* as new section 15A.

Clause 205 Acts repealed

This clause repeals the *Agents Act 1968* and the *Auctioneers Act 1959*.

Clause 206 Subordinate law repealed

This clause repeals the *Agents Regulations 1985* No 6.

Clause 207 Instruments repealed - sch 2

This clause repeals instruments mentioned in Schedule 2.

Clause 208 Acts amended – sch 3

This clause explains that Schedule 3 amends the *Fair Trading (Consumer Affairs) Act 1973*, the *Second-hand Dealers Act 1906* and the *Sale of Motor Vehicles Act 1977*.