



Queensland

Agents Financial Administration Bill 2010

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Agents Financial Administration Bill 2010

Contents

2010

A Bill

for

An Act to provide for the administration of agents' trust accounts, establish a claim fund to compensate persons in particular circumstances for financial loss arising from dealings with agents, and for other purposes

[s 1]

The Parliament of Queensland enacts—

Part 1 Preliminary

Division 1 Introduction

1 Short title

This Act may be cited as the *Agents Financial Administration Act 2010*.

2 Commencement

This Act commences on a day to be fixed by proclamation.

3 Act binds all persons

- (1) This Act binds all persons, including the State, and, so far as the legislative power of Parliament permits, the Commonwealth and the other States.
- (2) Nothing in this Act makes the State, the Commonwealth or any other State liable to be prosecuted for an offence.

4 Exemption—public officials

- (1) This Act does not apply to a prescribed officer in relation to trust moneys for which the prescribed officer is responsible, if another Act makes provision for the way the prescribed officer is required to deal with moneys held by the officer in trust.
- (2) In this section—
prescribed officer means—

-
- (a) an accountable officer under the *Financial Accountability Act 2009*; or
 - (b) a public service officer.

Division 2 Object

5 Main object

- (1) The main object of this Act is to protect consumers from financial loss in dealings with agents licensed under an Agents Act.
- (2) The object is to be achieved mainly by—
 - (a) regulating the way agents establish, manage and audit trust accounts; and
 - (b) establishing a claim fund to compensate persons in particular circumstances for financial loss arising from dealings with agents; and
 - (c) promoting administrative efficiency for claims made against the claim fund.

Division 3 Interpretation

6 Definitions

The dictionary in schedule 2 defines particular words used in this Act.

7 Meaning of *in charge*

- (1) A person is *in charge* of a licensee's business at a place where the licensee carries on business only if the person personally supervises, manages or controls the conduct of the licensee's business at the place.
- (2) In this section—

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licensee's business means the licensee's business carried on under the authority of the licensee's licence.

Part 2 Trust accounts

Division 1 Opening trust accounts

8 Trust account may only be opened at approved financial institution

- (1) A licensee must not open a general trust account or special trust account at a place other than the office or branch of an approved financial institution within the State.

Maximum penalty—200 penalty units.

Note—

A special trust account is a trust account created under section 13 in which an amount is held for investment at the direction of both parties to the sale.

- (2) Before opening the account, the licensee must give the manager or other officer in charge of the institution's office or branch a copy of the licensee's licence.

Maximum penalty for subsection (2)—200 penalty units.

9 Account's name

- (1) The licensee opening a general trust account must ensure that the account's name includes the words 'trust account'.

Maximum penalty—200 penalty units.

- (2) The licensee opening a special trust account must ensure that the account's name includes the words 'special trust account'.

Maximum penalty—200 penalty units.

10 Notice of account's opening, closing or name change

- (1) This section applies if a licensee does any of the following (each an *event*)—
 - (a) opens a general trust account or special trust account;
 - (b) changes the name of a general trust account or special trust account;
 - (c) closes a general trust account or special trust account.
- (2) The licensee must, under subsection (3), give the chief executive written notice of the happening of the event within 14 days of its happening.
Maximum penalty—200 penalty units.
- (3) The written notice must state—
 - (a) whether the account is a general trust account or special trust account; and
 - (b) the name of the financial institution where the account is or was kept; and
 - (c) the account name; and
 - (d) the identifying number of the financial institution; and
Editor's note—
This is commonly referred to as the bank state branch number.
 - (e) the account number.

Division 2 Payments to trust accounts

11 Application

- (1) Sections 12 and 13 apply if an amount is received by a licensee—
 - (a) for a transaction; or
 - (b) with a written direction for its use.

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Example of paragraph (b)—

an amount received by a property agent with a written direction to use it for advertising or marketing by the agent or another person

(2) In this section—

amount, received by a licensee for a transaction—

- (a) includes deposit and purchase monies for the transaction; but
- (b) does not include an amount payable to the licensee in relation to the transaction in refund of an expense the licensee was authorised to incur and did incur and for which the licensee holds a receipt.

12 Dealing with amount on receipt

A licensee must, immediately on receiving the amount—

- (a) pay it to the licensee's general trust account; or
- (b) if section 13(1) applies, invest it under section 13(2).

Example of paragraph (a)—

A licensee who collects an amount of rent for a property owner must pay the amount to the licensee's general trust account before the money can be paid to the owner.

Maximum penalty—200 penalty units or 2 years imprisonment.

13 Investments

(1) A licensee may invest the amount under subsection (2) if—

- (a) the licensee receives the amount for a sale; and
- (b) the sale is to be completed on a day that is—
 - (i) stated in the contract or ascertainable on the day the contract is entered into; and
 - (ii) more than 60 days after the amount is received; and

-
- (c) the amount is received with a direction from all parties to the sale that it be invested.
 - (2) The licensee must pay the amount as required by the direction to a special trust account with a branch of a financial institution within the State operated for the investment of the amount.

Maximum penalty for subsection (2)—200 penalty units or 2 years imprisonment.

14 No other payments to trust account

- (1) A licensee must not pay to a trust account an amount other than an amount that must be paid to the account under section 12 or 13.

Maximum penalty—200 penalty units or 1 year’s imprisonment.

- (2) However, if the licensee receives an amount consisting of trust money and other money (*non-trust money*) that can not be divided, the licensee must—
 - (a) pay the whole amount to the licensee’s general trust account; and
 - (b) draw the non-trust money from the account within 14 days after the money becomes available for drawing.

Example of amount consisting of trust money and non-trust money—

A property agent receives a single cheque for rent and services provided by the licensee, including, for example, television rental.

Maximum penalty—200 penalty units or 1 year’s imprisonment.

15 Multiple licence holders

A licensee who holds more than 1 licence is not required to keep a general trust account for each licence.

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16 Trust money not available to licensee's creditors

An amount paid, or required to be paid, to a trust account under this division can not be—

- (a) used for payment of the debt of a creditor of a licensee; or
- (b) attached or taken in execution under a court order or process by a creditor.

Division 3 Payments from trust accounts

17 When payments may be made from trust accounts

- (1) An amount paid to a trust account must be kept in the account until it is paid out under this Act.

Maximum penalty—200 penalty units or 2 years imprisonment.

- (2) An amount may be paid from a trust account only in a way permitted under this Act.

Maximum penalty—200 penalty units or 2 years imprisonment.

18 Permitted drawings from trust accounts

- (1) A licensee may draw an amount from the licensee's trust account to pay the licensee's transaction fee or transaction expenses in relation to a transaction only if—

- (a) the amount is drawn against the transaction fund for the transaction; and
- (b) the licensee is authorised to draw the amount under this section.

Maximum penalty—200 penalty units or 2 years imprisonment.

- (2) The licensee is authorised—

-
- (a) to draw an amount from the transaction fund to pay a transaction expense when the expense becomes payable; and
 - (b) when the transaction is finalised, to draw an amount from the transaction fund that is equal to the difference between—
 - (i) the balance of the transaction fund; and
 - (ii) the total of the licensee's transaction fee and any outstanding transaction expense;

to pay the person entitled to the amount or in accordance with the person's written direction; and

Example of when transaction is finalised—

the settlement of a contract for the sale of property or the termination of the contract

- (c) to draw the licensee's transaction fee from the transaction fund when the amount, if any, mentioned in paragraph (b) has been paid and when the transaction is finalised.
- (3) For subsection (2)(b) or (c), if a dispute about the transaction fund arises, the transaction is not taken to be finalised until the licensee is authorised to pay out the transaction fund under section 22.
 - (4) The licensee must pay an amount mentioned in subsection (2)(b) to the person entitled to it or in accordance with the person's written direction—
 - (a) if the person asks, in writing, for the balance—within 14 days after receiving the request; or
 - (b) if the person has not asked, in writing, for the balance—within 42 days after the person first had the right to the balance.

Maximum penalty—200 penalty units or 2 years imprisonment.

- (5) In this section—

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transaction expenses means the expenses the licensee is authorised to incur in connection with the performance of the licensee's activities for a transaction.

transaction fee means the fees, charges and commission payable for the performance of the licensee's activities for a transaction.

transaction fund means the amount held in a licensee's trust account for the transaction.

Division 4 Other trust account obligations

19 Accounting to clients

- (1) A licensee must account as required under this section to the person (*client*) who appoints the licensee to perform an activity for all amounts received in relation to a transaction, including an amount mentioned in subsection (2)(c).

Maximum penalty—200 penalty units or 2 years imprisonment.

- (2) The account must be in writing and state—
- (a) the amounts received in relation to the transaction; and
 - (b) how the amounts were or are to be paid out; and
 - (c) the source and the amount of any rebate, discount, commission or benefit that the licensee received—
 - (i) in relation to any expenses that the licensee incurred for the client in connection with the performance of a service; or
 - (ii) for referring the client to someone else for services in connection with the transaction.
- (3) The licensee must give the client the account—
- (a) if the client asks, in writing, for the account—within 14 days after receiving the request; or

- (b) if the client has not asked, in writing, for the account—within 42 days after the transaction is finalised.

20 Duties of financial institution managers

- (1) The manager or principal officer of an office or branch of a financial institution where trust money has been deposited, whether to a trust account or another account, must—
 - (a) allow an inspector, on written demand signed by the inspector, to inspect and copy any documents relating to the account; and
 - (b) immediately a licensee’s trust account is overdrawn, inform the chief executive of that fact; and
 - (c) immediately there is insufficient money in a licensee’s trust account to meet a cheque drawn on the account, inform the chief executive of—
 - (i) the amount for which the cheque is drawn; and
 - (ii) the amount in the account.

Maximum penalty—200 penalty units or 1 year’s imprisonment.

- (2) In this section—
 - licensee* includes—
 - (a) a former licensee; and
 - (b) a person who is not licensed, but who acts as a licensee.
 - trust money* includes—
 - (a) an amount that, under section 12, is required to be deposited to a licensee’s trust account; and
 - (b) an instrument for the payment of an amount mentioned in paragraph (a) if the instrument may be paid into a financial institution; and
 - (c) a security for an amount mentioned in paragraph (a) if title to the security is transferable by delivery.

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Division 5 Disputes about trust money

21 Application of div 5

- (1) This division applies if—
 - (a) a licensee holds a transaction fund for a transaction under section 18; and
 - (b) before the transaction fund is paid out under section 18, the licensee receives written notice from a party to the transaction that ownership of the fund or part of the fund is in dispute (the *amount in dispute*).
- (2) In subsection (1)—

party, to a transaction, does not include a licensee acting for a party to the transaction.

22 When amount in dispute may be paid

The licensee must not pay out the amount in dispute unless the licensee—

- (a) receives written notice—
 - (i) from all parties to the transaction stating the person who is entitled to the amount in dispute; or
 - (ii) a legal proceeding has been started in a court to decide who is entitled to the amount in dispute; or
- (b) pays the amount under section 24(3).

Maximum penalty—200 penalty units or 2 years imprisonment.

23 Where amount must be paid if notice given

The licensee must pay the amount in dispute immediately—

- (a) if notice under 22(a)(i) is received—to the person stated to be entitled to the amount or in accordance with the person's direction; or

-
- (b) if notice under section 22(a)(ii) is received—to the court in which the proceeding was started.

Maximum penalty—200 penalty units or 2 years imprisonment.

24 Dealing with amount if no notice

- (1) This section applies if the licensee does not receive a notice under section 22 within 30 days after receiving notice of the dispute.
- (2) The licensee must, within 7 days after the end of the 30 day period, give all parties to the transaction a written notice that—
 - (a) 30 days after the notice is given, the licensee will pay the amount in dispute to a stated person whom the licensee believes is entitled to receive it if the licensee has not received a notice under section 22; or
 - (b) the licensee can not decide who is entitled to the amount and is keeping it in the licensee’s trust account until the licensee receives notice under section 22.

Maximum penalty—200 penalty units or 2 years imprisonment.

- (3) If the licensee gives a notice under subsection (2)(a), the licensee may pay the amount to the person stated in the notice if the licensee does not receive a notice under section 22 within 30 days after the notice under subsection (2)(a) is given.

[s 25]

Part 3 Audit requirements

Division 1 Preliminary

25 Definitions for pt 3

In this part—

approved auditor means a person who is approved by the chief executive under section 28 to audit the licensee's trust accounts.

auditor means an approved auditor or a qualified auditor.

qualified auditor means a person who is—

- (a) registered as an auditor under the Corporations Act; or

Editor's note—

See the Corporations Act, section 1274AA (Register of disqualified company directors and other officers).

- (b) a member of CPA Australia who is entitled to use the letters 'CPA' or 'FCPA'; or
- (c) a member of The Institute of Chartered Accountants in Australia who is entitled to use the letters 'CA' or 'FCA'; or
- (d) a member of the National Institute of Accountants who is entitled to use the letters 'MNIA', 'FNIA', 'PNA' or 'FPNA'.

Division 2 Provisions about auditors

26 Principal licensee must appoint auditor

- (1) A principal licensee who is required under this Act to keep a trust account must appoint an auditor to audit the trust accounts kept or to be kept by the licensee under this Act.

Maximum penalty—200 penalty units or 1 year's imprisonment.

- (2) If the principal licensee is unable to appoint a qualified auditor to audit the licensee's trust accounts, the chief executive, if asked by the licensee, may approve another person to audit the licensee's trust accounts.

27 Application for approval as auditor

- (1) A person may apply to the chief executive to be an approved auditor for a stated licensee.
- (2) The application must—
 - (a) be made in the approved form to the chief executive; and
 - (b) establish the person's qualifications to be an approved auditor; and
 - (c) be accompanied by—
 - (i) a request by the stated licensee that the person be approved as the auditor to audit the licensee's trust accounts; and
 - (ii) evidence that the person holds current professional indemnity insurance in an amount not less than the amount prescribed under a regulation.

28 Chief executive to consider application

- (1) The chief executive must consider the application and approve, or refuse to approve, the person as an approved auditor for a stated licensee.
- (2) The chief executive may approve the person as an approved auditor if the chief executive is satisfied the person—
 - (a) is a suitable person to be an approved auditor; and
 - (b) has at least a diploma level tertiary qualification in accounting with an auditing component; and

[s 29]

- (c) holds current professional indemnity insurance in an amount not less than the amount prescribed under a regulation.
- (3) The chief executive may approve a person who meets the requirements of subsections (2)(a) and (c) but does not have the minimum qualification mentioned in subsection (2)(b) if the chief executive is satisfied—
 - (a) the person resides in a remote locality; and
 - (b) the person has the necessary skills or experience and a sufficient knowledge of this Act to perform the functions of an approved auditor; and
 - (c) there is no qualified auditor available to serve the needs of the locality.
- (4) If the chief executive decides to refuse to approve the person as an approved auditor, the chief executive must give the person an information notice within 14 days after the decision is made.
- (5) A person is not a *suitable person* for this section if the person—
 - (a) is affected by bankruptcy action; or
 - (b) is a person who has been convicted of an indictable offence involving dishonesty; or
 - (c) has been found guilty of professional misconduct or unprofessional conduct by CPA Australia, the Institute of Chartered Accountants in Australia or the National Institute of Accountants.

29 When approval of person as approved auditor ends

The approval of a person as an approved auditor ends if—

- (a) the person's appointment to audit the trust accounts of the licensee for whom the person is the approved auditor ends; or
- (b) the person is no longer a suitable person under section 28; or

-
- (c) the person no longer holds current professional indemnity insurance in an amount not less than the amount prescribed under a regulation; or
 - (d) the chief executive withdraws approval of the person as the approved auditor for the licensee under section 32.

30 Notice and evidence of auditor's appointment

- (1) This section applies if—
 - (a) a principal licensee appoints an auditor; and
 - (b) the licensee has not already advised the chief executive of the auditor's name and address under any of the following provisions—
 - (i) *Commercial Agents Act 2010*, section 14;
 - (ii) *Property Agents Act 2010*, section 22;
 - (iii) *Motor Dealers and Chattel Auctioneers Act 2010*, section 18.
- (2) The licensee must, within 1 month after the appointment, give the chief executive—
 - (a) written notice of the auditor's name and address; and
 - (b) evidence that the auditor has accepted the appointment.Maximum penalty—200 penalty units.

31 Steps to be taken if auditor's appointment ends

- (1) If a licensee's auditor resigns or the licensee ends the auditor's appointment, both the auditor and the licensee must immediately notify the chief executive of—
 - (a) the resignation or ending of the appointment; and
 - (b) the reasons for it.
- (2) An auditor or licensee who is required to give the chief executive notice under subsection (1) and fails to give the notice commits an offence.

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Maximum penalty—200 penalty units.

- (3) The licensee must appoint another auditor and, unless the licensee has a reasonable excuse, within 1 month after the resignation or ending of the appointment mentioned in subsection (1) takes effect, give the chief executive—
- (a) written notice of the auditor’s name and address; and
 - (b) evidence that the auditor has accepted the appointment.

Maximum penalty—200 penalty units.

- (4) If a licensee’s auditor dies, the licensee must—
- (a) as soon as the licensee becomes aware of the death, notify the chief executive of the death; and
 - (b) unless the licensee has a reasonable excuse, within 1 month after becoming aware of the death, appoint another auditor and give the chief executive—
 - (i) written notice of the auditor’s name and address; and
 - (ii) evidence that the auditor has accepted the appointment.

Maximum penalty—200 penalty units.

32 Chief executive may withdraw approval as approved auditor

- (1) The chief executive may withdraw the approval of a person as an approved auditor if the chief executive is satisfied that the person—
- (a) has not audited the licensee’s trust accounts in accordance with generally accepted standards of professional competency; or
 - (b) has failed to detect or report material irregularities in the operation of the licensee’s trust accounts; or
 - (c) has not properly performed the person’s functions under this Act.

-
- (2) The chief executive must give the person written notice—
 - (a) stating that the chief executive proposes to withdraw the person’s approval as an approved auditor for a stated licensee on a ground mentioned in subsection (1); and
 - (b) outlining the facts and circumstances forming the basis for the ground; and
 - (c) inviting the person to show, within a stated time of at least 21 days, why the approval should not be withdrawn.
 - (3) If the chief executive decides the ground still exists after considering any written representations within the stated time, the chief executive must—
 - (a) withdraw the person’s approval; and
 - (b) give an information notice to the person and the licensee for whom the person is the approved auditor within 14 days after the decision is made.

33 Chief executive may make information available to supervisory bodies

- (1) The chief executive may report a matter about a qualified auditor to the Australian Securities and Investment Commission or a prescribed entity of which the auditor is a member if the chief executive believes, on reasonable grounds, that the auditor—
 - (a) has not audited a licensee’s trust accounts in accordance with generally accepted standards of professional competency; or
 - (b) has failed to detect or report material irregularities in the operation of a licensee’s trust accounts; or
 - (c) has not properly performed the auditor’s functions under this Act.
- (2) The chief executive may make any information in the chief executive’s possession available to the commission or entity

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for the purposes of any investigation conducted by the commission or entity.

(3) In this section—

prescribed entity means CPA Australia, the Institute of Chartered Accountants in Australia or the National Institute of Accountants.

Division 3 Audit of trust accounts

34 Definitions for div 3

In this division—

audit month, for a licensee's licence, means—

- (a) the eighth month after the month in which the licence was first issued to the licensee and the same month in each subsequent year; or
- (b) another month specified by the chief executive by written notice given to the licensee.

Example of paragraph (a)—

If a licensee's licence was first issued to the licensee in January, the audit month for the licensee's licence is September.

audit period means—

- (a) the 12 month period in each year ending on the last day of the audit month; or
- (b) another period decided by the chief executive, either generally, by gazette notice, or by written notice given to a licensee.

audit report, for a licensee, means a report from the licensee's auditor under section 41.

trust account means a general trust account or a special trust account.

35 What trust accounts must be audited

- (1) A licensee's trust accounts must be audited for each audit period for which the licensee carried on business as a licensee and operated a trust account.
- (2) A licensee's trust accounts need not be audited for an audit period if the licensee gives the chief executive a statutory declaration that the licensee did not operate a trust account during the period.

36 Time for audit

- (1) This section applies to each audit period for which a licensee's trust accounts must be audited.
- (2) The licensee must, within 4 months after the last day of the audit month in each year or the extended period allowed by the chief executive under subsection (3)—
 - (a) have the licensee's trust accounts for the last audit period audited by the licensee's auditor; and
 - (b) file the auditor's signed original audit report with the chief executive.

Maximum penalty—200 penalty units or 2 years imprisonment.

Note—

The auditor must give the licensee a signed original audit report under section 407 (Audit reports).

- (3) The chief executive may extend the time mentioned in subsection (2) if an auditor or licensee applies in writing to the chief executive for the extension.
- (4) The application must state the grounds on which the extension is sought.
- (5) If a licensee is charged with an offence relating to a failure to file an audit report, it does not matter that the contravention happened without the licensee's authority or contrary to the licensee's instructions.

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37 Auditors—functions

- (1) An auditor has the following functions under this division—
 - (a) to inspect and audit, in each audit period, the trust accounts of each licensee by whom the auditor is engaged;
 - (b) to make an audit report for the licensee for the audit period;
 - (c) if the licensee is a licensee for the whole of the audit period—to make 2 unannounced examinations of the licensee’s trust accounts during the audit period;
 - (d) if the licensee is a licensee for less than the whole audit period, but more than 6 months of the period—to make 1 unannounced examination of the licensee’s trust accounts during the audit period.
- (2) An auditor must not make an unannounced examination of a licensee’s trust accounts within 2 months after the last day of the audit period or another unannounced examination.

38 Auditor’s advice to chief executive

An auditor must immediately give written notice to the chief executive if the auditor—

- (a) can not report that a trust account has been satisfactorily kept under this Act; or
- (b) finds, on an unannounced examination of a licensee’s trust accounts, an irregularity in relation to an account that ought to be brought to the chief executive’s notice.

Maximum penalty—200 penalty units or 1 year’s imprisonment.

39 Auditor may ask licensee to produce other accounts

- (1) This section applies if an auditor considers, to enable the auditor to decide whether a licensee’s trust accounts have been satisfactorily kept under this Act, it is necessary—

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- (a) to examine a general account of the licensee; or
 - (b) to be given information about the accounts.
- (2) The auditor may ask the licensee to produce the general account or give the information.
- (3) If the licensee refuses, the auditor must immediately give written notice to the chief executive.

Maximum penalty for subsection (3)—200 penalty units or 1 year's imprisonment.

40 Audit on ceasing to be licensee or carrying on business

- (1) This section applies if—
- (a) a licensee must keep trust accounts; and
 - (b) the licensee stops being a principal licensee.
- (2) The licensee must, within 2 months after the licensee stops being a principal licensee—
- (a) have the licensee's trust accounts audited by the licensee's auditor for the period—
 - (i) starting on the day immediately after the end of the period covered by the last audit of the trust accounts or, if the trust accounts have not previously been audited, the day on which the licensee was first required to keep trust accounts; and
 - (ii) ending on the day the licensee stops being a principal licensee; and
 - (b) file the auditor's signed original audit report with the chief executive.

Maximum penalty—200 penalty units or 2 years imprisonment.

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41 Audit reports

- (1) An auditor who audits a licensee's trust accounts must give the licensee an original signed audit report under this section.
Maximum penalty—200 penalty units or 1 year's imprisonment.
- (2) The auditor must include the following in the report—
 - (a) the audit period for which the report is made;
 - (b) the name and number of each trust account audited;
 - (c) the name of the financial institution, the office or branch of the institution where each trust account was kept and the identifying number of the office or branch;
 - (d) the licensee's name and—
 - (i) if the licensee is a corporation—the name of each licensed person in charge of the corporation's business for the audit period; and
 - (ii) if the licensee carried on business under a registered business name—the business name and the names of any persons with whom the licensee carried on the business;
 - (e) each place where the licensee carried on business as a licensee;
 - (f) a statement about whether each trust account has been satisfactorily kept under this Act;
 - (g) a statement specifying the day and result of each unannounced examination for the audit period under section 37(1);
 - (h) a statement about whether the auditor has audited the licensee's general account;
 - (i) a statement about whether any trust account has been overdrawn;
 - (j) a statement about whether a trust creditor's ledger account has been overdrawn;

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- (k) a statement about whether, for each month during the audit period—
 - (i) each trust account cash book was reconciled with the bank balance and trust ledger; and
 - (ii) an analysis was made showing the name of each person for whom an amount was held and the amount held for each person;
 - (l) the serial numbers of the trust receipts used during the audit period and the unused trust receipts produced to the auditor;
 - (m) particulars of the amounts held in trust for more than 3 months by the licensee at the last day of the audit period;
 - (n) a statement that each trust account cash book has been reconciled with the bank balance of the trust account at the last day of the audit period;
 - (o) a copy of the reconciliation of the trust account cash book and the bank balance of the trust account at the last day of the audit period;
 - (p) a statement about anything else about any trust account audited that the auditor considers should be reported to the chief executive.

Part 4 Claim fund

42 Claim fund

- (1) The claim fund is established.
- (2) The fund consists of—
 - (a) the amount standing to the credit of the claim fund, established under the repealed Act, immediately before

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the commencement of the *Property Agents Act 2010*, section 257; and

- (b) amounts payable to the fund under this Act; and
 - (c) other amounts transferred to the fund by the Treasurer.
- (3) The Treasurer must transfer amounts to the fund, appropriated from time to time, to meet claims against the fund or the remuneration and costs of a receiver or special investigator payable from the fund, for any particular financial year.
 - (4) Accounts for the fund must be kept as part of the departmental accounts of the department.
 - (5) Amounts transferred to the fund must be deposited in a departmental financial-institution account of the department, but may be deposited in an account used for depositing other amounts of the department.

43 How fund may be applied

- (1) The fund must be used to pay the amount of all claims allowed against the fund.
- (2) The fund may also be used to pay the remuneration and costs of either or both of the following—
 - (a) a receiver appointed under section 51;
 - (b) a special investigator appointed under section 74.

Note—

The remuneration and costs of a receiver are recoverable under section 68 (Recovery of remuneration and costs). The remuneration and costs of a special investigator are recoverable under section 79 (Recovery of remuneration and costs). Amounts recovered under these sections by the chief executive are paid to the fund under section 108 (Recovery of payments—general).

- (3) The Treasurer may transfer an amount from the fund to the consolidated fund.

44 Agreements with financial institutions

- (1) The chief executive may enter into an agreement for the State with a financial institution about the keeping of general trust accounts by licensees.
- (2) The chief executive may enter into an agreement only with the Minister's approval.
- (3) The agreement may provide for the following things—
 - (a) payment of interest on the whole or part of amounts held in licensees' general trust accounts to the consolidated fund;
 - (b) informing the chief executive of amounts held in licensees' general trust accounts;
 - (c) auditing licensees' general trust accounts;
 - (d) other things concerning licensees' general trust accounts.
- (4) A financial institution may pay interest to the consolidated fund under an agreement.

Part 5 Freezing trust accounts and appointing receivers and special investigators

Division 1 Definitions

45 Definitions for pt 5

In this part—

account means—

- (a) a trust account in a licensee's name with a financial institution; or

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- (b) an account in the licensee's name or in which the licensee has an interest with a financial institution; or
- (c) another account to which trust money is deposited.

defalcation means stealing, embezzlement, omitting to account, misappropriation or misapplication, or other act about property punishable by imprisonment.

holder, of an account, means the licensee or other person authorised to operate on the account.

licensee includes a former licensee and the personal representative of a deceased licensee.

money includes—

- (a) an instrument for the payment of an amount if the instrument may be paid to a financial institution; and
- (b) security for money if title to the security is transferable by delivery.

receivership property, for a receiver, has the meaning given by section 54(2).

trust money includes an amount that was, or ought, under this Act, to have been, deposited in a trust account required to be kept by a licensee.

trust property, for a licensee—

- (a) means—
 - (i) property received by the licensee in trust that has not been given to the person entitled to it or someone else under the person's direction or according to law; or
 - (ii) property that, except for the appointment of a receiver, would be receivable for another person by the licensee in trust after the receiver's appointment; or
 - (iii) trust money; and
- (b) includes computer hardware, software and discs, ledgers, books of account, vouchers, records, deeds,

files and other documents used in connection with something mentioned in paragraph (a).

Division 2 Freezing licensees' accounts

46 Chief executive may freeze licensee's accounts in particular cases

- (1) The chief executive may decide to give a direction under subsection (2) if it appears to the chief executive that any of the following persons has, or may have, stolen or misappropriated or misapplied trust money—
 - (a) a licensee;
 - (b) the person in charge of a licensee's business at a place;
 - (c) an employee of a licensee.
- (2) The chief executive may direct, by signed writing, that—
 - (a) if a claim has been made against the fund concerning the trust money, all or part of the amount to the credit of a stated account be paid to the chief executive; or
 - (b) an amount must not be drawn from a stated account other than with the chief executive's written approval; or
 - (c) a stated account may be operated only under stated conditions.
- (3) The direction must—
 - (a) be given to each holder of the account and the financial institution where the account is kept; and
 - (b) state the account to which it relates; and
 - (c) if it includes a direction under subsection (2)(c), state the conditions under which the account may be operated.
- (4) If an amount is paid to the chief executive under subsection (2)(a), the chief executive must pay the amount to the fund.

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47 Financial institution must comply with direction

- (1) After the direction has been given to a financial institution, and until it is withdrawn, the financial institution must not—
 - (a) pay a cheque or other instrument drawn on the account stated in the direction unless the cheque or instrument is also signed by the chief executive; or
 - (b) give effect to another transaction on the account that is not authorised because of the direction.

Maximum penalty—

- (a) for an individual guilty under chapter 2 of the Criminal Code of an offence—200 penalty units or 1 year’s imprisonment; or
 - (b) for a corporation—1000 penalty units.
- (2) Subsection (1) applies whether or not a copy of the direction has been given to anyone else.
 - (3) For section 46(2)(b), the chief executive’s signature on the cheque or other instrument is sufficient evidence of the chief executive’s approval to draw an amount from the account to honour the cheque or other instrument.
 - (4) A manager or principal officer in charge of an office or branch of the financial institution where the account is kept, or another officer of the financial institution, must not knowingly contravene this section.

Maximum penalty—200 penalty units or 1 year’s imprisonment.

- (5) A person to whom a direction is given does not incur a civil liability to another only because the person complies with the direction.

48 Account not to be operated unless chief executive allows

After the direction has been given to the holder of an account, and until it is withdrawn, the holder must not sign a cheque or other instrument drawn on an account stated in the direction unless the cheque or other instrument has first been signed by

the chief executive or a person authorised by the chief executive to sign the cheque or instrument.

Maximum penalty—200 penalty units or 2 years imprisonment.

49 Chief executive may operate account

- (1) This section applies if a holder of an account is unwilling to operate an account stated in a direction under section 46.
- (2) The chief executive or a person authorised in writing by the chief executive (*authorised person*) may operate on the account.
- (3) A statutory declaration made by the chief executive or authorised person to the effect that the account holder is unwilling to operate on the account is sufficient evidence to the licensee's financial institution of that fact.

50 Withdrawal of direction

- (1) The chief executive may withdraw a direction given under section 46 at any time.
- (2) If the direction is withdrawn, the chief executive must immediately give all persons who were given the direction a notice that the direction has been withdrawn.
- (3) A direction stops having effect when it is withdrawn.

Division 3 Receivers

Subdivision 1 Appointment

51 When receiver may be appointed

- (1) If the chief executive believes, on reasonable grounds, a defalcation has, or may have, been committed in relation to a

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licensee's trust account, the chief executive may appoint a receiver if—

- (a) the licensee consents to the appointment; or
- (b) the chief executive—
 - (i) gives the licensee written notice—
 - (A) stating that the chief executive proposes to appoint a receiver on the ground that a defalcation has, or may have, been committed in relation to the licensee's trust account; and
 - (B) outlining the facts and circumstances forming the basis for the ground; and
 - (C) inviting the licensee to show, within a stated time of at least 21 days, why the appointment should not be made; and
 - (ii) after considering any written representations given within the stated time, still considers the ground exists.

Note—

Under the *Judicial Review Act 1991*, part 4, a person aggrieved by an administrative decision of the chief executive can ask the chief executive to give a written statement of reasons for the decision, if they are not given. See the *Acts Interpretation Act 1954*, section 27B (Content of statement of reasons for decision) for what the chief executive must set out in the reasons.

- (2) The chief executive may immediately appoint a receiver if the chief executive believes, on reasonable grounds, a person can not obtain payment or delivery of trust property held for the person by a licensee because of—
 - (a) the licensee's mental or physical infirmity; or
 - (b) the licensee's death; or
 - (c) the abandonment of the licensee's business; or
 - (d) the licensee's disqualification from holding a licence; or

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- (e) the cancellation or suspension of the licensee's licence;
or
 - (f) a refusal to renew the licensee's licence; or
 - (g) the expiry of the licensee's licence.

52 Trust property over which receiver may be appointed

A receiver may be appointed over trust property—

- (a) held by a licensee; or
- (b) held by another person for a licensee; or
- (c) recoverable by a licensee; or
- (d) if a licensee is dead, that may be recoverable by the licensee's personal representative.

53 Who may be appointed

- (1) The chief executive may appoint a person as a receiver only if satisfied the person is appropriately qualified to perform a receiver's functions.
- (2) A person may be appointed as a receiver and a special investigator over the same trust property.

Editor's note—

See section 74 (Appointment of special investigator).

54 How receivers are appointed

- (1) The chief executive must appoint a receiver by signed notice.
- (2) The notice must state the trust property (*receivership property*) over which the receiver is appointed.
- (3) The appointment takes effect when the notice is signed.
- (4) The chief executive must give a copy of the notice to the licensee and the receiver as soon as practicable after the signing of the notice.

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- (5) If the licensee is a corporation, the licensee must give notice of the appointment to each person who was an executive officer of the corporation at the time the event giving rise to the appointment happened, unless the licensee has a reasonable excuse.

Maximum penalty for subsection (5)—

- (a) for an individual guilty of an offence under chapter 2 of the Criminal Code or for section 140—100 penalty units; or
- (b) for a corporation—500 penalty units.

Subdivision 2 Receiver's functions and powers

55 Receivers—functions

A receiver appointed under this division has the following functions—

- (a) to take possession of receivership property;
- (b) to manage receivership property;
- (c) to receive claims against receivership property;
- (d) if the licensee held receivership property in trust—
- (i) to identify the person or persons who have the right to it; and
- (ii) to distribute it under this division;
- (e) to identify any defalcation that has, or may have, been committed;
- (f) to report to the chief executive about a receivership.

56 Requiring information

- (1) A receiver may ask a person to give the receiver information the receiver reasonably requires about receivership property.

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- (2) A person must give the receiver the information, unless the person has a reasonable excuse.
Maximum penalty—200 penalty units or 1 year’s imprisonment.
 - (3) It is a reasonable excuse for a person not to give information to a receiver if doing so might tend to incriminate the person.

57 Possession of receivership property

- (1) A receiver may take or enter into possession of receivership property.
- (2) As soon as practicable after taking or entering into possession of receivership property, the receiver must give a receipt for it to the person from whom the property was taken or who held possession of the property.
- (3) The receiver must allow a person who would be entitled to the receivership property if it were not in the receiver’s possession—
 - (a) to inspect it; or
 - (b) if it is a document, to take a copy of it.
- (4) The receiver must return receivership property that the receiver is satisfied is not required for the receivership to the licensee or other person who has the right to it.
- (5) The receiver may take or enter into possession of receivership property under subsection (1) despite a lien or other security over it claimed by any person.
- (6) However, the taking or entry into possession does not affect the person’s claim to the lien or other security against a person other than the receiver.

58 Orders for possession of receivership property

- (1) This section applies if—
 - (a) a receiver requires a person in possession of receivership property to give possession of it to the receiver; and

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- (b) the person does not comply with the requirement.
- (2) The receiver may apply to a court having jurisdiction for the recovery of debts up to the amount or value of the receivership property concerned for an order for possession of the property.
- (3) On the application, the court may make any order it considers appropriate.

59 Enforcing orders

- (1) This section applies if—
 - (a) a court makes an order under section 58 for possession of receivership property against a person; and
 - (b) the person has been given a copy of the order; and
 - (c) the person has not complied with the order.
- (2) The court may make an order authorising a police officer, or the receiver or another person and a police officer—
 - (a) to enter stated premises or another place occupied by the person and search for the receivership property; and
 - (b) to seize the receivership property and move it to a place the receiver considers appropriate.
- (3) The court may also make another order it considers appropriate.

60 Improperly withdrawing, destroying or concealing receivership property

A person must not—

- (a) withdraw an amount or make a payment from an account with intent to defeat a receiver's functions; or
- (b) destroy, conceal, move from 1 place to another place, give to another or place under another's control receivership property over which a receiver has been appointed.

Maximum penalty—200 penalty units or 2 years imprisonment.

61 Dealing with receivership property

- (1) A receiver may deal with receivership property in the same way as the licensee may have lawfully dealt with the property.
- (2) Without limiting subsection (1), the receiver may do the following—
 - (a) if the licensee had no general trust account, open a general trust account;
 - (b) claim or receive a debt owing to the licensee in connection with the receivership property;
 - (c) start or defend a proceeding concerning the receivership property for the licensee;
 - (d) engage a legal representative or other agent to give advice;
 - (e) engage employees or agents to help the receiver carry out the receiver's functions;
 - (f) if the licensee had power to sell or require the sale of the receivership property, sell or require the sale of the property.

62 Obstructing receivers

A person must not obstruct a receiver in the performance of the receiver's functions or the exercise of the receiver's powers under this subdivision.

Maximum penalty—200 penalty units or 1 year's imprisonment.

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Subdivision 3 Distributing receivership property

63 Notice to claimants against receivership property

- (1) The receiver must give notice to persons who may have a claim against receivership property.
- (2) The notice may be given—
 - (a) by post; or
 - (b) by newspaper advertisement; or
 - (c) in another way the receiver reasonably thinks will bring the notice to the attention of persons who may have a claim to the receivership property.
- (3) A notice must state a time, at least 1 month after the notice is given, for particulars and grounds of a claim against the receivership property to be given to the receiver.
- (4) The claim must state—
 - (a) the event alleged to give rise to the claim; and
 - (b) when the event happened; and
 - (c) if the claimant was not immediately aware that the claimant suffered financial loss because of the event, when the claimant became aware of the financial loss; and
 - (d) all relevant particulars about the event and the financial loss; and
 - (e) the claimant's estimated financial loss.
- (5) A claim is taken to have been made on the day the claim is given to the receiver even though the claimant is unable to state all of the particulars mentioned in subsection (4).
- (6) The receiver may require the claimant to verify the claim, or part of the claim.

Example of verification—
statutory declaration

64 Access to documents

- (1) The receiver must give a person who wishes to claim against receivership property reasonable access to documents held by the receiver to allow particulars and grounds of the claim to be given.
- (2) The receiver must give the access free of charge.

65 Deciding claims

- (1) The receiver must consider all claims against receivership property and decide whether each claim is allowable.
- (2) The receiver may refuse to allow a person's claim against the receivership property if—
 - (a) the person was given notice under section 63; and
 - (b) particulars and grounds of the claim were not given within the time stated in the notice.
- (3) The receiver must refuse to allow a person's claim against the receivership property if the receiver is satisfied that the person does not have a lawful claim against the property.
- (4) If the receiver refuses a claim under subsection (2) or (3), the receiver must give the person written notice of the refusal.

66 Payment of claims

- (1) This section applies if—
 - (a) a receiver has given notice under section 63(1); and
 - (b) the time for giving particulars and grounds of claims has ended; and
 - (c) the receiver has considered the claims against receivership property.
- (2) The receiver may pay a claim allowed by the receiver only if the receivership property is enough to pay all claims allowed by the receiver.

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- (3) If the receivership property is not enough to pay all of the allowed claims, the receiver—
 - (a) may pay any part of the property that consists of money to the chief executive; and
 - (b) must give the claims the receiver has allowed and any documents in relation to the claims to the chief executive; and
 - (c) must give a report to the chief executive—
 - (i) stating that the receiver can not pay all of the claims allowed by the receiver; and
 - (ii) identifying the claims against the property that the receiver considers should be paid from the fund.
- (4) Money paid to the chief executive under subsection (3) must be—
 - (a) paid to the fund; and
 - (b) paid from the fund under section 67(3)(b).
- (5) In this section—

claim does not include a claim by the licensee.

67 Money not dealt with by receiver

- (1) This section applies to receivership property consisting of money in the receiver's possession.
- (2) The receiver must give the money to the chief executive if—
 - (a) the receiver has not dealt with it under this division; and
 - (b) the chief executive asks for it.
- (3) Money given to the chief executive under subsection (2) must be paid to the fund and be paid from the fund in the following order—
 - (a) to reimburse claims paid from the fund in relation to the licensee;

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- (b) to pay unsatisfied claims against the fund in relation to the licensee;
 - (c) to pay the remuneration and costs of a receiver appointed under section 51;
 - (d) to pay the remuneration and costs of a special investigator appointed under section 74;
 - (e) to pay claims by the licensee against the money.

Subdivision 4 Recovery of receivers' remuneration and costs

68 Recovery of remuneration and costs

- (1) The following persons are liable to reimburse the chief executive for an amount paid to the receiver, including an amount paid from the fund, for the receiver's remuneration and costs—
 - (a) the licensee;
 - (b) if the licensee is a corporation, the executive officers of the corporation when the event in relation to which the chief executive appointed the receiver happened.
- (2) If more than 1 person is liable to reimburse the chief executive, the liability of the persons is joint and several.
- (3) The chief executive may recover an amount liable to be reimbursed under subsection (1) as a debt.

Subdivision 5 Ending receivership

69 Ending receiver's appointment

A receiver's appointment ends if—

- (a) the receiver resigns by signed notice given to the chief executive; or

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- (b) the receiver or licensee applies to the chief executive to end the appointment and the chief executive approves the application; or
- (c) the receiver dies; or
- (d) the chief executive ends the appointment by signed notice given to the receiver.

70 Dealing with receivership property when appointment ends

- (1) This section applies to receivership property if—
 - (a) the receiver’s appointment ends; and
 - (b) the chief executive has not asked for the property under section 67.
- (2) If, within 14 days after the end of the receiver’s appointment, the chief executive appoints another person (*new receiver*) to be the receiver in the former receiver’s place, the former receiver must—
 - (a) give the receivership property to the new receiver as soon as reasonably practicable; or
 - (b) if the chief executive gives the former receiver a direction about how to deal with the receivership property, comply with the direction.

Maximum penalty—200 penalty units or 1 year’s imprisonment.

- (3) If a new receiver is not appointed within the 14 days, the former receiver must give the receivership property to the licensee or other person who has the right to it.

Maximum penalty—200 penalty units or 1 year’s imprisonment.

- (4) However, the chief executive may direct the former receiver to destroy or give to the chief executive any part of the receivership property consisting of documents if the documents have not been given to the person entitled to them.

- (5) The former receiver must comply with a direction under subsection (4).

Maximum penalty for subsection (5)—200 penalty units or 1 year's imprisonment.

71 Returns by receiver

- (1) A receiver must give the chief executive a report about the receivership when the chief executive directs.
- (2) The receiver must also give the chief executive a report when the receiver's appointment ends.
- (3) The report must contain the information reasonably required by the chief executive.
- (4) The receiver is not entitled to be paid for the receivership until reports required to be given under this section are given to the chief executive.

Subdivision 6 Miscellaneous

72 Receiver not personal representative

To prevent any doubt, a receiver of a deceased licensee, in performing the receiver's functions, is not to be taken to be the licensee's personal representative.

73 Receivership property free from execution or attachment

Receivership property can not be levied on or taken or attached under a judgment.

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Division 4 Special investigators

74 Appointment of special investigator

- (1) The chief executive may by written notice appoint a special investigator over a licensee's trust account if the chief executive considers the trust account has not been kept as required under this Act.
- (2) The notice must state—
 - (a) the licensee's name and the trust account; and
 - (b) the terms on which the special investigator is appointed; and
 - (c) the special investigator's functions and powers.
- (3) A copy of the notice must be given to the licensee.
- (4) The chief executive may appoint a person as a special investigator only if the chief executive is satisfied the person is appropriately qualified to perform a special investigator's functions.
- (5) An inspector may be appointed as a special investigator.

75 Special investigators—functions

A special investigator appointed under this division may perform any of the following functions stated in the investigator's notice of appointment—

- (a) inspecting the licensee's trust accounts and records that relate to the trust accounts;
- (b) preparing or constructing incomplete trust account records;
- (c) performing other accounting tasks to establish the state of the trust account;
- (d) reporting to the chief executive under section 78.

76 Special investigators—powers

- (1) The chief executive may, by signed notice, give a special investigator any or all of an inspector’s powers under the *Fair Trading Inspectors Act 2010*.
- (2) A special investigator’s powers under subsection (1) end when the special investigator’s appointment ends.

77 Licensee must comply with special investigator’s lawful requests

- (1) The licensee over whose trust account the special investigator is appointed must comply with a special investigator’s lawful requests, unless the licensee has a reasonable excuse.

Maximum penalty—200 penalty units or 1 year’s imprisonment.
- (2) The special investigator must advise the chief executive of any failure by the licensee to comply with a request.

78 Reports to chief executive

- (1) A special investigator must report to the chief executive at the time, and in the way, required by the chief executive.
- (2) However, if the special investigator considers sufficient grounds exist to appoint a receiver, the special investigator must advise the chief executive immediately of the grounds.

79 Recovery of remuneration and costs

- (1) The following persons are liable to reimburse the chief executive for any amount paid to the special investigator, including an amount paid from the fund, for the investigator’s remuneration and costs—
 - (a) the licensee over whose trust account the special investigator is appointed;
 - (b) if the licensee over whose trust account the special investigator is appointed is a corporation, the executive

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officers of the corporation when the event in relation to which the chief executive appointed the special investigator happened.

- (2) If more than 1 person is liable to reimburse the chief executive, the liability of the persons is joint and several.
- (3) The chief executive may recover an amount liable to be reimbursed under subsection (1) as a debt.

80 Ending special investigator's appointment

A special investigator's appointment ends if—

- (a) the investigator resigns by signed notice given to the chief executive; or
- (b) the investigator dies; or
- (c) the investigator's notice of appointment states the appointment ends when an event happens and the event happens; or
- (d) the chief executive ends the appointment by signed notice given to the investigator.

Part 6 Jurisdiction of QCAT

81 Jurisdiction

For this Act, QCAT has the following jurisdiction—

- (a) to hear and decide claims, other than minor claims, against the fund;
- (b) to review decisions of the chief executive in relation to minor claims;
- (c) to review a decision of the chief executive stated in schedule 1.

Part 7 Claims against the fund

Division 1 Preliminary

82 Definitions for pt 7

In this chapter—

claimant means a person who makes a claim against the fund.

claim notice see section 89(1).

financial loss, suffered by a person, if evidenced by a judgment of a court, does not include interest awarded on the judgment.

licensee includes a former licensee and a person who is not licensed, but who acts as a licensee.

marketeting contravention means a contravention of any of the following by a relevant person—

- (a) the *Property Agents Act 2010*, section 224, 225 or 226;
- (b) section 573A, 573B or 573C of the repealed Act.

Editor's note—

For claims relating to offences mentioned in paragraph (b), see section 151 (Claim fund).

registered office see the *Property Agents Act 2010*, section 100.

relevant person means any of the following—

- (a) a property agent under the *Property Agents Act 2010*;
- (b) an employee or agent of, or a person carrying on business with, the property agent; or
- (c) a person having charge or control, or apparent charge or control, of the property agent's registered office or business.

respondent see section 89(1).

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83 What is the purchase of a *non-investment residential property*

A person purchases a *non-investment residential property* only if—

- (a) the property is a residential property; and
- (b) either of the following has been assessed in relation to the purchase—
 - (i) a concession, under the *Duties Act 2001*, chapter 2, part 9, for transfer duty;
 - (ii) a concession, under the repealed *Stamp Act 1894*, section 55A, for stamp duty.

Division 2 Making and dealing with claims

84 General time limit for making claims

- (1) This section applies to a claim against the fund other than a claim because of, or arising out of, a marketeering contravention in relation to the purchase of a non-investment residential property.
- (2) A person may make the claim against the fund only if the person makes the claim within the earlier of the following—
 - (a) for a claim in relation to an event under the following provisions, 1 year after the person becomes aware that the person has suffered financial loss because of the happening of the event—
 - (i) *Commercial Agents Act 2010*, section 112;
 - (ii) *Property Agents Act 2010*, section 188;
 - (iii) *Motor Dealers and Chattels Auctioneers Act 2010*, section 213;
 - (b) 3 years after the happening of the event that caused the person’s financial loss.

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- (3) However, if the person starts a proceeding in a court to recover the person's financial loss within the time permitted to make a claim under subsection (2), the person may make the claim within 3 months after the proceeding in the court ends.
 - (4) Subsection (3) does not limit the time allowed under subsection (2) to make a claim.
 - (5) In this section—
court includes QCAT.

85 Time limit for making particular claims relating to marketeering contraventions and non-investment residential property

- (1) A person may make a claim against the fund for capital loss because of, or arising out of, a marketeering contravention in relation to the person's purchase of a non-investment residential property only if—
 - (a) the person has within 1 year after the contract date, given the chief executive notice in the approved form that the person intends to make the claim; and
 - (b) the person makes the claim within 6 years after the contract date.
- (2) The approved form must include the matters mentioned in section 87(2)(a) to (d).
- (3) The QCAT Act, section 61 does not apply to empower QCAT to extend the time permitted to do a thing mentioned in subsection (1)(a) or (b).
- (4) In this section—
contract date means the day on which the contract for the purchase was entered into.

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86 Time limit for a claim notified by receiver

Despite section 84 or 85, a claim given under section 66(3)(b) to the chief executive by a receiver is taken to have been made within the time allowed under section 84 or 85.

87 Making claims other than particular claims relating to marketeering contraventions and non-investment residential property

- (1) This section applies to a claim against the fund, other than a claim for loss because of, or arising out of, a marketeering contravention in relation to the purchase of a non-investment residential property.
- (2) The claim must be made to the chief executive in the approved form and state—
 - (a) the event alleged to give rise to the claim; and
 - (b) when the event happened; and
 - (c) if the claimant was not immediately aware that the claimant suffered financial loss because of the happening of the event, when the claimant became aware of the financial loss; and
 - (d) all relevant particulars about the event and the financial loss; and
 - (e) the claimant's estimated financial loss.
- (3) The claim is taken to have been made on the day the claim is given to the chief executive even though the claimant is unable to state all of the particulars mentioned in subsection (2).
- (4) The chief executive may require the claimant to verify the claim, or part of the claim.

Example of verification—

statutory declaration

- (5) If the claim is not made within the time allowed under section 84, the chief executive must give the person a notice in the approved form stating that—

- (a) the claim is out of time; and
- (b) the person may apply to QCAT, within 14 days after being given the notice, for an extension of time within which to make the claim.

88 Making particular claims relating to marketeering contraventions and non-investment residential property

- (1) This section applies to a claim against the fund for capital loss because of, or arising out of, a marketeering contravention in relation to the purchase of a non-investment residential property.
- (2) The claim must—
 - (a) be made to the chief executive in the approved form; and
 - (b) state the realised capital loss claimed.

Editor's note—

See also division 5 (Deciding financial loss for non-investment residential property).

- (3) A purported claim that does not substantially comply with subsection (2) is of no effect.
- (4) The chief executive may require the claimant to verify the claim or part of the claim.

Example of verification—

statutory declaration

- (5) To remove any doubt, it is declared that if the purchase was by more than 1 person, only 1 claim may be made.
- (6) A claim mentioned in subsection (5) may be made by 1 of the purchasers or by 2 or more of the purchasers jointly.

89 Chief executive to give respondent notice of claim

- (1) The chief executive must give notice of the claim (*claim notice*) to the person or persons (*respondent*) whose actions are alleged to have given rise to the claim.

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- (2) The claim notice must be accompanied by a copy of the claim.
- (3) The respondent may—
 - (a) give the chief executive any information relevant to the claim; or
 - (b) attempt to settle the claim with the claimant.
- (4) The respondent must give the chief executive any information relevant to the claim within 14 days after the claim notice is received by the respondent.
- (5) If the respondent and claimant settle the claim, the respondent must immediately advise the chief executive in writing and provide evidence of the settlement.
- (6) If the chief executive is satisfied that the claim has settled, the chief executive may treat the claim as having been withdrawn.
- (7) In this section—

claim does not include a claim given to the chief executive by a receiver under section 66(3)(b).

90 Corporation to give notices in relation to claim

- (1) This section applies if the respondent is a corporation.
- (2) The respondent must give written notice of the claim, within 14 days after the claim notice is received by the respondent, to each person who was an executive officer of the corporation at the time the event alleged to give rise to the claim happened, unless the respondent has a reasonable excuse.

Maximum penalty—

- (a) for an individual guilty of an offence under chapter 2 of the Criminal Code or for section 140—100 penalty units; or
- (b) for a corporation—500 penalty units.
- (3) An executive officer mentioned in subsection (2) is taken to be a respondent to the claim.

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- (4) The respondent is taken to have given the notice to an executive officer if the notice is sent to the residential and business address of the officer last known to the respondent.
 - (5) The respondent must give the chief executive, within 21 days after the claim notice is given to the respondent—
 - (a) written notice of the name and last known residential and business address of each person who was an executive officer of the corporation at the time the event alleged to give rise to the claim happened; and
 - (b) a copy of the notice to the former executive officer given under subsection (2) and information about when the notice was given.

Maximum penalty for subsection (5)—

- (a) for an individual guilty of an offence under chapter 2 of the Criminal Code or for section 140—100 penalty units; or
- (b) for a corporation—500 penalty units.

91 Dealing with claims that have not settled

- (1) If the claim has not settled within 28 days after the claim notice is given to the respondent, the claimant may give the chief executive written notice that the claimant wants to proceed with the claim.
- (2) If a notice under subsection (1) relates to a minor claim, the chief executive is to decide the minor claim.
- (3) If a notice under subsection (1) relates to a claim other than a minor claim—
 - (a) the chief executive must refer the claim to QCAT; and
 - (b) QCAT is to decide the claim.

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92 Inspector may investigate claims and report and related documents may be referred to QCAT

- (1) The chief executive may direct an inspector to investigate a claim that has not settled.
- (2) If an inspector investigates a claim, the inspector must prepare a report about the claim and give a copy of the report to the chief executive.
- (3) The chief executive must give a copy of the report to the claimant and the respondent and, if the report is about a claim to be decided by QCAT, to the president of QCAT.
- (4) The chief executive may also give documents relating to the claim to the claimant and the respondent (*the parties*) and, if the claim is to be decided by QCAT, to the president of QCAT whether or not a report is given to the parties and QCAT under subsection (3).

Division 3 Minor claims

93 Procedure for deciding minor claims

- (1) This division applies to a minor claim the chief executive must decide.
- (2) The chief executive, by written notice, must invite the claimant and the respondent (the *parties*) to give the chief executive written comments in relation to the inspector's report prepared under section 92 within 14 days after giving the notice.
- (3) If the chief executive receives comments from 1 or both parties, the chief executive must provide the other party with a copy of the comments and invite that party to give the chief executive any further comments within 14 days after giving the notice.
- (4) The chief executive, by written notice, may ask the claimant or respondent for the further information or documents the chief executive reasonably requires to decide the claim.

- (5) The chief executive must have regard to any report prepared by an inspector under section 92 and the parties' comments when deciding the claim.
- (6) The chief executive must decide the claim without a hearing.

94 Amendment of claim

- (1) The chief executive may, at any time before deciding the claim, amend the particulars of the claim in the way the chief executive considers appropriate—
 - (a) on application, if the chief executive is satisfied the amendment is of a formal or minor nature and no party is unfairly prejudiced by the amendment; or
 - (b) on the chief executive's own initiative, if all the parties agree.
- (2) The amended claim is taken to be the claim.

95 Respondent fails to respond to claim

- (1) This section applies if the chief executive is satisfied that the respondent—
 - (a) has been given notice of the claim, but has not responded to the claim; or
 - (b) can not be located after the making of reasonable inquiries into the respondent's whereabouts.
- (2) The chief executive may consider and decide the claim in the absence of any comments or submissions made by the respondent.

96 Deciding minor claims

- (1) The chief executive may allow the claim, wholly or partly, or reject the claim.
- (2) However, the chief executive may allow the claim only if satisfied, on the balance of probabilities, that—

[s 97]

- (a) an event mentioned in any of the following provisions happened—
 - (i) *Commercial Agents Act 2010*, section 112(1);
 - (ii) *Property Agents Act 2010*, section 188(1);
 - (iii) *Motor Dealers and Chattels Auctioneers Act 2010*, section 213(1); and
- (b) the claimant suffered financial loss because of the happening of the event.
- (3) If the chief executive allows the claim, wholly or partly, the chief executive must—
 - (a) take into account any amount the claimant might reasonably have received or recovered if not for the claimant's neglect or default; and
 - (b) decide the amount of the claimant's financial loss; and
 - (c) name the person who is liable for the claimant's financial loss.

97 Notifying decision

- (1) The chief executive must give the parties an information notice for the chief executive's decision under section 96(1) (the *reviewable decision*).
- (2) The information notice must include the following additional information—
 - (a) the chief executive's findings in relation to the facts of the case;
 - (b) if the decision is that an amount be paid to the claimant from the fund—
 - (i) that the respondent named in the decision is liable to reimburse the fund to the extent of the amount paid to the claimant from the fund; and
 - (ii) if more than 1 person is named as being liable to reimburse the fund, that the liability of the persons named is joint and several;

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- (c) that if no application is made to have the decision reviewed within the time allowed under the QCAT Act—
 - (i) the decision is binding on the parties; and
 - (ii) if the decision is to allow the claim and authorise payment from the fund, the respondent named in the decision as liable to reimburse the fund is liable to reimburse the fund to the extent of the amount paid to the claimant from the fund.

98 Party may ask QCAT to review chief executive's decision

A party who is dissatisfied with the chief executive's decision under section 96 may apply, as provided under the QCAT Act, to QCAT for a review of the decision.

99 Chief executive's decision binds the parties

If no application for review of the chief executive's decision is made within the time allowed under the QCAT Act—

- (a) the chief executive's decision is binding on the claimant and the respondent; and
- (b) the amount paid to the claimant from the fund in accordance with the decision may be recovered by the chief executive as a debt owing to the chief executive by the respondent named in the decision; and
- (c) the respondent may not subsequently challenge the correctness of the decision or the amount payable.

Division 4 Claims other than minor claims

100 Deciding claims other than minor claims

- (1) QCAT may allow the claim, wholly or partly, or reject the claim.

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- (2) However, QCAT may allow the claim only if satisfied, on the balance of probabilities, that—
 - (a) an event mentioned in any of the following provisions happened;
 - (i) *Commercial Agents Act 2010*, section 112(1);
 - (ii) *Property Agents Act 2010*, section 188(1);
 - (iii) *Motor Dealers and Chattels Auctioneers Act 2010*, section 213(1); and
 - (b) the claimant suffered financial loss because of the happening of the event.
- (3) If QCAT allows the claim, wholly or partly, QCAT must—
 - (a) take into account—
 - (i) any amount the claimant might reasonably have received or recovered if not for the claimant’s neglect or default; and
 - (ii) any amount ordered to be paid to the claimant as compensation under the *Property Agents Act 2010*, section 209, 226 or 248; and
 - (b) decide the amount of the claimant’s financial loss; and
 - (c) name the person who is liable for the claimant’s financial loss.

Division 5 Deciding financial loss for non-investment residential property

101 Application of div 5

This division applies if the chief executive or QCAT is deciding a claimant’s financial loss for realised capital loss because of, or arising out of, a marketeering contravention in relation to the purchase of a non-investment residential property.

Editor's note—

See also the *Property Agents Act 2010*, section 190 (Claims limited to realised loss).

102 General test for working out loss

- (1) Subject to section 103, the financial loss is the amount of the difference between the contract price or value for the property paid by the claimant and the contract price or value for the sale of the property by the claimant (the *on-sale*).
- (2) The loss is only realised if the on-sale has been completed.

103 Adjustment for on-sale not at market value

- (1) The chief executive or QCAT must decide whether the contract price or value for the on-sale reasonably reflected the property's market value when the contract was entered into.
- (2) If the chief executive or QCAT decides the contract price or value did not reasonably reflect the property's market value—
 - (a) the chief executive or QCAT must fix what the reasonable market value of the property was when the contract was entered into; and
 - (b) for section 102(1), the contract price or value is taken to be that fixed market value.

Division 6 Payment of claims and liability of persons for payments from the fund

104 Payment of claims

- (1) If a claim is allowed under section 96 or 100 or on a review of the chief executive's decision, the chief executive must authorise payment from the fund in the amount decided by the chief executive or QCAT.
- (2) A payment under subsection (1)—

[s 105]

- (a) must not be made—
 - (i) for a minor claim—until the end of the period allowed for review of the chief executive’s decision and, if a review is applied for, until the review and any appeal is finally decided; or
 - (ii) otherwise—until the end of the period allowed for appeal and, if an appeal is made, until the appeal is finally decided; and
- (b) is taken to be in full settlement of the claim against the fund.
- (3) This section is subject to section 106.

105 Liability for payment from the fund

- (1) This section applies if—
 - (a) a person (the *responsible person*) is named in the chief executive’s decision or QCAT’s order as being liable for a claimant’s financial loss; and

Editor’s note—

See sections 96 (Deciding minor claims), 100 (Deciding claims other than minor claims) and 118 (Orders QCAT may make on claim hearing).
 - (b) an amount has, under section 104, been paid from the fund to the claimant in settlement of the claimant’s claim.
- (2) Each person as follows is jointly and severally liable to reimburse the fund to the extent of the amount paid to the claimant—
 - (a) the responsible person;
 - (b) if the responsible person is a corporation, each person who was an executive officer of the corporation when the relevant event mentioned in any of the following provisions happened—
 - (i) *Commercial Agents Act 2010*, section 112(1);

- (ii) *Property Agents Act 2010*, section 188(1);
 - (iii) *Motor Dealers and Chattels Auctioneers Act 2010*, section 213(1).
- (3) The chief executive may recover from each person mentioned in subsection (2) as a debt an amount for which the person is, under the subsection, liable to reimburse the fund.
 - (4) Before taking action to recover the amount of the debt, the chief executive must give a letter of demand to the debtor requiring the debtor to pay the amount to the chief executive within 28 days after receiving the letter.

106 Limits on recovery from fund

- (1) A claimant can not recover from the fund an amount more than the balance of the claimant's financial loss after deducting from the claimant's loss—
 - (a) the amount, including the value of all benefits, received or recovered by the claimant from a source other than the fund in reduction of the loss; and
 - (b) the amount, including the value of all benefits, the chief executive or QCAT considers the claimant might reasonably have received or recovered if not for the claimant's neglect or default.

Examples of paragraph (a)—

- 1 compensation received from the licensee for the loss
 - 2 a payment from a receiver for the loss
- (2) A claimant may not recover from the fund for a single claim an amount more than the amount prescribed under a regulation.
 - (3) Also, the claimant may not recover more than \$35000 from the fund for a single claim for financial loss if the claim relates to a non-investment residential property purchased by the claimant because of, or arising out of, a marketeering contravention.

[s 107]

- (4) A regulation may prescribe the total amount that may be paid from the fund because of, or arising out of, a contravention, failure to ensure clear title to a vehicle, stealing, misappropriation or misapplication by a single person.
- (5) Interest is not payable from the fund in relation to a claim allowed against the fund.

107 Notice of other recovery

A claimant must give the chief executive written notice of an amount or benefit, other than an amount from the fund, received by the claimant in relation to the claimant's financial loss, whether before or after the claim is paid.

Maximum penalty—200 penalty units or 3 years imprisonment.

Division 7 Reimbursements to fund

108 Recovery of payments—general

The chief executive must pay to the fund any amount recovered by the chief executive in satisfaction of an amount paid from the fund.

109 Recovery of overpayments

- (1) This section applies if a claimant who has received a payment from the fund recovers—
 - (a) an amount more than the claimant is entitled to recover under section 106 (*overpayment*); or
 - (b) a thing capable of physical delivery in relation to which the claimant received a payment from the fund.
- (2) The claimant must—
 - (a) reimburse the overpayment to the fund; or
 - (b) for a thing capable of physical delivery—

- (i) deliver the thing to the chief executive in accordance with the chief executive's direction; or
- (ii) reimburse to the fund the amount of the payment from the fund the person received in relation to the thing.

Maximum penalty—200 penalty units.

- (3) The chief executive may recover the overpayment or the amount of the payment from the fund the person received in relation to the thing as a debt owing to the chief executive by the person.
- (4) If the chief executive receives a thing, the chief executive may sell the thing in the way the chief executive decides.

Part 8 Review proceedings

110 Person dissatisfied with chief executive's decision may seek review

A person who is dissatisfied with a decision of the chief executive made under a provision specified in schedule 1 may apply to QCAT to have the decision reviewed (*application for review*).

111 Stay of operation of decisions

- (1) A decision of the chief executive, other than a decision made under section 46, being reviewed is stayed for the purpose of securing the effectiveness of the review.
- (2) However, the period of a stay does not extend past the time when QCAT decides the application.

[s 112]

Part 9 Proceedings generally

Division 1 Extending time

112 QCAT may extend time

- (1) QCAT may extend the time within which to file the claim or seek review of a decision of the chief executive if QCAT is satisfied—
 - (a) the application is made—
 - (i) for a claim—within the time mentioned in the notice given under section 87(5)(b); or
 - (ii) for a review of a decision of the chief executive—within 42 days after the person receives notice of the decision to be reviewed; and
 - (b) it is appropriate to extend time having regard to—
 - (i) the reasons for not making the claim or seeking the review within the time allowed; and
 - (ii) the application generally; and
 - (iii) for a claim, the relative hardship that an extension of time or a refusal to extend time would place on the claimant or respondent; and
 - (iv) the justice of the matter generally.
- (2) No appeal lies against QCAT's decision under this section.

Division 2 Proceedings involving a claim against the fund

113 Chief executive may make submissions

- (1) This section applies if a proceeding before QCAT involves a claim against the fund.

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- (2) The chief executive may make submissions to QCAT, including submissions about liability for the claimant's financial loss.
 - (3) Subsection (2) applies whether or not the chief executive is a party to the proceeding.

114 Application of QCAT Act, s 131

To remove any doubt, it is declared that the reference in the QCAT Act, section 131(2) to a person includes a reference to the chief executive.

Division 3 Applications for reimbursement orders

115 Application for reimbursement order

- (1) This section applies if—
 - (a) the chief executive decides to allow, wholly or partly, a claim against the fund under section 96; and
 - (b) the respondent to the claim named in the decision as liable to reimburse the fund has not done so as required under a letter of demand given to the respondent under section 105(4).
- (2) The chief executive may apply, as provided under the QCAT Act, to QCAT for an order that a respondent reimburse the fund.
- (3) The application must be accompanied by the following documents—
 - (a) a copy of the claim against the fund in relation to which the application is made;
 - (b) copies of the written notice of the chief executive's decision, the decision and the information notice given under section 97;

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- (c) a copy of the letter of demand given under section 105(4);
- (d) a statutory declaration by the chief executive stating—
 - (i) the amount paid from the fund in settlement of the claim; and
 - (ii) the amount of any payment received from the respondent in satisfaction of the claim.

116 Respondent to be advised of application for reimbursement order

- (1) On receiving the application, the registrar must—
 - (a) fix a date for consideration of the application by QCAT; and
 - (b) give a copy of the application and the accompanying documents to the respondent; and
 - (c) advise the respondent that QCAT will make a reimbursement order if satisfied that—
 - (i) the chief executive has made a decision in relation to the claim against the fund; and
 - (ii) under the chief executive’s decision the respondent is liable to reimburse the fund in a stated amount; and
 - (iii) an information notice under section 97 was given to the respondent; and
 - (iv) the respondent did not apply to QCAT under section 98 to have the decision reviewed; and
 - (v) a letter of demand was sent to the respondent under section 105(4); and
 - (vi) the respondent has not paid the stated amount within the time allowed under the letter of demand.
- (2) The registrar must invite the respondent to make written submissions for QCAT’s consideration about when and in

what way the respondent intends to satisfy the amount paid from the fund in settlement of the claim.

- (3) Submissions made under subsection (2) must be given to the registrar by a date notified to the respondent being a day at least 7 days before the day fixed for consideration of the application.

Division 4 QCAT’s orders

117 Stopping contraventions

- (1) This section applies if QCAT is satisfied, on application by the chief executive, that a person is doing, or is about to do, something in contravention of this Act.
- (2) This section does not apply if the *Property Agents Act 2010*, section 206 applies.
- (3) QCAT may, by order, prohibit the person who is doing or is about to do the thing (the ***prohibited person***) from starting or continuing the thing.
- (4) QCAT may make an order under this section on the chief executive’s application made without notice to the prohibited person but, in that case, QCAT must allow the prohibited person a reasonable opportunity to show cause why the order should not be confirmed.
- (5) If QCAT, after considering the prohibited person’s evidence and submissions, if any, and any further evidence or submissions of the chief executive, is not satisfied the order should continue in force, QCAT must rescind the order.
- (6) A person must not contravene an order under this section.
Maximum penalty—540 penalty units.
- (7) An order under this section has effect on the giving of a copy of the order to the prohibited person.

[s 118]

118 Orders QCAT may make on claim hearing

QCAT may make the following orders in relation to a claim against the fund—

- (a) an order allowing the claim, wholly or partly, or rejecting the claim;
- (b) an order stating that a named person is liable for a claimant's financial loss and the amount of the loss;
- (c) an order about recovery of an amount payable in relation to a claim;
- (d) an order that no amount is recoverable in relation to a claim.

119 Reimbursement orders

- (1) QCAT must consider an application for a reimbursement order and any written submissions made by the respondent for the application.
- (2) QCAT must make a reimbursement order if satisfied that—
 - (a) the chief executive has made a decision in relation to a claim against the fund; and
 - (b) under the chief executive's decision the respondent is liable to reimburse the fund in a stated amount; and
 - (c) written notice of the chief executive's decision, a copy of the decision and an information notice under section 97 was given to the respondent; and
 - (d) the respondent did not apply to QCAT to have the chief executive's decision reviewed under section 98; and
 - (e) the respondent has not paid the stated amount within the time allowed under the letter of demand.
- (3) If QCAT makes a reimbursement order, the order must state that the respondent is liable to pay to the chief executive a stated amount within a stated period.

120 When QCAT order takes effect

- (1) A QCAT decision or order in a proceeding involving the claim fund takes effect—
 - (a) if all parties to the proceeding are present when the decision or order is made—when the decision or order is made; or
 - (b) otherwise—when the decision or order is published.
- (2) A decision or order involving the claim fund must be published under the QCAT Act, section 125.

Division 5 Chief executive's right of appeal

121 Appeal

- (1) The chief executive may appeal to the appeal tribunal against any decision of QCAT, but only on the ground of error of law.
- (2) In this section—

appeal tribunal means QCAT as constituted under the QCAT Act, section 166 for the purposes of an appeal.

Part 10 Injunctions and undertakings

Division 1 Injunctions

122 Injunctions

An injunction under this part may be granted by the District Court against a person (*respondent*) at any time.

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123 Who may apply for injunction

The following persons may apply to the District Court for an injunction—

- (a) the chief executive;
- (b) a person aggrieved by the respondent's conduct.

124 Grounds for injunction

The District Court may grant an injunction if the court is satisfied that a person has engaged, or is proposing to engage, in conduct that constitutes or would constitute—

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

125 Court's powers for injunctions

(1) The power of the District Court to grant an injunction restraining a person from engaging in conduct may be exercised—

- (a) whether or not it appears to the court that the person intends to engage again, or to continue to engage, in conduct of that kind; and
- (b) whether or not the person has previously engaged in conduct of that kind.

-
- (2) The power of the court to grant an injunction requiring a person to do an act or thing may be exercised—
 - (a) whether or not it appears to the court that the person intends to fail again, or to continue to fail, to do the act or thing; and
 - (b) whether or not the person has previously failed to do the act or thing.
 - (3) An interim injunction may be granted under this part until the application is finally decided.
 - (4) The District Court may rescind or vary an injunction at any time.

126 Terms of injunction

- (1) The District Court may grant an injunction in the terms the court considers appropriate.
- (2) Without limiting the court's power under subsection (1), an injunction may be granted restraining a person from carrying on a business as a licensee (whether or not the person is licensed or the business is carried on as part of, or incidental to, the carrying on of another business)—
 - (a) for a stated period; or
 - (b) except on stated terms and conditions.
- (3) Also, the court may grant an injunction requiring a person to take stated action, including action to disclose information or publish advertisements, to remedy any adverse consequences of the person's contravention of this Act.

127 Undertakings as to costs

If the chief executive applies for an injunction under this part, no undertaking as to damages or costs may be required or made.

Division 2 Undertakings

128 **Chief executive may seek undertaking after contravention**

- (1) If the chief executive believes, on reasonable grounds, a person has contravened or been involved in a contravention of this Act, the chief executive may, by written notice given to the person—
 - (a) state the act or omission the chief executive believes is the contravention; and
 - (b) ask the person to give the chief executive a written undertaking that the person will not continue or repeat the act or omission.
- (2) If—
 - (a) the person gives the undertaking and, if the contravention is conduct consisting of a series of acts or omissions, the person stops the conduct; and
 - (b) the chief executive accepts the undertaking;

the chief executive can not start an offence proceeding against the person for the contravention, unless the chief executive withdraws the undertaking under section 130.

129 **Undertaking about other matter**

Without limiting section 128, the chief executive may accept an undertaking given by a person for this section about anything for which the chief executive or an inspector has a function or power.

Example of type of undertaking for this section—

an undertaking to publish corrective advertising

130 **Variation and withdrawal of undertakings**

- (1) If the chief executive accepts the undertaking, it may be varied or withdrawn at any time by—

-
- (a) the person who gave it, but only if the chief executive agrees to the variation or withdrawal; or
 - (b) the chief executive, if the chief executive believes, on reasonable grounds—
 - (i) that, before it was accepted, the person who gave it contravened this Act in a way unknown to the chief executive; and
 - (ii) had the chief executive known about the contravention, the chief executive would not have accepted the undertaking or would not have accepted it unless its terms were changed.
- (2) The chief executive may also withdraw the undertaking if the chief executive believes, on reasonable grounds, it is no longer necessary.
 - (3) If the chief executive varies or withdraws, or agrees to the variation or withdrawal of, the undertaking, the chief executive must give the person who gave it written notice of its variation or withdrawal.
 - (4) The variation or withdrawal takes effect when written notice of the variation or withdrawal is received by the person.

131 Enforcement of undertakings

- (1) If the chief executive believes, on reasonable grounds, a person has contravened a term of an undertaking, the chief executive may apply to the District Court for an order under this section.
- (2) If the court is satisfied that the person has contravened the term, the court may make 1 or more of the following orders—
 - (a) an order directing the person to comply with the term;
 - (b) an order directing the person to pay to the State an amount that is not more than the direct or indirect financial benefit obtained by the person from, and reasonably attributable to, the contravention;

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- (c) an order directing the person to pay compensation to someone else who has suffered loss or damage because of the contravention;
 - (d) an order directing the person to give a security bond to the State for a stated period;
 - (e) another order the court considers appropriate.
- (3) The District Court may order the forfeiture to the State of all or part of a security bond given by a person under subsection (2)(d) if—
- (a) the chief executive applies to the court for the order; and
 - (b) the court is satisfied that the person contravened the undertaking during the period for which the bond was given.

132 Register of undertakings

- (1) The chief executive must keep a register of each undertaking given to the chief executive by a person under this part.
- (2) The register must contain a copy of the undertaking.
- (3) A person may, on payment of any fee that may be prescribed under a regulation, inspect, or get a copy of details in, the register—
 - (a) at a place or places decided by the chief executive; or
 - (b) by using a computer.
- (4) A person may pay the fee, in advance or in arrears, under an arrangement approved by the chief executive.
- (5) The register may be kept in any way the chief executive considers appropriate.
- (6) The chief executive may publish the information contained in the register on the department's website.

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

Division 1 **General contraventions**

133 **Offence to deal with trust account**

A person must not operate on a licensee's trust account unless the person is—

- (a) the licensee; or
- (b) a person actually employed by the licensee and authorised by the licensee to operate on the trust account; or
- (c) otherwise permitted under this Act to operate on the licensee's trust account.

Maximum penalty—200 penalty units or 3 years imprisonment.

134 **False or misleading statements**

- (1) A person must not, for this Act, state anything to an official the person knows is false or misleading in a material particular.

Maximum penalty—200 penalty units or 2 years imprisonment.

- (2) In this section—

official means the chief executive or a public service employee.

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135 False or misleading documents

- (1) A person must not, for this Act, give an official a document containing information the person knows is false or misleading in a material particular.

Maximum penalty—200 penalty units or 2 years imprisonment.

- (2) Subsection (1) does not apply to a person if the person, when giving the document—
 - (a) informs the official, to the best of the person’s ability, how it is false or misleading; and
 - (b) if the person has, or can reasonably obtain, the correct information, gives the correct information.

- (3) A person must not make an entry in a document required or permitted to be made or kept under this Act knowing the entry to be false or misleading in a material particular.

Maximum penalty—200 penalty units or 2 years imprisonment.

- (4) In this section—

official means the chief executive or a public service employee.

Division 2 Evidentiary matters

136 Evidentiary provisions

- (1) This section applies to a proceeding under this Act.
- (2) A signature purporting to be the signature of the chief executive or an inspector is evidence of the signature it purports to be.
- (3) A certificate purporting to be signed the chief executive, a member of QCAT, the registrar or an inspector stating any of the following matters is evidence of the matter—
 - (a) a stated document is—

-
- (i) an order, direction, requirement or decision, or a copy of an order, direction, requirement or decision, given or made under this Act; or
 - (ii) a notice, or a copy of a notice, given under this Act; or
 - (iii) a record, or a copy of a record, kept under this Act; or
 - (iv) a document, or a copy of a document, kept under this Act;
- (b) on a stated day, a stated person—
 - (i) was, or was not, the holder of a stated licence; or
 - (ii) was given a stated notice, order, requirement or direction under this Act.

137 Entries in licensee’s documents

An entry in a document kept by or belonging to a licensee or found in the licensee’s premises is evidence that the entry has been made by or with the authority of the licensee.

Division 3 Proceedings

138 Proceedings for an offence

- (1) Subject to subsection (2), a proceeding for an offence against this Act must be taken in a summary way under the *Justices Act 1886* within the later of the following—
 - (a) 1 year after the offence is committed;
 - (b) 6 months after the commission of the offence comes to the complainant’s knowledge, but within 2 years after the commission of the offence.
- (2) A proceeding for an indictable offence may be taken, at the prosecution’s election—

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- (a) by way of summary proceedings under the *Justices Act 1886*; or
- (b) on indictment.
- (3) A proceeding against a person for an indictable offence must be before a magistrate if it is a proceeding—
 - (a) for the summary conviction of the person; or
 - (b) for an examination of witnesses in relation to the charge.
- (4) If a proceeding for an indictable offence is brought before a justice who is not a magistrate, jurisdiction is limited to taking or making a procedural action or order within the meaning of the *Justices of the Peace and Commissioners for Declarations Act 1991*.
- (5) If—
 - (a) a person charged with an indictable offence asks at the start of a summary proceeding for the offence that the charge be prosecuted on indictment; or
 - (b) the magistrate hearing a charge of an indictable offence considers the charge should be prosecuted on indictment;
 the magistrate—
 - (c) must not decide the charge as a summary offence; and
 - (d) must proceed by way of a committal proceeding.
- (6) If a magistrate acts under subsection (5)—
 - (a) any plea of the person charged, made at the start of the proceeding, must be disregarded; and
 - (b) any evidence brought in the proceeding before the magistrate decided to act under subsection (5) is taken to be evidence in the proceeding for the committal of the person for trial or sentence; and
 - (c) before committing the person for trial or sentence, the magistrate must make a statement to the person under the *Justices Act 1886*, section 104(2)(b).

- (7) The maximum penalty that may be imposed on a summary conviction of an indictable offence is 200 penalty units or 1 year's imprisonment.
- (8) In this section—
indictable offence means an offence against this Act for which the maximum penalty of imprisonment is more than 2 years.

139 Responsibility for acts or omissions of representatives

- (1) This section applies in a proceeding for an offence against this Act.
- (2) If it is relevant to prove a person's state of mind about a particular act or omission, it is enough to show—
 - (a) the act was done or omitted to be done by a representative of the person within the scope of the representative's actual or apparent authority; and
 - (b) the representative had the state of mind.
- (3) An act done or omitted to be done for a person by a representative of the person within the scope of the representative's actual or apparent authority is taken to have been done or omitted to be done also by the person, unless the person proves the person could not, by the exercise of reasonable diligence, have prevented the act or omission.
- (4) In this section—
offence includes a contravention of this Act for which an amount may be ordered by the District Court or QCAT to be paid as a money penalty.
representative means—
 - (a) of a corporation—an executive officer, employee or agent of the corporation; or
 - (b) of an individual—an employee or agent of the individual.

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state of mind, of a person, includes—

- (a) the person’s knowledge, intention, opinion, belief or purpose; and
- (b) the person’s reasons for the intention, opinion, belief or purpose.

140 Executive officers must ensure corporation complies with Act

- (1) The executive officers of a corporation must ensure that the corporation complies with this Act.
- (2) If a corporation commits an offence against a provision of this Act, each of the executive officers of the corporation also commit an offence, namely, the offence of failing to ensure that the corporation complies with the provision.

Maximum penalty—the penalty for the contravention of the provision by an individual or, if the penalty is expressed to be for this section, the expressed penalty.

- (3) Evidence that the corporation has been convicted of an offence against a provision of this Act is evidence that each of the executive officers committed the offence of failing to ensure that the corporation complies with the provision.
- (4) However, it is a defence for an executive officer to prove that—
 - (a) if the officer was in a position to influence the conduct of the corporation in relation to the offence—the officer took all reasonable steps to ensure the corporation complied with the provision; or
 - (b) the officer was not in a position to influence the conduct of the corporation in relation to the offence.
- (5) For subsection (4)(a), it is sufficient for the executive officer to prove that the act or omission that was the offence was done or made without the officer’s knowledge despite the officer having taken all reasonable steps to ensure the corporation complied with the provision.

141 Power of court

- (1) A court may, in addition to any other penalty it may impose, order that a licensee's licence be suspended for a stated period or cancelled if the licensee has been convicted of an offence against this Act.
- (2) The court may also order that a person convicted of an offence against this Act be disqualified from holding a licence for a stated period or permanently.
- (3) The court may make an order under subsection (1) or (2)—
 - (a) on the chief executive's application; or
 - (b) on its own initiative.
- (4) If an order is made by a court under this section on the court's own initiative, the court must cause a copy of the order to be given to the chief executive.

142 Allegations of false or misleading representations or statements etc.

In any proceeding for an offence against this Act involving a false or misleading statement, representation or entry, or false or misleading information, it is enough for a charge to state that the statement, representation, entry or information was 'false or misleading'.

Part 12 General

143 Public warning statements

- (1) The Minister or chief executive may make or issue a public statement identifying and giving warnings or information about the commission of offences against this Act and persons who commit the offences.
- (2) The statement may identify particular offences and persons.

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- (3) The Minister or chief executive must not make or issue a statement under this section unless satisfied that it is in the public interest to do so.

144 Civil remedies not affected

Nothing in this Act affects or limits any civil remedy that a person may have against a licensee or another person in relation to any matter.

145 Criminal Proceeds Confiscation Act 2002 not limited

Nothing in this Act limits the *Criminal Proceeds Confiscation Act 2002*.

146 Delegation—chief executive

- (1) The chief executive may delegate the chief executive's powers, other than power under section 143, to an appropriately qualified public service employee.

- (2) In subsection (1)—

appropriately qualified includes having the qualifications, experience or standing appropriate to exercise the power.

Example of standing—

the level at which a person is employed within the department

147 Approved forms

The chief executive may approve forms for use under this Act.

148 Review of Act

- (1) The Minister must ensure the operation of this Act is reviewed.

-
- (2) The review must start within 3 years after the commencement of this section.
 - (3) The Minister must table in the Legislative Assembly a report on the outcome of the review as soon as practicable after the review is finished.

149 Regulation-making power

- (1) The Governor in Council may make regulations under this Act.
- (2) Without limiting subsection (1), a regulation may be made about the following—
 - (a) ways in which amounts may be paid from a trust account;
 - (b) imposing a penalty for a contravention of a regulation of not more than 20 penalty units;
 - (c) the audit of trust accounts and documents;
 - (d) the keeping of records, including the form in which a record is kept;
 - (e) the keeping of receipts and evidence of expenditure;
 - (f) the length of time a document required to be kept under this Act is to be kept.

Part 13 Transitional provisions

150 Definitions for ch 0

In this chapter—

commencement means the commencement of this section.

previous, if followed by a provision number, means the provision with that number under the repealed Act.

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151 Claim fund

- (1) The rights and liabilities of the claim fund under the repealed Act (the *former fund*) are taken to be the rights and liabilities of the claim fund under this Act (the *current fund*).
- (2) A claim that has been made against the former fund, and not finished before the commencement, continues as if it were a claim against the current fund.
- (3) If, before the commencement, a person could have made a claim against the former fund but did not make the claim, the person may make the claim against the current fund.
- (4) If, before the commencement, the chief executive had started a proceeding to recover an amount paid out of the former fund, the proceeding is taken to have been started by the chief executive as if the amount had been paid out of the current fund.
- (5) If, had the repealed Act not been repealed, the chief executive could start a proceeding to recover an amount paid out of the former fund, the chief executive may start the proceeding as if the amount had been paid out of the current fund.
- (6) This Act applies to a proceeding under subsection (4) or (5), with necessary changes.

152 Continuation of existing investigations

An investigation started under the repealed Act that was not finished before the commencement is taken to be an investigation started under this Act.

153 Existing special investigators

A person who held an appointment as a special investigator under the repealed Act immediately before the commencement is taken, on the commencement, to be appointed as a special investigator under this Act.

154 Existing right to review

- (1) This section applies if—
 - (a) immediately before the commencement, a person could have applied to the tribunal under previous section 98 or 110 for a review of a decision of the chief executive; and
 - (b) on the commencement the person has not made the application; and
 - (c) the time allowed for making the application under the QCAT Act has not expired.
- (2) The following applies—
 - (a) the person may apply to QCAT for the review; and
 - (b) QCAT may hear and decide the review.

155 Existing review proceedings

- (1) This section applies if—
 - (a) immediately before the commencement, a person applied to the tribunal under the repealed Act for a review of a decision under previous section 98 or 110; and
 - (b) on the commencement, the review had not been finally decided.
- (2) QCAT may review, or continue to review, the decision.

156 Legal proceedings

- (1) A legal proceeding brought under the repealed Act that has not been finished before the commencement may be continued and finished under the repealed Act.
- (2) Subsection (3) applies if—
 - (a) a legal proceeding has not, but could have, been started under the repealed Act because of an event that happened before the commencement; and

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- (b) the proceeding is about an event for which a legal proceeding can be started under this Act; and
 - (c) the time allowed for bringing the proceeding has not expired.
- (3) The legal proceeding may be started under this Act.

157 Injunctions relating to pre-commencement conduct

- (1) An injunction granted by the District Court under the repealed Act continues to be a valid injunction under this Act according to its terms.
- (2) The provisions of this Act relating to injunctions apply to an injunction continued under subsection (1).
- (3) In addition to section 124, the District Court may also grant an injunction if the court is satisfied that a person has, before the commencement, engaged in conduct that constituted—
 - (a) a contravention of the repealed Act; or
 - (b) an attempt to contravene the repealed Act; or
 - (c) aiding, abetting, counselling or procuring a person to contravene the repealed Act; or
 - (d) inducing or attempting to induce, whether by threats, promises or otherwise, a person to contravene the repealed Act; or
 - (e) being in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of the repealed Act; or
 - (f) conspiring with others to contravene the repealed Act.

158 Undertakings relating to pre-commencement conduct

- (1) An undertaking given by a person to the chief executive under the repealed Act continues to be a valid undertaking under this Act according to its terms.

-
- (2) The provisions of this Act relating to undertakings apply to an undertaking continued under subsection (1).
 - (3) Section 128 also applies if the chief executive reasonably believes a person has, before the commencement, contravened or been involved in a contravention of the repealed Act.

159 Continuation of register of undertakings

The register of undertakings kept under the repealed Act is continued in existence and taken to be the register of undertakings under this Act.

160 Chief executive's acts and decisions

- (1) This section applies to an act done or a decision made by the chief executive under the repealed Act that may be done lawfully by the chief executive under this Act.
- (2) The act or decision is taken to have been done or made by the chief executive under this Act.

161 Existing approved financial institutions

A financial institution that was an approved financial institution under the repealed Act immediately before the commencement, is taken to be an approved financial institution under this Act.

162 Existing agreements with financial institutions

- (1) This section applies to an agreement entered into between the chief executive and an approved financial institution under the repealed Act about the keeping of general trust accounts by licensees.
- (2) The agreement is taken to be an agreement entered into between the chief executive and a financial institution about the keeping of general trust accounts by licensees under this Act.

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163 Existing trust accounts

A general trust account or special trust account opened under the repealed Act is taken to be a general trust account or special trust account under this Act.

164 Existing auditors

- (1) This section applies if, immediately before commencement, a person was an approved auditor for a stated licence under the repealed Act, section 394.
- (2) The auditor is taken to be an approved auditor for the licence under this Act.

165 New auditors

- (1) This section applies if a person had applied to the chief executive to be an approved auditor for a licensee and the application had not been decided immediately before commencement.
- (2) On the commencement, the application is taken to be made under this Act.

166 Existing audits

- (1) This section applies if an audit had been commenced under the repealed Act and the audit had not been completed immediately before commencement.
- (2) The requirements for audits under the repealed Act continue to apply.

167 Existing disputes about trust money

A dispute about trust money arising prior to the commencement is taken to be a dispute arising under this Act.

168 Existing receivers

- (1) A receiver of property appointed by the chief executive under the repealed Act is taken to be a receiver over the property appointed under this Act.
- (2) If the receiver appointed by the committee is in possession of the property immediately before the commencement, the receiver is taken to be in possession of the property under this Act.

169 Receivership property

- (1) This section applies if an order was made under the repealed Act immediately before commencement for a person in possession of receivership property to give possession of it to a receiver.
- (2) The order is taken to have been made under this Act.

170 Proceedings for offences under the repealed Act

- (1) This section applies if a person is alleged to have committed an offence against any of the following provisions of the repealed Act before the commencement—
 - (a) section 375(1) or (2), 376(1) or (2) or 377(2);
 - (b) section 379, 380(2) or 381(1) or (2);
 - (c) section 384(1) or (2), 385(1) or (4) or 386(1);
 - (d) section 388, 389 or 390(2);
 - (e) section 392(1), 396(2) or 397(2), (3) or (4);
 - (f) section 402(2), 404 or 405(3);
 - (g) section 406(2), 407(1) or 413(1) or (4);
 - (h) section 414, 420(5), 422(2);
 - (i) section 426; 428 or 436(2), (3) or (5);
 - (j) section 443(1), 475(2) or (5) or 493;
 - (k) section 495(2), 529A(6) or 558;

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- (1) section 580, 582(1), 583(1) or (3) or 591(2).
- (2) Despite the Criminal Code, section 11, proceedings for the offence may be started or continued, and the court may hear and decide the proceedings, as if the repealed Act had not been repealed.

171 References to repealed Act

In an Act or document, a reference to the repealed Act may, if the context permits, be taken as a reference to this Act.

Schedule 1 Decisions subject to review

sections 81 and 110

- section 28(1) (Chief executive to consider application)
- section 32(3) (Chief executive may withdraw approval as approved auditor)
- section 46(1) (Chief executive may freeze licensee's accounts in particular cases)

Schedule 2 Dictionary

section 6

account, for part 5, see section 45.

affected by bankruptcy action, in relation to an individual, means the individual—

- (a) is bankrupt; or
- (b) has compounded with creditors; or
- (c) has otherwise taken, or applied to take, advantage of any law about bankruptcy.

Agents Acts means any or all of the following Acts—

- (a) *Commercial Agents Act 2010*;
- (b) *Motor Dealers and Chattel Auctioneers Act 2010*;
- (c) *Property Agents Act 2010*.

application for review see section 110.

approved auditor, for part 3, see section 25.

approved financial institution means a financial institution that has entered into an agreement with the chief executive under section 44.

arrangement includes agreement, promise, scheme, transaction (with or without consideration), understanding and undertaking (whether express or implied).

audit month, for part 3, division 3, see section 34.

auditor, for part 3, see section 25.

audit period, for part 3, division 3, see section 34.

audit report, for part 3, division 3, see section 34.

business address means—

- (a) for a licensee carrying on business under a license—the address where the activities under the license are performed; or
- (b) for a licensee who is in charge of another licensee’s business—the address of the place of business where the licensee is to be in charge.

claimant, for part 7, see section 82.

claim fund means the claim fund established under section 42.

claim notice, for part 7, see section 82.

conviction includes a plea of guilty or a finding of guilt by a court, but does not include a plea of guilty or a finding of guilt by a court if no conviction is recorded by the court.

defalcation, for part 5, see section 45.

employ includes engage on a contract for services or commission and use the services of, whether or not for reward.

executive officer, for a corporation, means any person, by whatever name called and whether or not the person is a director of the corporation, who is concerned, or takes part, in the management of the corporation.

financial loss, for part 7, see section 82.

former licensee means a person who held a licence under this or the repealed Act.

fund means the claim fund.

holder—

- (a) of an account, for part 5, see section 45; or
- (b) of a licence, means the person in whose name the licence is issued.

in charge see section 7.

information notice means a notice complying with the QCAT Act, section 157(2).

inspector means an inspector appointed under the *Fair Trading Inspectors Act 2010*.

licence means a licence issued under an Agents Act.

licensed, in relation to a person, means licensed under an Agents Act.

licensee—

- (a) generally, means the holder of a licence under an Agents Act, that is in force; and
- (b) for part 5, see section 45; and
- (c) for part 7, see section 82.

marketeering contravention, for part 7, see section 82.

minor claim, against the fund, means a claim of not more than \$10000.

misleading includes deceptive.

money, for part 5, see section 45.

non-investment residential property, for part 7, see section 83.

obstruct includes hinder, delay and attempt to obstruct.

on-sale see section 102(1).

principal licensee means a licensee that carries on business under the licensee's licence on the licensee's own behalf.

qualified auditor, for part 3, see section 25.

receivership property, for part 5, see section 45.

registered office see section 82.

registrar means the principal registrar under the QCAT Act.

relevant person, for part 7, see section 82.

repealed Act means the *Property Agents and Motor Dealers Act 2000*.

representation includes a statement, promise, publication and other representation made in any way.

respondent—

- (a) for part 7, see section 82; and
- (b) for part 10, see section 122.

reward includes remuneration of any kind including, for example, any fee, commission or gain.

sell includes agree to sell, advertise or display for sale, attempt to sell, have for sale, negotiate for a sale, and in any way be concerned in selling.

trust account—

- (a) generally, means a trust account kept under this Act; and
- (b) for part 3, division 3, see section 34.

trust money, for part 5, see section 45.

trust property, for part 5, see section 45.