

Estate Agents (Amendment) Bill

EXPLANATORY MEMORANDUM

PART 1—PRELIMINARY

- Clause 1 sets out the purpose of the Bill.
- Clause 2 provides for the commencement of the Bill. Parts 1 and 6 of the Bill comes into operation on the day on which it receives the Royal Assent. The remaining provisions of the Bill come into operation on proclamation or, if not already proclaimed, on 1 February 2000.
- Clause 3 provides that the **Estate Agents Act 1980** is the Principal Act.

PART 2—DUTIES OF ESTATE AGENTS

- Clause 4 amends section 4 of the Principal Act by amending the definition of "estate agent". The effect of the amendment is to allow any person to compile information and prepare reports on dealings with or disposition of any real estate or businesses on behalf of any other person.

Clause 4 further amends section 4 by inserting a definition of "retail shopping centre office" and by amending the definition of "branch office". The effect of the amendment of the definition of "branch office" is that a retail shopping centre office is not a branch office under the Act.

- Clause 5 inserts a new section 30AAA into the Principal Act.
- Section 30AAA(1) allows an agent's representative to manage one or more estate agency offices if each estate agency office so managed is in a retail shopping centre. Where an agent's representative manages more than one estate agency office in a retail shopping centre, each of the estate agency offices must be situated in a retail shopping centre that is owned by the same person or by a related body corporate. Further, where an agent's representative manages one or more estate agency offices in a retail shopping centre, the only estate agency business that may

be carried on at each of the estate agency offices is limited to one or more of the activities set out in sub-section (1).

Sub-section (2) allows a licensed estate agent to manage more than one estate agency office if each additional office so managed is in a retail shopping centre. Where an estate agent manages more than one estate agency office in a retail shopping centre, each of the estate agency offices must be in a retail shopping centre that is owned by the same person or by a related body corporate. Further, where an estate agent manages one or more estate agency offices in a retail shopping centre, the only estate agency business that may be carried on at each of the additional estate agency offices is limited to one or more of the activities set out in sub-section (2)(c).

Sub-section (3) defines "related body corporate", "related retail shopping centre" and "retail shopping centre" for the section.

PART 3—MATTERS RELATING TO MONEY

Clause 6 inserts a new section 49B into the Principal Act.

The new section provides that the amount payable to an estate agent by the agent's principal for outgoings must not exceed the actual amount payable by the agent for those outgoings. It sets out the manner in which discounts, rebates and commissions received or receivable by an estate agent in respect of outgoings are to be dealt with.

Clause 7 amends section 50 of the Principal Act by removing a reference in sub-section (1) to a repealed sub-section.

The clause further amends section 50(1) by inserting a paragraph (c) that provides that the agent shall not be entitled to sue for or recover or retain any commission or money in respect of any outgoings for or in respect of any transaction unless the agent has complied with new section 49B in respect of the outgoings of the transaction.

The clause further amends section 50 by inserting new sub-sections (4A) to (4C).

New section 50(4A) creates a new offence in respect of the receipt or retention or demand by an estate agent of an amount in contravention of new section 49B, the maximum penalty for

which is, in the case of a natural person, 5 years imprisonment or 600 penalty units or both or, in the case of a corporation, 600 penalty units.

New section 50(4B) provides that the offence is an indictable offence and new section 50(4C) provides that in addition to the imposition of a penalty under new section 50(4A) the Court may order that the estate agent refund any excess or improper amount received or retained by the agent.

These new sections are in addition to the provisions of the **Crimes Act 1958** relating to secret commissions or gifts.

- Clause 8 amends section 59 of the Principal Act by inserting a new sub-section (1A). The new sub-section provides that an estate agent is not obliged to deposit trust money in the agent's trust account if the person for whom or on whose behalf the money is received gives the agent, before or at the same time as the agent receives the money, a written direction to pay the money to another person, or in accordance with the direction and the agent complies with that direction.

Where, for example, an estate agent receives a bond in respect of a residential tenancy from a tenant, the estate agent may pay the bond directly to the Residential Tenancies Bond Authority, if the tenant gives the agent a written direction to that effect.

- Clause 9 amends section 64A of the Principal Act by inserting a new sub-section (5). The new sub-section provides that the Director of the Office of Fair Trading and Business Affairs may recover the costs of an audit under section 64A from an estate agent if the audit report reveals that the agent has contravened the Principal Act or the regulations in relation to the keeping of trust accounts. An audit under section 64A is an audit of the accounts of trust money of an estate agent that is ordered by the Director.

- Clause 10 amends section 75(1) of the Principal Act by inserting a new paragraph (fa). The new paragraph allows for payment out of the Estate Agents' Guarantee Fund of costs and expenses incurred by or in relation to the Victorian Civil and Administrative Tribunal's Residential Tenancies List, including the fees and remuneration payable to the members of the Tribunal.

Clause 11 amends section 76(3) of the Principal Act by inserting two new paragraphs.

New section 76(3)(g) allows for application from the Estate Agents' Guarantee Fund of an amount of money for the purpose of advising, assisting or providing information to or in respect of purchasers or providers or potential purchasers or providers of, or other persons involved in the provision of, domestic building services under domestic building contracts.

New section 76(3)(h) allows for application from the Estate Agents' Guarantee Fund of an amount of money for the purpose of advising, assisting or providing information in respect of credit contracts within the meaning of the Consumer Credit (Victoria) Code relating to the purchase of real estate or the purchase of domestic building services under domestic building contracts.

PART 4—INSPECTION POWERS

Clause 12 amends section 4 of the Principal Act to insert definitions of "inspector" and "OFTBA Act" into the Principal Act.

Clause 13 repeals section 70 of the Principal Act.

Clause 14 inserts a new Part VIIA into the Principal Act, that provides as follows:

New section 91A defines "financial institution", "licensed estate agent", "money", "occupier" and "trust account" for Part VIIA.

New section 91B requires an inspector to produce an identity card before exercising a power or during the exercise of a power, when asked. Production of an identity card is not required when an inspector exercises a power by writing to a person. A penalty of 10 penalty units applies for a contravention of section 91B.

Section 91C(1) requires a licensed estate agent to keep available for inspection at all reasonable times at each office at which the agent carries on the business of an estate agent all trust accounts and other documents relating to that business.

Section 91C(2) requires a former licensed estate agent whose licence has been cancelled or surrendered in the last seven years to make all trust accounts and other documents relating to the former business available for inspection by an inspector.

Section 91C(3) requires a licensed estate agent whose licence is suspended to make all trust accounts and other documents relating to the business of the estate agent as an estate agent available for inspection by an inspector during the period of the suspension.

Section 91C(4) requires an estate agent who has a principal office outside Victoria when required to produce or make available to an inspector all trust accounts and other documents relating to the business carried on by the agent as an estate agent in Victoria.

A penalty of 10 penalty units applies for a contravention of each sub-section of section 91C.

Section 91D(1) empowers an inspector to require a licensed estate agent as defined for the purposes of this Part to answer questions, to supply information and to produce documents relating to the estate agent's business as an estate agent.

New section 91E empowers an inspector to require any person who has possession, custody or control of documents relating to a licensed estate agent's business as an estate agent to answer questions, to supply information and to produce documents relating to that business.

New section 91F provides that the Director of the Office of Fair Trading and Business Affairs or an inspector, with the written consent of the Director, may request a Minister, a public statutory authority, a municipal council or the Chief Commissioner of Police to answer questions or to supply information relating to a licensed estate agent's business as an estate agent. The person or entity so requested must comply with the request.

New section 91G provides that the Director of the Office of Fair Trading and Business Affairs or an inspector, with the written consent of the Director, may require a publisher, broadcaster, telecommunications operator, postal operator or financial institution to answer questions or to supply information relating to a licensed estate agent's business as an estate agent.

New section 91H empowers an inspector to inspect, copy, take extracts from, seize, secure and retain documents produced to the inspector under section 91D or 91E. The section further

provides that the inspector must not require a person to produce a document other than at the person's place of business or the Office of Fair Trading and Business Affairs without the person's consent.

New section 91I provides that an inspector, with the written approval of the Director of the Office of Fair Trading and Business Affairs, may apply to the Magistrates' Court for an order requiring a person to answer questions or to supply information relating to a licensed estate agent's business as an estate agent.

New section 91J provides that an inspector may enter and search premises, seize anything, examine goods, take samples of goods, inspect documents, make copies of documents and take extracts from documents with the consent of the occupier after the inspector has produced the inspector's identity card, and informed the occupier of the purpose of the search, of the occupier's rights to refuse consent and of the use to which anything seized may be put, and asked the occupier to sign a form recording the consent.

New section 91K empowers an inspector, at any time that the premises are open for business or between the hours of 9 a.m. and 5 p.m. and after producing the inspector's identity card, to enter and search any premises at which a licensed estate agent is carrying on business, to seize or secure against interference anything believed to be connected with a contravention of the Principal Act or regulations, and to inspect or make copies or take extracts from any documents on the premises.

New section 91L provides that an inspector, with the written approval of the Director, may apply to the Magistrates' Court for a search warrant to enter premises and search for, seize, secure against interference, examine and inspect and make copies of or take extracts from anything named in the warrant.

New section 91M provides that an inspector executing a search warrant must announce his or her entry and give an opportunity for unforced entry unless a person's safety or the effective execution of the warrant necessitates otherwise.

New section 91N provides that an inspector must identify him or herself to the occupier or, in the occupier's absence, to any other

person present, and give the occupier or that other person a copy of the search warrant.

New section 91O empowers an inspector to seize or take a sample of any thing not described in the search warrant if the inspector believes on reasonable grounds that the thing is of a kind which could have been included in the warrant or will afford evidence of a breach of an OFTBA Act, and, in the case of seizure, that seizure is necessary to prevent the thing's concealment, loss or destruction or use in a contravention of the Principal Act or an OFTBA Act.

New section 91P empowers an inspector executing a search warrant to issue an embargo notice in relation to any thing that cannot be seized and removed. The section further provides for a penalty of 100 penalty units for dealing with the thing contrary to the embargo notice.

Section 91P(3) provides that it is a defence to prosecution for the offence against the section to prove that the movement of the thing was for the purpose of its protection.

Section 91P(4) provides that a dealing with the thing in contravention of the section is void.

New section 91Q provides for an inspector to give to the person from whom a document is seized, a certified copy of the document, which can be used in evidence in place of the original.

New section 91R provides that a seized item must be returned if the reason for its seizure ceases to exist and that it must, in any case, be returned within 3 months unless proceedings have commenced within that period or the Magistrates' Court has extended the period.

New section 91S provides that an inspector may, within 3 months of seizure of an item, apply to the Magistrates' Court for an extension of the retention period. The section further provides for the making of the order by the Magistrate's Court.

New section 91T provides that an inspector exercising a power of entry who produces the inspector's identity card to the occupier of the premises, or the occupier's agent or employee, may require that person to provide information, documents and reasonable assistance to the inspector.

New section 91U makes it an offence for anyone to refuse or fail, without reasonable excuse, to comply with a requirement under Part VIIA. A penalty of 100 penalty units applies in respect of the offence.

New section 91V provides that a person is not excused from answering questions or producing documents under Part VIIA on the ground of self incrimination, but if the person claims that an answer to a question may be self-incriminating, the answer cannot be used in criminal proceedings other than in respect of the falsity of the answer.

New section 91W makes it an offence for a person to give an inspector information that the person believes to be false or misleading, or to produce to an inspector a document that he or she knows to be false or misleading without indicating its false or misleading nature and, if practicable, providing correct information. A penalty of 100 penalty units applies in respect of the offence.

New section 91X provides for sections 120 (inspectors to be permitted to enter premises open to the public and to purchase goods or services), 135 (offence to hinder or obstruct inspector), 136 (offence to impersonate an inspector), 137 (inspectors to report exercise of powers of entry to Director), 138 (Director to keep register of such reports) and 139 (Director to investigate complaints) of the **Fair Trading Act 1999** to apply to Part VIIA.

New section 91Y provides for the giving of written requirements and the provision of documents by registered post.

New section 91Z makes it an offence for an inspector to reveal certain information and for exceptions to that offence in respect of information given to a Court, Tribunal, law enforcement agency or the Business Licensing Authority or with the written authority of the Director or the person to whom the information relates. A penalty of 25 penalty units applies in respect of the offence.

Clause 15 inserts new sections 92D and 92E into the Principal Act.

New section 92D provides that the Business Licensing Authority may require a licensed estate agent to answer questions or provide information relating to the business of the licensed

estate agent. The section provides that it is an offence to refuse or fail, without reasonable excuse, to comply with a requirement of the Authority. A penalty of 100 penalty units applies in respect of the offence.

New section 92E provides that the licensed estate agent is not excused from answering questions or producing documents under section 92D on the ground of self incrimination, but if the licensed estate agent claims that an answer to a question may be self-incriminating, the answer cannot be used in criminal proceedings other than in respect of the falsity of the answer.

PART 5—INFRINGEMENT NOTICES

Clause 16 inserts new division headings into Part VIII of the Principal Act.

Clause 17 inserts a new Division 2 into Part VIII of the Principal Act that provides as follows:

New section 98 defines "authorised officer" and "prescribed offence" for the Division.

New section 98A provides that an authorised officer may service an infringement notice and for how the notice may be served.

New section 98B provides for the matters that must be stated in the infringement notice.

New section 98C provides that the infringement penalty for an offence against the regulations is the amount prescribed by the regulations as the infringement penalty.

New section 98D provides for the circumstances in which an authorised officer may accept late payment of the infringement penalty.

New section 98E provides for the withdrawal of an infringement notice and for how a withdrawal notice may be served. The section also provides that if an infringement notice is withdrawn, the amount of any infringement penalty paid must be refunded.

New section 98F provides that if the infringement penalty is paid and the infringement notice is not withdrawn, the payment expiates the offence and no proceedings may be taken against the person on whom the notice was served in respect of the

offence and no conviction is recorded against the person for the offence.

New section 98G provides that the payment of an infringement penalty is not an admission of guilt in relation to the offence or of liability for the purpose of any civil claim or proceeding arising from the occurrence of the offence and does not prejudice any such civil claim or proceeding. The section also provides that the payment must not be referred to in a report provided to a court for sentencing purposes.

New section 98H provides for the filing of a charge in respect of an offence to which an infringement notice relates if the penalty is not paid or the notice is withdrawn.

New section 98I provides for the circumstances in which the infringement penalty may be enforced in accordance with the provisions of the **Magistrates' Court Act 1989**.

New section 98J provides that the issue of an infringement notice does not prevent the conduct of an inquiry by the Victorian Civil and Administrative Tribunal into an estate agent or agent's representative for any act or omission for which the notice was issued.

Clause 18 amends section 99 of the Principal Act by inserting a new section 99(gh).

New section 99(gh) provides that the Governor in Council may make regulations to prescribe offences in respect of which an infringement notice may be issued and the penalties that apply if those offences are dealt with by infringement notice.

PART 6—FUNDRAISING APPEALS ACT 1998

Clause 19 amends section 5(3)(c) of the **Fundraising Appeals Act 1998** to provide that soliciting or receiving a benefit on behalf of an organisation from a current member of the organisation is an exception to the definition of "fundraising appeal".