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# ELIZABETHAE II REGINAE

A.D. 1988

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No. 66 of 1988

An Act to amend the Land Agents, Brokers and Valuers Act, 1973.

[Assented to 1 November 1988]

The Parliament of South Australia enacts as follows:

## Short title

1. (1) This Act may be cited as the *Land Agents, Brokers and Valuers Act Amendment Act, 1988*.

(2) The *Land Agents, Brokers and Valuers Act, 1973*, is in this Act referred to as "the principal Act".

## Commencement

2. (1) Sections 1, 2, 5, 6, 7, 8, 9 and 12 will come into operation on the day on which this Act is assented to by the Governor.

(2) The remaining sections will come into operation on a day to be fixed by proclamation.

## Interpretation

3. Section 6 of the principal Act is amended—

(a) by inserting after the definition of "money" in subsection (1) the following definitions:

"mortgage" means a legal or equitable mortgage over land:

"mortgage financier" means a person who—

(a) is—

(i) an agent or land broker;

or

(ii) an associate of an agent or land broker;

and

(b) receives money from another on the understanding that the money will be lent to a third person on the security of a mortgage;

and

(b) by inserting after subsection (5) the following subsection:

- (6) For the purposes of this Act, a person is an associate of another if—
- (a) they are partners;
  - (b) one is a spouse, parent or child of the other;
  - (c) they are both trustees or beneficiaries of the same trust, or one is a trustee and the other is a beneficiary of the same trust;
  - (d) one is a body corporate and the other is a director of the body corporate;
  - (e) one is a body corporate and the other is a person who has a legal or equitable interest in five per cent or more of the share capital of the body corporate;
  - (f) a chain of relationships can be traced between them under any one or more of the above paragraphs.

### Interpretation

4. Section 62 of the principal Act is amended—

(a) by striking out from subsection (1) the definitions of “agent” and “associate” and substituting the following definition:

“agent” includes—

- (a) a land broker;
- (b) a mortgage financier;
- (c) a person who carries on a business of a prescribed class;

(b) by striking out from subsection (1) the definitions of “financial business” and “financier”;

and

(c) by striking out subsection (2).

### The Agents' Indemnity Fund

5. Section 75 of the principal Act is amended by striking out subsection (4) and substituting the following subsection:

(4) Money standing to the credit of the fund must be applied by the Commissioner—

- (a) in payment of the costs of administering the fund;
- (b) in, or towards, satisfaction of claims by persons who have suffered pecuniary loss as a result of the fiduciary default of an agent;
- (c) in payment of insurance premiums under this Division;
- (d) in payment to prescribed persons or bodies for prescribed education programmes conducted for the benefit of agents or members of the public;
- (e) for any other purpose prescribed by this Act.

**Claims on the fund****6. Section 76 of the principal Act is amended—**

- (a) by striking out from subsection (1) “, by application in the prescribed form to the Tribunal,”;
  - (b) by striking out from paragraph (b) of subsection (3) “in the opinion of the Tribunal,”;
- and
- (c) by striking out subsection (4).

**Substitution of section 76b****7. Section 76b of the principal Act is repealed and the following section is substituted:****Establishment of claims**

76b. (1) A claim for compensation must be made to the Commissioner.

(2) The Commissioner must assess the amount of compensation to which the Commissioner believes the claimant is entitled and must, by notice in writing served on the claimant, inform the claimant of the amount of the assessment.

(3) The claimant may, by notice in writing served on the Commissioner, accept the Commissioner's assessment or reject the assessment.

(4) Where a claimant accepts the Commissioner's assessment under subsection (3) the claimant's entitlement to compensation is finally determined for the purposes of this Division.

(5) If a claimant rejects the Commissioner's assessment or has not served notice on the Commissioner under subsection (3) within three months after the Commissioner served notice on the claimant under subsection (2), the Commissioner must refer the claim to the Tribunal.

(6) Where a claim is referred to the Tribunal by the Commissioner, the Tribunal must, by order, determine the amount of compensation to which the claimant is entitled.

(7) The Tribunal must, by notice in writing served on the claimant and the Commissioner inform the claimant and the Commissioner of the amount of the Tribunal's determination.

(8) A claimant who is aggrieved by a determination of the Tribunal under this section may appeal to the Supreme Court against the determination.

(9) Upon an appeal under subsection (8) the Supreme Court may reverse or vary the determination of the Tribunal and may make such further orders as it considers just in the circumstances.

(10) An appeal against a determination of the Tribunal under this section must be instituted within three months after the day on which notice of the determination was served on the claimant under this section but the Court may, if satisfied that proper cause to do so exists, dispense with the requirement that the appeal be so instituted.

(11) When making an assessment or determination under this section the Commissioner or the Tribunal must disregard any possible reduction to which the claimant's entitlement may be subject pursuant to section 76f.

(12) Subject to section 76f, a claimant is entitled to payment of the amount of compensation determined under this section.

(13) A claimant's entitlement to compensation will (to the extent to which it has not been satisfied or discharged) be increased by interest at the prescribed rate from

the first anniversary of the lodgment of the claim with the Commissioner until the entitlement is satisfied or discharged under this Division but interest must not be calculated on any component of the claimant's entitlement that is attributable to interest that has already accrued under this subsection.

(14) The personal representative of a claimant (including a deceased claimant) is entitled to prosecute the claim on behalf of the claimant or the claimant's estate.

(15) A notice to be served on a claimant under this section must be served—

(a) personally or by post;

or

(b) where the whereabouts of the claimant are unknown—

(i) by publication of the notice in a newspaper circulating in the area in which the claimant was last known to reside;

or

(ii) where the Commissioner or Tribunal has never known the claimant's place of residence—by publication of the notice in a newspaper circulating generally throughout the State.

(16) In any proceedings under this section, evidence of an admission or confession is admissible to prove a fiduciary default, notwithstanding that the person by whom the admission or confession was made is not a party to the proceedings.

(17) A determination of the Tribunal or the Court under this section must be made on the balance of probabilities.

### **Rights of the Commissioner**

8. Section 76c of the principal Act is amended by inserting after "makes a payment" in subsection (1) "(whether in respect of compensation or interest)".

### **Substitution of section 76f**

9. Section 76f of the principal Act is repealed and the following section is substituted:

#### **Insufficiency of fund**

76f. (1) Where the fund is insufficient to pay all outstanding amounts to which claimants are entitled the Commissioner must make proportionate reductions in the amounts paid out in respect of those entitlements.

(2) Where, at the time at which a claimant's entitlement to compensation is determined, other persons have made claims under this Division that have not yet been determined, the Commissioner may defer payment of the claimant's entitlement for any period (not exceeding 12 months) in order to allow time for the entitlements of those other claimants to be determined.

(3) The Commissioner may set aside such part of the fund as the Commissioner from time to time considers necessary to protect the interests of persons who have made claims against the fund that have not been determined or who are likely to make claims against the fund in the future and when determining whether payments to claimants should be reduced under subsection (1) the Commissioner must not take into account that part of the fund set aside under this subsection.

(4) If, after a claimant's entitlement to compensation has been determined, the claimant recovers an amount (that was not allowed for in that determination) in respect of the pecuniary loss suffered by the claimant, the claimant's entitlement to compensation is reduced by the amount recovered.

(5) Entitlements in respect of which payments are made under this section are discharged notwithstanding that they may not have been satisfied in full.

(6) The Commissioner may, with the approval of the Minister, make payments to any person—

(a) whose entitlement to compensation under this Division has been discharged by reason of the operation of this section;

(b) whose entitlement to compensation under this Division is insufficient because an amount that that person was expected to recover in respect of the pecuniary loss has not been recovered;

or

(c) whose claim is barred,

but any payment so made does not revive or reinstate an entitlement or claim.

#### Insertion of new s. 98b

10. The following section is inserted after section 98a of the principal Act:

##### Money received by mortgage financiers

98b. (1) Where a mortgage financier receives money from another (whether by way of a loan or otherwise) on the understanding that the money will be lent to a third person on the security of a mortgage, the following provisions apply:

(a) the financier holds the money on trust for that other person until the money is lent on the security of a mortgage;

(b) any such mortgage must be in favour of—

(i) that other person;

or

(ii) the financier or a trustee company, in either case, as trustee for that other person;

and

(c) except with the prior written authority of that other person, any such mortgage—

(i) must not be subject to a prior mortgage;

and

(ii) must be registered under the *Real Property Act, 1886*, before or forthwith after the lending of the money.

(2) If a mortgage financier lends or otherwise parts with possession of money to which subsection (1) applies and a requirement of that subsection is not complied with, the financier is guilty of an offence.

Penalty: \$4 000 or imprisonment for one year.

#### Regulations

11. Section 107 of the principal Act is amended—

(a) by inserting after paragraph (qc) of subsection (1) the following paragraph:

(qd) regulate and prescribe any matter or thing relating to the operations of mortgage financiers;;

and

(b) by striking out from paragraph (r) of subsection (1) “\$1 000” and substituting “\$2 000”.

**Amendment of schedule****12. The schedule to the principal Act is amended—**

(a) by inserting after the definition of “the 1986 amending Act” in clause 1 the following definition:

“the 1988 amending Act” means the *Land Agents, Brokers and Valuers Act Amendment Act, 1988*;

(b) by striking out paragraph (b) of clause 12;

and

(c) by striking out clause 13 and substituting the following clauses:

13. (1) The Commissioner may make payments pursuant to section 76f (6) in respect of claims against the Consolidated Interest Fund that were allowed by the Land and Business Agents Board if those claims were made on or after 1 January, 1980.

(2) The Commissioner is entitled to subrogation under section 76c in respect of payments made under subclause (1).

14. The following provisions apply in respect of claims (excluding barred claims and claims allowed or disallowed by the Land and Business Agents Board) made on or after 1 January, 1980, and before the commencement of the 1988 amending Act against the Consolidated Interest Fund or the Agents' Indemnity Fund—

(a) subject to paragraph (b), the allowance or disallowance of a claim by the Tribunal or a determination made by the Tribunal in respect of a claim before the commencement of the 1988 amending Act is void;

(b) paragraph (a) does not apply in respect of a determination of the Tribunal that a claim is not barred by reason of being made out of time;

(c) the claims will be taken to have been made to the Commissioner under Division III of Part VIII as amended by the 1988 amending Act and must be dealt with by the Commissioner and the Tribunal in pursuance of that Division as so amended and for the purposes of determining interest payable under that Division they will be taken to have been lodged on the date on which they were originally lodged with the Board or the Tribunal.

In the name and on behalf of Her Majesty, I hereby assent to this Bill.

D. B. DUNSTAN, Governor