

EXPLANATORY MEMORANDUM

Consumer Protection Legislation Amendment Bill 2018

CONSUMER PROTECTION LEGISLATION AMENDMENT BILL 2018

Overview of Bill

The Consumer Protection Legislation Amendment Bill 2018 makes amendments to a range of Acts administered by the Department of Mines, Industry Regulation and Safety (the Department) - Industry Regulation and Consumer Protection Group (the Group), to implement recommendations of the WA Coroner with regard to fixing of furniture in rented premises, increase outdated penalties and provide for more efficient and effective regulation.

The Bill will make the following amendments:

- provide the Commissioner for Consumer Protection (the Commissioner) with enhanced powers for monitoring compliance with the requirements of the *Charitable Collections Act 1946* and investigating suspected non-compliance and with authority to make decisions in relation to licensing;
- clarify provisions in the *Residential Tenancies Act 1987* (RTA) relating to representation of the parties at court hearings, consequences of damage to common property, fixing of furniture for the purposes of child safety and the apportionment of utilities charges;
- insert a provision into the RTA to enable the Commissioner to prosecute residential tenancy database operators based in other jurisdictions for offences in relation to management of the data of WA consumers;
- amend provisions dealing with furnishing of false and misleading information to the Department in the *Land Valuers Licensing Act 1978*, the *Real Estate and Business Agents Act 1978* (REBA Act) and the *Settlement Agents Act 1981* (SAA) to better align the licensing schemes and facilitate the online lodgement of information;
- amend relevant provisions in the REBA Act and SAA to permit claims against the fidelity funds to be made up to six months after the expiry of an agent's licence and triennial certificate;
- amend relevant provisions in the REBA Act to permit an allegation against an agent to be dealt with by the State Administrative Tribunal after expiry of their licence;
- amend the *Home Building Contracts Act 1991* (HBCA) to clarify the circumstances in which cover will be provided under the home indemnity insurance scheme to consumers affected by the default of a builder;
- adjust outdated penalties in a range of Acts administered by the Department to ensure that they are broadly consistent with penalties for similar offences in other legislation and in line with community expectations and that they also continue to provide an effective deterrent. Some penalties have increased significantly as a result of not having been adjusted for some time; and
- provide an option for imposition of a term of imprisonment for serious defalcations by real estate and settlement agents.

A clause by clause commentary of the Bill is as follows:

Clause 1 PART 1 - PRELIMINARY **Short Title**

This clause provides the short title of the *Consumer Protection Legislation Amendment Act 2018*.

Clause 2 Commencement

This clause provides that sections 1 and 2 of the Act will commence on Royal Assent. The remainder of the Act will commence on proclamation. There may be some delay in the commencement of sections 52 and 81. These sections involve the introduction of a new option of imprisonment for some offences and will require amendments to the Integrated Courts Management System in consultation with the Department of Justice. It is intended that the remainder of the Act will be proclaimed as soon as supporting Regulations are completed.

PART 2 – AUCTION SALES ACT 1973 AMENDED

Clause 3 Act amended

Clause 3 provides that this Part amends the *Auction Sales Act 1973* (ASA)

Clause 4 Section 28 amended

Clause 4 amends section 28 by inserting a penalty of a fine of \$25 000 for an offence under section 28(5) consistent with current drafting practice and other amendments being made to the ASA by the Bill. Section 28(9) is deleted as it is no longer required – the offence provision at 28(5) allows any failure to comply with the requirements of the section to be dealt with effectively.

Clause 5 Section 35 amended

Clause 5 amends section 35 of the ASA to delete sub-sections (1) and (2) removing the general penalty provision in accordance with current drafting practice. This will be replaced with specific penalties in each offence provision.

Clause 6 Various provisions amended

Clause 6 inserts a penalty of a fine of \$25 000 in respect of each of the following offence provisions: sections 22(3) (failure to deliver up a licence in accordance with a court order); 23(1) (misleading advertising); 24(1) (false or misleading representations); 26(1) and (2) (failure to maintain financial records); 27(1) (failure to render accounts); 29(2) (taking unauthorised bids); 31(1), 31(2), 31(3), 31(4), 31(6) and 31(7) (offences connected with splitting of lots of livestock or farm produce). These provisions were previously subject to the general penalty provision which is to be deleted by the Bill.

Clause 7 Various penalties amended

Clause 7 makes the following amendments to penalties:

- Penalty for a contravention of section 6(6) (the requirement to hold a licence) is increased from \$500 to \$50 000.
- Penalty for a contravention of section 25(1) (promoting or conducting a mock auction) is increased from \$1 000 to \$50 000. The alternative penalty of imprisonment for 12 months is unchanged.
- Penalty for a contravention of section 30(2) (requirement for auctioneer of stock to retain a sales register) is increased from \$500 to \$10 000.
- Penalty for a contravention of section 30(5) (auctioneer purchasing stock on his own behalf without consent) is increased from \$1 000 to \$50 000. The alternative penalty of imprisonment for 12 months is unchanged.

PART 3 – CHARITABLE COLLECTIONS ACT 1946 AMENDED

Clause 8 Act amended

Clause 8 provides that this Part amends the *Charitable Collections Act 1946* (CCA).

Clause 9 Section 5 amended

Clause 9 amends section 5 of the CCA to insert a new definition for “Commissioner”. Consistent with other licensing Acts administered by Consumer Protection, the definition refers to the definition in section 6 of the *Fair Trading Act 2010* (FTA), the person designated as Commissioner for the purposes of that Act.

Clause 10 Section 6 amended

Clause 10 increases the penalty for a contravention of section 6(1) (requirement to hold a licence) from \$100 to \$20 000.

Section 6(2) is deleted, as section 6(1) is the only offence provision in the section.

Clause 11 Section 8 amended

Clause 11 amends section 8 to replace references to the Minister with references to the Commissioner. The effect of the amendment is to empower the Commissioner to approve the means by which a licence holder may authorise a person to undertake a collection on behalf of the licensee. This is consistent with the responsibilities exercised by the Commissioner in respect of other licensing legislation administered by Consumer Protection.

The power has previously been provided to the Minister and delegated to the Commissioner. The fact that the Commissioner has not previously exercised a power under the CCA has prevented the Commissioner from accessing the range of investigative and compliance tools provided by the FTA.

Clause 12 Section 9 amended

Clause 12 increases the penalty for a contravention of section 9(2) (failure to deliver documents on revocation of authority) from \$100 to \$5 000.

Clause 13 Section 11 amended

Clause 13 amends section 11 to replace references to the Minister with references to the Commissioner. The effect of the amendment is to empower the Commissioner to grant a licence to undertake charitable collections. This is consistent with the responsibilities exercised by the Commissioner in respect of other licensing legislation administered by Consumer Protection.

The power has previously been delegated to the Commissioner by the Minister. The fact that the Commissioner has not previously exercised a power under the CCA has prevented the Commissioner from accessing the range of investigative and compliance tools provided by the FTA.

Clause 14 Section 12 amended

Clauses 14(1), 14(2), 14(3) and 14(4) amend section 12 to replace references to the Minister with references to the Commissioner. The effect of the amendment is to empower the Commissioner to place conditions on a charitable collections licence. The Commissioner will also be empowered to revoke a charitable collections licence. This is consistent with the responsibilities exercised by the Commissioner in respect of other licensing legislation administered by Consumer Protection.

The power has previously been delegated to the Commissioner by the Minister. The fact that the Commissioner has not previously exercised a power under the CCA has prevented the Commissioner from accessing the range of investigative and compliance tools provided by the FTA.

Clause 15 Section 13 amended

Clause 15 amends section 13 to replace references to the Minister with references to the Commissioner. The effect of the amendment is to empower the Commissioner to initiate an investigation into the possible revocation of a licence. This is consistent with the responsibilities exercised by the Commissioner in respect of other licensing legislation administered by Consumer Protection.

The power has previously been delegated to the Commissioner. The fact that the Commissioner has not previously exercised a power under the CCA has prevented the Commissioner from accessing the range of investigative and compliance tools provided by the FTA.

Clause 16 Section 15 amended

Clause 16(1) deletes sections 15(1),(2) and (3), which provide that the Minister may require audited financial reports from all licence holders at any time of the Minister's choosing, replacing them with new requirements for all licence holders to maintain records of their collections, and to provide audited reports if required to do so by the Commissioner.

The amendment provides for more targeted requests to be made for financial reports – as they may be sought from all licensees on a regular basis (as is current practice), or from an individual licensee or a specific group of licensees as required.

Section 15(1) will provide new definitions of “collections records” and “collector” for the purposes of the section. The records that the collector will be required to maintain are the same as those currently required to be provided to the Minister on request.

Section 15(2) will require the collector to keep collection records and to retain the records for 7 years.

Section 15(3) will provide a power for the Commissioner to require a copy of, or access to, collections records and to require that the records are audited by an approved person. This may be done by a specific request in writing, or by imposing a reporting condition on a licence.

Clause 16(2) amends the reference to “any such penalty” in section 15(4) to reflect the fact that there are now two penalty provisions in section 15 and to identify those provisions.

Clause 17 Section 18 deleted

Clause 17 deletes section 18 which is a general penalty provision. In accordance with current drafting practice a penalty has instead been included in each section of the CCA that is an offence provision.

Clause 18 Section 19 amended

Clause 18 amends section 19 to replace references to the Minister with references to the Commissioner. The effect of the amendment is to empower the Commissioner to initiate a prosecution for an offence under the CCA. This is consistent with the responsibilities exercised by the Commissioner in respect of other licensing legislation administered by Consumer Protection.

The power has previously been delegated to the Commissioner. The fact that the Commissioner has not previously exercised a power under the CCA has prevented the Commissioner from accessing the range of investigative and compliance tools provided by the FTA.

Clause 19 Section 20A inserted

Clause 19 inserts a new section 20A which provides that powers of investigation under section 61 and Part 6 of the FTA apply for the purposes of the CCA.

This provides the Commissioner with a suite of powers that are available in respect of the licensing and registration legislation administered by the Commissioner. Section 88E of the FTA, which permits compliance checks at business premises, has not been included as a significant portion of licence holders are volunteer organisations with business conducted from residential premises. In those circumstances it is not considered appropriate to exercise powers of entry and seizure without a warrant.

Clause 20 Section 22 inserted

Clause 20 inserts a transitional provision which ensures that, where the Minister has approved a means of authorising persons to collect on behalf of a licensee under section 6 prior to the amendment of that section, the means will be considered to have been approved by the Commissioner so that any existing arrangement can be maintained.

PART 4 – DEBT COLLECTORS LICENSING ACT 1964 AMENDED

Clause 21 Act amended

Clause 21 provides that this Part amends the *Debt Collectors Licensing Act 1964* (DCLA).

Clause 22 Section 14 amended

Clause 22 amends section 14 by inserting a fine of \$20 000 for the provision of false information for the purposes of the Act under subsection (1) (which was previously dealt with under a general offence provision) and replacing the penalty of a fine of \$100 with a fine of \$20 000 for taking more than the agreed commission under subsection (2).

Clause 23 Section 17 amended

Clause 23 inserts a penalty of a fine of \$25 000 into section 17(1). Section 17(3), which is a general penalty provision for section 17, is deleted by clause 23(2), as there are no other offence provisions in section 17.

Clause 24 Section 22 deleted

Clause 24 deletes section 22 in accordance with current drafting convention. The general penalty provision has been deleted and replaced with specific penalties for each offence provision.

Clause 25 Various provisions amended

Clause 25 inserts a penalty of a fine of \$25 000 in respect of each of the following offence provisions: sections 6(2) (assuming additional powers), 16(1) (failure by a bank manager to disclose information) and 18(4) (failure to keep required financial records). These

provisions were previously subject to the general penalty provision which is to be deleted by the Bill.

Clause 26 Various penalties amended

Clause 26 makes the following amendments to penalties:

- Penalty for a contravention of any provision of section 5 (the requirement to hold a licence) is increased from \$200 for an individual and \$400 for a corporation to \$50 000.
- Penalty for a contravention of section 15(5) (failure to comply with trust accounting requirements) is increased from \$200 to \$25 000.
- Penalty for a breach of the regulations under section 26(1)(h) is increased from \$200 to \$5 000.

PART 5 – FAIR TRADING ACT 2010 AMENDED

Clause 27 Act amended

Clause 27 provides that this Part amends the *Fair Trading Act 2010* (FTA).

Clause 28 Section 88E amended

Clause 28 amends section 88E by inserting section 88(1A) to provide that the section, which permits entry and seizure at the business premises in the course of an investigation undertaken by the Commissioner in respect of a regulated activity, does not apply to an investigation in respect of an activity regulated under the CCA.

Clause 29 Schedule 2 amended

Schedule 2 is the list of Acts which are registration Acts for the purposes of exercise by the Commissioner of enforcement provisions in Division 4A. The Schedule is amended by the addition of the CCA.

PART 6 – HOME BUILDING CONTRACTS ACT 1991 AMENDED

Clause 30 Act amended

Clause 30 provides that this Part amends the *Home Building Contracts Act 1991* (HBCA).

Clause 31 Section 25B amended

Clause 31 amends section 25B of the HBCA by inserting a new subsection 25B(4) which creates an exemption from the requirement to hold home indemnity insurance for residential building work that does not require a building permit under the *Building Act 2011* or is not part of a prescribed building service under the *Building Services (Registration) Act 2011*.

The effect is that home indemnity insurance is not required for non-structural work such as cabinet making, tiling and painting which

either does not require a building permit or is not required to be carried out by a registered builder.

This reflects current practice, as it is not possible to obtain insurance from providers for that type of work.

Clause 32 Section 25D amended

This clause clarifies the circumstances in which a claim can be made under a home indemnity insurance policy.

Clause 32(1) inserts a new definition of ‘relevant circumstance’ into section 25D and provides that a relevant circumstance arises where a builder is insolvent or the builder’s licence has been cancelled or not renewed under the *Building Services (Registration) Act 2011* due to insufficiency of financial resources, and also if the builder is an individual where the builder has died or cannot be found in Australia, and if the builder is a corporation, where the corporation has ceased to exist.

Clause 32(2) amends the trigger for liability of a home indemnity insurer, providing that a policy must provide for a claim to be made where a “relevant circumstance” exists, replacing the current trigger which is “death or insolvency or an inability to find the builder”.

PART 7 – LAND VALUERS LICENSING ACT 1978 AMENDED

Clause 33 Act amended

Clause 33 provides that this part amends the *Land Valuers Licensing Act 1978* (LVLA).

Clause 34 Section 20 deleted

Clause 34 deletes section 20, which deals with giving false and misleading information in relation to an application for grant or renewal of a licence, and is to be replaced by a new section 33A.

Clause 35 Section 22 amended

Clause 35 deletes section 22(2)(a) and replaces it with a new provision that provides 28 days for renewal after the day on which a licence expires. As a consequence of the application of section 61 of the *Interpretation Act 1984*, the current provision allows only 27 days which is inconsistent with the provisions of other licensing Acts administered by Consumer Protection.

Clause 36 Section 33A inserted

Clause 36 inserts a new section 33A replacing the current section 20, which deals with the provision of false or misleading information in connection with an application, with a new section that provides that a person who gives false or misleading information to the Commissioner at any time that the Act requires information to be

provided to the Commissioner commits an offence. The penalty for the offence is a fine of \$20 000.

Section 33A(2) will provide that both a false and misleading statement, and an omission which renders a statement misleading, will constitute an offence, as will giving or producing misleading information in another form.

Clause 37 Various penalties amended

Clause 37 makes the following amendments to penalties in the LVLA:

- Penalty for a contravention of any provision of section 23(1) (the requirement to hold a licence) is increased from \$50 000 to \$100 000.
- Penalty for a contravention of section 24(1) (false claim of being licensed) is increased from \$50 000 to \$100 000.
- Penalty provision at section 25(3) is redrafted to reflect current drafting practice but penalty is unchanged.
- Penalty provision at section 29A(1) is redrafted to reflect current drafting practice but penalty is unchanged.

PART 8 – REAL ESTATE AND BUSINESS AGENTS ACT 1978 AMENDED

Clause 38 Act amended

Clause 38 provides that this Part amends the *Real Estate and Business Agents Act 1978* (REBA Act).

Clause 39 Section 4 amended

Clause 39 replaces the current definition of ‘agents code of conduct’ with an equivalent definition for ‘code of conduct for agents’.

This amendment is for consistency in the use of terminology in the REBA Act and does not result in any substantive change.

Clause 40 Section 26 amended

Section 26 deals with the requirement for a real estate or business agent or a real estate and business agent to be licensed. Clause 40 amends the provision by adding a new subsection to provide that, where a licensed agent is required to surrender a licence and triennial certificate under new sections 34D(2) or (3), and the agent does not comply with the requirement and continues to carry on business, or hold itself out as licensed, the licensed agent will be taken to be unlicensed for the purposes of section 26 and will thereby contravene section 26(1) if they continue to carry on business or hold itself out as an agent.

Clause 41 Section 27 amended

Section 27 provides for the licensing of natural persons. Clause 41 amends section 27 to clarify that it only applies to an application by an individual, defined by the *Interpretation Act 1984* as a natural

person. The clause also amends other words in the section to apply gender neutral language in accordance with current drafting practice.

Clause 42 Section 29 amended

Section 29 provides for the licensing of a body corporate. Clause 42 makes a technical amendment to section 29(b) to address a drafting error by removing a repeat of the word 'that'. It does not result in any substantive change.

Clause 43 Section 30 amended

Section 30 contains provisions that give effect to a licence and the holding of a triennial certificate in respect of a licence.

Clause 43 amends section 30 of the REBA Act by deleting subsections (3) and (4). Section 30(3) is replaced by new section 34C which will retain the substance of subsection 30(3). Section 30(4) is replaced by a new section 102(7).

Clause 44 Section 31 amended

Section 31 of the REBA Act provides for the grant and renewal of triennial certificates. This amendment clarifies that a certificate may only be renewed on the application of a current licence holder – referred to in the section as 'the licensee'.

Clause 44(1) amends section 31(2)(a) to adopt consistent terminology. It does not result in any substantive change.

Clause 44(2) replaces section 31(3) with a new provision that more clearly sets out the requirement and reflects current drafting practice. The new provision requires the licensee to satisfy the Commissioner of ongoing eligibility to hold a triennial certificate.

The requirement under subsection (b) for the Commissioner to consider whether the licensee has met prescribed educational requirements has been deleted. This has been replaced with a new offence provision at section 40B where an agent fails to meet prescribed education requirements.

Clause 45 Section 32 amended

Clause 45(1) amends section 32 to refer to renewal of 'a licensee's' triennial certificate, reflecting the requirement that a renewal can take place under this section only if the applicant holds a current licence. Consequential to new section 34C, clause 45 also allows for the renewal of a triennial certificate after surrender as well as after expiry of the triennial certificate.

Clause 45(2) amends section 32(2) to refer to renewal of 'a licensee's' triennial certificate, reflecting the requirement that a renewal is only eligible under this provision if the applicant holds a current licence in accordance with section 30(2a). The section has also been amended to clarify that, where a triennial certificate is renewed more than one month, but less than 12 months after expiry

or surrender, the renewal will take effect on the date the application is granted, unless the Commissioner is satisfied that special circumstances exist that mean that it should take effect from the day after expiry or surrender to maintain continuity.

The amendments made to section 32 do not affect the power of the Commissioner to refuse to renew the triennial certificate pursuant to section 31.

Clause 46 Section 33 amended

Clause 46(1) deletes section 33(1) and replaces it with a new subsection which, like the deleted provision, still permits a licensee to apply to renew a triennial certificate more than 12 months after expiry or surrender of the triennial certificate. The amendment simplifies the provision by removing the requirement for an application to be made at least one month in advance of the applicant's intention to recommence trading.

Clauses 46(2),(3) and (4) amend terminology in section 33 to reflect current drafting practice, and to refer to 'the licensee' rather than 'the applicant' reflecting the requirement that a renewal can take place only if the applicant holds a current licence because a holding fee has been paid in accordance with section 30(2a).

Clause 46(5) adds a new subclause (6) which provides that, where a triennial certificate is renewed more than 12 months after expiry under this section, the renewal of the triennial certificate takes effect on the day it is granted. This is consequential to the replacement of section 33(1) by clause 46(1).

The amendments made to section 33 do not affect the power of the Commissioner to refuse to renew the triennial certificate pursuant to section 31.

Clause 47 Clause 47 replaces section 34 with new sections 34, 34AA and 34AB which provide that the Commissioner can impose conditions on a licence at any time rather than only at grant and renewal. The sections also provide that a licence holder may apply for the removal of a condition and that a condition may be removed at any time.

It embeds and clarifies existing requirements for notification by the Commissioner of the intention to make any decision to impose a restriction/limitation. In those circumstances reasons must be also provided and the licensee must be given an opportunity to respond before a final decision is made.

New section 34 also incorporates the existing requirement for agents to comply with the Act and the code of conduct for agents.

The provisions in respect of special conditions do not apply to conditions imposed to achieve equivalence of occupations under section 20 of the *Mutual Recognition Act 1992 (Cwth)* which applies

in Western Australia as a result of the operation of section 4 of the *Mutual Recognition (Western Australia) Act 2010*.

Clause 48 Section 34C and 34D inserted

Clause 48 inserts new sections 34C and 34D and is consequential to the deletion of section 30(3) by clause 43.

Under the current statute, a triennial certificate cannot be surrendered unless the holder also surrenders their licence. Section 34C retains the capacity for a licence holder to surrender a licence and triennial certificate, at any time, and adds the capacity for a licence holder to surrender only the triennial certificate at any time during the triennial period. This enlivens their ability to pay the fee in accordance with section 30(2a), which will provide the holder with the ability to apply to renew the triennial certificate at a later date in accordance with section 31, 32 or 33.

Section 34D only applies if a licence holder is a firm or a body corporate. The section clarifies the requirement in the current section 30(3) to surrender a licence and triennial certificate if the licence holder ceases to have the qualifications for holding the licence. That is, the section provides that both the licence and triennial certificate must be surrendered within 5 days after the licence holder ceased to have the required number of licensed partner(s) or director(s) and/or ceased to have a licensed partner or director in *bona fide* control of the business.

34D(3) provides that the requirement to surrender the licence and triennial certificate does not apply to firms or bodies corporate who are operating in accordance with Schedule 1, clause 6 – which specifies circumstances under which a firm or body corporate may operate for a limited period of time after the death or withdrawal of a licensed partner or licensed director who is the person in *bona fide* control of the business.

Clause 49 Section 40B inserted

Clause 49 inserts a new section 40B to provide that an agent must meet the prescribed educational requirements – these are the requirements to complete the compulsory professional development activities as required by the regulations. Failure to comply with the provision carries a penalty of a fine of \$5 000.

This provision replaces the deleted section 31(3)(b) which permitted the Commissioner to refuse to renew a triennial certificate if the educational requirements were not met but did not provide for any form of sanction other than the loss of the person's livelihood.

Clause 50 Section 48 amended

Clause 50 amends section 48 by deleting the current subsections (4) and (5) and replacing them with a new provision. The new provision

requires the sales representative to satisfy the Commissioner of ongoing eligibility to hold a certificate. The requirement for the Commissioner to consider whether the sales representative has met prescribed educational requirements as part of the renewal process has been deleted. This has been replaced with a new offence provision at section 50C where the sales representative fails to complete prescribed professional development requirements.

Clause 51 Section 50 replaced

Clause 51 replaces section 50 with a new section 50AA which provides that the Commissioner can impose conditions on a certificate of registration at any time, not just at grant or renewal. It also provides that a sales representative may apply for the removal of a condition and that a condition may be removed at any time.

It embeds, within the legislation, processes to provide for natural justice including a requirement for notification to the applicant of the Commissioner's intentions to make any decision that may be adverse to the interests of the sales representative. In those circumstances reasons must be provided and the sales representative must be given an opportunity to respond before a final decision is made.

This requirement does not apply to a condition imposed at registration that limits the type of work the sales representative can undertake as a result of circumstances prescribed in regulation 6A(3) for an application for registration as a sales representative with a condition restricting the registrant to property management transactions only.

The provisions in respect of special conditions do not apply to conditions imposed to achieve equivalence of occupations under section 20 of the *Mutual Recognition Act 1992 (Cwth)* which applies in Western Australia as a result of the operation of section 4 of the *Mutual Recognition (Western Australia) Act 2010*.

The new section also incorporates the current requirement for a sales representative to comply with the Act and the requirements of the code of conduct for sales representatives.

Clause 52 Section 50C added

Clause 52 inserts a new section 50C to provide that a sales representative must meet the prescribed educational requirements – these are the requirements to complete the compulsory professional development activities as required by the regulations. Failure to comply with the provision carries a penalty of a fine of \$5 000.

This provision replaces the deleted section 48(5)(b) which permitted the Commissioner to refuse to renew registration if the educational requirements had not been met, but did not provide for any other form of sanction.

Clause 53 Section 84 amended

Section 84 provides for offences under Part VI (administration of trust accounts). Clause 53 amends section 84 by increasing the penalty for a contravention of section 68B(1) (failure by a financial institution to credit interest on a trust account) from \$10 000 to \$50 000, increasing the general penalty for offences in respect of administration of a trust account from \$3 000 to \$25 000 and inserting a new provision to allow for an alternative penalty of 2 years imprisonment for an offence against section 68(4) or (5) (unauthorised withdrawals or payments from a trust account) to provide an appropriate penalty for serious instances of defalcation.

Clause 54 Section 100A amended

Clause 54 deletes section 100A(4). Subsection (4) is no longer required as providing false and misleading information in respect of trust accounts in response to a requirement under the Act will be covered by the amended section 134A.

Clause 55 Section 102 amended

Clause 55 amends section 102 to insert a new subsection (7). The new provision allows an allegation to be made to the SAT in respect of a contravention under the REBA Act by an agent for up to 12 months after the agent ceases to hold a licence or triennial certificate. This replaces deleted section 30(4), which permitted an allegation to be dealt with after surrender of an agent's licence or triennial certificate, but did not provide for a situation where the licence and triennial certificate have expired.

Subsection (7)(b) provides that, in such cases, the SAT may exercise any of its powers other than the power to suspend or cancel the agent's licence.

Clause 56 Section 103 amended

Clause 56 replaces the term "agents code of conduct" in this section with "code of conduct for agents". This is a change in terminology only and has no substantive effect.

Clause 57 Section 116 amended

Clause 57 deletes sections 116(1) and (2A) and replaces them with a new subsection (1).

The new section retains the same function of the fidelity fund, to reimburse a person for pecuniary or property loss resulting from the defalcation of an agent to the extent of the loss. The previous provision required the agent to be licensed at the time of the defalcation, although subsection 2A provided that the CEO could allow a claim where the licensee does not hold a triennial certificate at the time of the defalcation. The new provision permits a claim on the fund where the defalcation occurs within 6 months after the agent ceases to hold a licence and triennial certificate where the CEO considers that to be just and reasonable.

Clause 58 Section 131L amended

Clause 58(1) amends section 131L by adding a definition of “settlement” with reference to section 3(1) of the *Settlement Agents Act 1981* to clarify the use of the term in the section.

Clause 58(2) amends subsection 1 to replace the requirement for an application for assistance from the home buyers assistance account to be made no later than 90 days after the purchaser contracts to buy a property with a requirement that the application be made within 90 days of settlement of the contract. This recognises that the information required to be included in the application is often unavailable until after settlement has been effected.

Clause 59 Section 134A amended

Clause 59(1) amends section 134A(1), which provides that it is an offence for a person to give false or misleading information, by extending its operation from information supplied to the Commissioner in respect of specified applications, to all instances where a person is required by the Act to give information to the Commissioner or the Chief Executive Officer.

Clause 59(2) makes consequential amendments to other subsections but does not change the way in which those subsections operate.

Clause 60 Section 136A amended

Clause 60 amends section 136A, which provides that the Commissioner may, in special circumstances, refund the whole or part of the fee paid for a licence or triennial certificate to also make provision for refund of the whole or a part of a fee paid by a sales representative for a certificate of registration.

The Department operates the licensing system on a cost recovery basis. Consideration of refund of fees takes into account the requirement to recover the cost of services already provided to minimise reliance on the state’s consolidated funds.

Clause 61 Schedule 1 clause 1 amended

Clause 61 amends clause 1 of Schedule 1 by providing that, for the purposes of assessing whether an applicant may be granted a licence, previous experience as an agent within Western Australia over the five years preceding the application is treated in the same way as previous experience as an agent in another jurisdiction.

Clause 62 Various penalties amended

Clause 62 makes the following amendments to penalties in the REBA Act:

- Penalty for a contravention of section 26 (the requirement to hold a licence) is increased from \$20 000 to \$100 000.

- Penalty for a contravention of section 39(3) (permitting another person to use a licence or triennial certificate) is increased from \$20 000 to \$100 000.
- Penalty for a contravention of any provision in section 44 (requirement for a real estate sales representative to be registered) is increased from \$3 000 to \$25 000.
- Penalty for a contravention of any provision in section 45 (requirement for a business sales representative to be registered) is increased from \$3 000 to \$25 000.
- Penalty for a contravention of section 46 (requirement for partners and directors to be registered) is increased from \$2 000 to \$20 000.

PART 9 – RESIDENTIAL TENANCIES ACT 1987 AMENDED

Clause 63 Act Amended

Clause 63 provides that this Part amends the *Residential Tenancies Act 1987* (RTA).

Clause 64 Section 3 amended

Clause 64 amends section 3 of the RTA (Terms used) to insert a definition of “common area” as the term will be used in amendments made by other clauses. The term includes common property in a strata scheme as defined in the *Strata Titles Act 1985* section 3 as well as other common areas provided for the access or use of tenants, such as shared access areas and courtyards in a public housing scheme.

Clause 65 Section 22 amended

Clause 65(1) amends section 22(2) which permits a party to authorise an agent to represent or assist in the preparation of a case if the agent is the property manager or employed as an advocate by a non-profit organisation. The amendment provides that, in addition, a court may make an order for representation or assistance under subsection 3C.

Clause 65(3) inserts a two new subsections (3B) which clarify that, where a party has appointed an agent, representation and assistance extends to include preparation and filing of documents initiating the proceedings and (3C) which provides that a court may order that a party be represented or assisted in proceedings if the party is unable to appear or unable to conduct the proceedings on the party’s own behalf, and the other party will not be disadvantaged. Subsection 3C will restore the general discretion of the court to appoint any appropriate person to represent or assist a party where this is considered necessary.

Clause 66 Section 38 amended

Section 38 describes the responsibilities of a tenant with regard to maintaining the rented premises in a reasonable state of cleanliness,

reporting damage, and not intentionally or negligently damaging the premises. Clause 66 amends section 38(1)(c) to extend its operation to provide that the tenant shall also not intentionally or negligently cause damage to a common area or chattels in the common area.

Clause 67 Section 47 amended

Section 47 provides for the circumstances in which a tenant may affix items and remove fixtures.

Clause 67 amends section 47 by inserting a new subsection 2A which provides that a tenant may affix furniture to the walls of the rental premises for the purposes of ensuring the safety of a child with the consent of the lessor. Consent may only be withheld in specific identified circumstances. Circumstances set out in the subsection are:

- where the fixture would disturb asbestos building material;
- where the premises is heritage listed; or
- where the premises is a lot in a strata complex and the by-laws prohibit the affixing of items to internal walls.

The subsection also provides for additional circumstances to be prescribed.

Section 47(2A) will also provide that:

- the tenant must remove the fixture when vacating the premises;
- the tenant is responsible for the cost of installing and removing the fixture; and
- the tenant is responsible for repairing, or paying to the lessor, the reasonable cost of repairing, any damage caused by the fixture.

Clause 68 Section 49A amended

Clause 68 amends section 49A in order to clarify the circumstances in which a tenant will be responsible for the payment of charges for public utility services.

The amendment will clarify that where a utility service is connected in the name of a lessor or a strata company, the tenant is only responsible for the payment of consumption charges – being those charges that relate to use of the service calculated by metered unit.

Where use at the rental premises is separately metered, consumption will be measured by the meter reading. Where use at the premises is not separately metered, the method of calculating consumption must have previously been agreed in writing, and the liability must be calculated in accordance with the written agreement.

It will also introduce a new requirement for the tenant to be provided with an account for any consumption charge within 30 days of receipt by the lessor of the utility account from the service provider.

An exemption from the requirement to provide the account within 30 days will apply where the tenant has vacated the premises to allow sufficient time for the tenant to be located and for outstanding liabilities to be determined.

Clause 69 Section 73 amended

Section 73 provides that a court may terminate a residential tenancy agreement where the tenant has intentionally or recklessly caused or permitted serious damage to the premises. Clause 69 amends section 73(1) so that it also applies where the damage concerned is to common area as defined in section 3.

Clause 70 Section 82B amended

Clause 70 inserts a new subsection (2) into section 82B which deals with application of the provisions relating to residential tenancy databases. The new subsection provides that the provisions are to apply, so far as possible, to all database operators whether inside or outside of Western Australia to the extent that they are dealing with personal information about a person or their occupation of premises within this state.

Clause 71 Part 8 inserted

Clause 71 inserts a new Part 8 which contains transitional provisions dealing with the implementation of the amendments to section 49A.

Subsection (1) of the new section 98 contains definitions of “amended section 49A”, “commencement day”, “former section 49A” and “public utility service” as used in the section.

Subsection (2) provides that, subject to subsections (3) and (4), section 49A as amended applies to all residential tenancy agreements in force at commencement.

Subsection (3) provides that the former provision applies where a lessor has received an invoice and provided notice to the tenant prior to the commencement of the new provision.

Subsection (4) provides that where a lessor has received notice of account but has not provided notice to the tenant on commencement of the Act, the new provisions apply, but the 30 day notice requirement does not apply in respect of the account.

PART 10 – SETTLEMENT AGENTS ACT 1981 AMENDED

Clause 72 Act amended

Clause 72 provides that this Part amends the *Settlement Agents Act 1981* (SAA).

Clause 73 Section 4 amended

Clause 73 amends references in section 4(2) to reflect numbering changes made as a result of amendments to section 34.

Clause 74 Section 26 amended

Section 26 deals with the requirement for a settlement agent to be licensed. Clause 74 amends the provision by adding a new subsection to provide that, where a licensed agent is required to surrender a licence and triennial certificate under new section 34D(2) or (3), and continues to carry on business, or hold himself out as a licenced agent, the person will be taken to be unlicensed for the purposes of section 26 and will contravene section 26(1).

Clause 75 Section 27 amended

Clause 75 amends section 27 to clarify that it applies only to an application by an individual, defined by the *Interpretation Act 1984* as a natural person. The clause also amends other words in the section to apply gender neutral language in accordance with current drafting practice.

Clause 76 Section 30 amended

Clause 76 amends section 30 of the SAA by deleting subsections (4) and (5). Section 30(4) is no longer required as new section 34C will provide for surrender of the agent's licence and/or triennial certificate. Section 30(5) is replaced by a new section 83(2).

Clause 77 Section 31 amended

Section 31 of the SAA provides for the grant and renewal of triennial certificates. This section clarifies that a certificate may only be renewed on the application of a current licence holder – referred to in the section as 'the licensee'.

Clause 77(2) replaces section 31(3) with a new provision that more clearly set out the requirements and reflects current drafting practice. The new provision requires the licensee to satisfy the Commissioner of ongoing eligibility to hold a triennial certificate.

The requirement under subsection (b) for the Commissioner to consider whether the licensee has met prescribed educational requirements has been deleted. This has been replaced with a new offence provision at section 41B which creates an offence where an agent fails to complete prescribed professional development requirements.

Clause 78 Section 32 amended

Clause 78(1) amends section 32 to refer to renewal of 'a licensee's' triennial certificate, reflecting the requirement that a renewal can take place under this section only if the applicant holds a current licence. Consequential to new section 34C, clause 78 also allows for the renewal of a triennial certificate after surrender as well as after expiry of the triennial certificate.

Clause 78(2) amends section 32(2) to clarify that, where a triennial certificate is renewed more than one month, but less than 12 months

after expiry or surrender, the renewal will take effect on the date the application is granted, unless the Commissioner is satisfied that special circumstances exist that mean that it should take effect from the day after expiry or surrender to maintain continuity.

The amendments made to section 32 do not affect the power of the Commissioner to refuse to renew the triennial certificate pursuant to section 31.

Clause 79 Section 33 amended

Clause 79(1) deletes section 33(1) and replaces it with a new subsection which, like the deleted provision, permits a licensee to apply to renew a triennial certificate more than 12 months after expiry or surrender, but removes the requirement for an application to be made at least 1 month before the proposed renewal date.

Clauses 79(2),(3) and (4) amend terminology in section 33 to reflect current drafting practice, and to refer to 'the licensee' rather than 'the applicant' reflecting the requirement that a renewal can take place only if the applicant holds a current licence because a holding fee has been paid to retain the licence under section 30(2a).

Clause 79(5) adds a new subclause (6) which provides that, where a triennial certificate is renewed more than 12 months after expiry under this section, the renewal takes effect on the day it is granted.

The amendments made to section 33 do not affect the power of the Commissioner to refuse to renew the triennial certificate pursuant to section 31.

Clause 80 Section 34 replaced

Clause 80 replaces section 34 with new sections 34, 34AA and 34AB which provide that the Commissioner can impose special conditions on a licence at any time rather than only at grant and renewal. The sections also provide that a condition may be removed at any time and that a licence holder may apply for the removal of a condition.

It embeds processes for notification of the Commissioner's intentions to make any decision that is adverse to the interests of the applicant or licence holder. In those circumstances reasons must be provided and the licensee must be given an opportunity to respond before a final decision is made.

The provisions in respect of special conditions do not apply to conditions imposed to achieve equivalence of occupations under section 20 of the *Mutual Recognition Act 1992 (Cwth)* which applies in Western Australia as a result of the operation of section 4 of the *Mutual Recognition (Western Australia) Act 2010*.

The new section 34 also incorporates the existing requirement for agents to comply with the Act and the code of conduct for agents.

Clause 81 Section 34C and 34D inserted

Clause 81 inserts new sections 34C and 34D.

Section 34C provides that a licence holder may, at any time, surrender a licence and triennial certificate, or surrender a triennial certificate only and pay the fee prescribed for the purposes of section 30(3a).

34D only applies if a licence holder is a firm or body corporate. The section clarifies the requirement in section 30(4) to surrender a licence and triennial certificate if the licence holder ceases to have the qualifications for holding the licence. That is, the section provides that both the licence and triennial certificate must be surrendered within 5 days after the licence holder ceased to have the required number of licensed partner(s) or director(s) and/or ceased to have a licensed person in *bona fide* control of the business.

34D(3) provides that there is no requirement for surrender of the licence and triennial certificate where a business is being carried on under Schedule 1 Clause 10 – which permits a business to operate for a limited period of time after the death or withdrawal of a licensed partner, director or the person in *bona fide* control of the business.

Clause 82 Section 41B inserted

Clause 82 inserts a new section 41B to provide that an agent must meet the prescribed educational requirements – these are the requirements to complete the compulsory professional development activities as required by the regulations. Failure to comply with the provision carries a penalty of a fine of \$5 000.

This provision replaces the deleted section 31(2A)(b) which permitted the Commissioner to refuse to renew a triennial certificate if the educational requirements were not met but did not provide for any other form of sanction.

Clause 83 Section 65 amended

Section 65 provides for offences for Division 2 (administration of trust accounts). Clause 83 amends section 65 by increasing the penalty for a contravention of section 49B(1) (failure by a financial institution to credit interest on a trust account) from \$10 000 to \$50 000, increasing the general penalty for offences in respect of administration of a trust account from \$3 000 to \$25 000 and inserting a new provision to allow for an alternative penalty of 2 years imprisonment for an offence against section 49(4) or (5) (unauthorised withdrawals or payments from a trust account) to provide an appropriate penalty for serious instances of defalcation.

Clause 84 Section 81A amended

Clause 84 deletes section 81A(4). Subsection (4) is no longer required as providing false and misleading information in respect of trust accounts in response to a requirement under the Act will be covered by the amended section 111A.

Clause 85 Section 83 amended

Clause 85 amends section 83 to insert a new subsection (2). The new provision allows an allegation to be made to the SAT in respect of a contravention under the SAA for up to 12 months after the agent ceases to hold a licence or triennial certificate. This replaces deleted section 30(5), which permitted an allegation to be dealt with after surrender of an agent's licence or triennial certificate, but also covers a situation where the licence and triennial certificate have expired.

Subsection (2)(b) provides that, in those circumstances, the SAT may exercise any of its powers other than the power to suspend or cancel the agent's licence.

Clause 86 Section 93 amended

Clause 86 deletes sections 93(1) and (2A) and replaces them with a new subsection (1).

The new section retains the same function of the fidelity fund, to reimburse a person for pecuniary or property loss resulting from the defalcation of an agent to the extent of the loss. The current provision requires the agent to be licensed at the time of the defalcation, although subsection 2A provides that the CEO may allow a claim where the licensee does not hold a triennial certificate at the time of the defalcation. The amendment instead provides access to the fund where the defalcation occurs within 6 months after the agent ceases to hold a licence and triennial certificate where the CEO considers that to be just and reasonable.

Clause 87 Section 111A amended

Clause 87(1) amends section 111A(1), which provides that it is an offence for a person to give false or misleading information, by extending its operation from information supplied to the Commissioner in respect of specified applications, to all instances where a person is required by the Act to give information to the Commissioner.

Clause 87(2) makes consequential amendments to other subsections but does not change the way in which those subsections operate.

Clause 88 Various penalties amended

Clause 88 makes the following amendments to penalties in the SAA:

- Penalty for a contravention of section 26 (the requirement to hold a licence) is increased from \$20 000 to \$100 000.
- Penalty for a contravention of section 40(3) (permitting another person to use a licence or triennial certificate) is increased from \$20 000 to \$100 000.

**PART 11 – STREET COLLECTIONS (REGULATION) ACT 1980
AMENDED**

Clause 89 Act amended

Clause 89 provides that this Part amends the *Street Collections (Regulation) Act 1940* (SCA).

Clause 90 Section 2 amended

Clause 90 deletes the definition of “metropolitan area” which is used to describe the area of operation of the legislation but makes reference to a repealed provision, and replaces it with a definition of “metropolitan region” which makes reference to section 4(1) of the *Planning and Development Act 2005*. The amendment does not materially alter the operation of the SCA.

Clause 91 Section 3 amended

Section 3 provides that a relevant collection must not be made on a street within the metropolitan area unless a permit is held. Clause 91 replaces the term “metropolitan area” with “metropolitan region” reflecting the amendment to terminology.

Clause 92 Section 6 amended

Clause 92 amends section 6 to include a penalty of a fine of \$5 000 for contravention of that provision. This permits removal of the general penalty provision in accordance with current drafting practice.

Clause 93 Section 7 amended

Clause 93 increases the penalty for a contravention of section 7(2) (breach of regulations) from \$40 to \$2 000.

Clause 94 Section 8 deleted

Clause 94 deletes the general penalty provision in accordance with current drafting practice.