



New South Wales

Legal Profession Amendment (Mortgage Practices) Act 2000 No 23

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New South Wales

Legal Profession Amendment (Mortgage Practices) Act 2000 No 23

Act No 23, 2000

An Act to amend the *Legal Profession Act 1987* to make provision for the regulation of certain mortgage work carried out by solicitors; to make further provision with respect to money received by solicitors for payment of costs; to repeal the *Legal Profession Amendment (Solicitors' Mortgage Practices) Act 1998*; and for other purposes. [Assented to 5 June 2000]

The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *Legal Profession Amendment (Mortgage Practices) Act 2000*.

2 Commencement

This Act commences on a day or days to be appointed by proclamation.

3 Amendment of Legal Profession Act 1987 No 109

The *Legal Profession Act 1987* is amended as set out in Schedule 1.

4 Repeal of Legal Profession Amendment (Solicitors' Mortgage Practices) Act 1998 No 50

The *Legal Profession Amendment (Solicitors' Mortgage Practices) Act 1998* is repealed.

Schedule 1 Amendments

(Section 3)

[1] Section 31 Non-payment of contributions and levies by solicitors in respect of Indemnity Fund or Fidelity Fund

Insert at the end of section 31:

Note. Part 9 sets out further grounds on which the Law Society Council must refuse to issue a practising certificate to a solicitor or suspend a solicitor's practising certificate. These grounds relate to a failure by the solicitor to obtain fidelity insurance in respect of a regulated mortgage.

[2] Section 54 Functions of Law Society

Insert after section 54 (1):

(1AA) The Law Society Council also has the function of disseminating information to increase public awareness of the requirements of this Act and the *Corporations Law* relating to solicitors who negotiate the making of or act in respect of regulated mortgages (within the meaning of Part 9) or are involved in managed investment schemes (within the meaning of the *Corporations Law*).

[3] Section 56 Secrecy

Insert after section 56 (5):

(6) Subsections (1) and (3) do not prevent a person referred to in those subsections from disclosing to the Australian Securities and Investment Commission particulars of the conduct of a solicitor in respect of any regulated mortgage (within the meaning of Part 9).

[4] Section 61A

Insert after section 61:

61A Money received by solicitor for costs in workers compensation matters

(1) Section 61 does not apply in respect of money received by a solicitor for a person claiming workers compensation for the payment of costs due to the solicitor in respect of the claim, being costs that have been awarded by the Compensation Court.

(2) In this section:

Compensation Court means the Compensation Court of New South Wales constituted under the *Compensation Court Act 1984*.

workers compensation means compensation under any of the following Acts:

- (a) *Workers Compensation Act 1987*,
- (b) *Workers Compensation (Bush Fire, Emergency and Rescue Services) Act 1987*,
- (c) *Workers' Compensation (Dust Diseases) Act 1942*,
- (d) *Workplace Injury Management and Workers Compensation Act 1998*.

[5] Section 73 Payments from Fidelity Fund

Insert after section 73 (1) (d):

- (e) the costs of the Law Society Council in exercising its function under section 54 (1AA), and

[6] Section 80 Claims against Fidelity Fund

Insert at the end of section 80:

Note. There are constraints on the making of claims against the Fidelity Fund in respect of certain mortgage work carried out by solicitors. See Part 9.

[7] Part 9

Insert after Part 8A:

Part 9 Mortgage practices and managed investment schemes

Division 1 Preliminary

115 Definitions

In this Part:

ASIC exemption means an exemption from the *Corporations Law* given by the Australian Securities and Investment Commission under the *Corporations Law*.

associate of a solicitor has the same meaning as in Division 1 of Part 6.

borrower means a person who borrows from a lender or contributor money that is secured by a mortgage.

client of a solicitor means a person who:

- (a) receives the solicitor's advice about investment in a regulated mortgage or managed investment scheme, or
- (b) gives the solicitor instructions to use money for a regulated mortgage or managed investment scheme.

contributor means a person who lends, or proposes to lend, money that is secured by a contributory mortgage arranged by a solicitor.

contributory mortgage means a mortgage to secure money lent by 2 or more contributors as tenants in common or joint tenants, whether or not the mortgagee is a person who holds the mortgage in trust for or on behalf of those contributors.

financial institution means:

- (a) an authorised deposit-taking institution, or
- (b) a body that, immediately before 1 July 1999, was a society within the meaning of the *Friendly Societies (NSW) Code* or a body that is a friendly society for the purposes of the *Life Insurance Act 1995* of the Commonwealth, or
- (c) a trustee company referred to in the Second Schedule to the *Trustee Companies Act 1964*, or
- (d) a property trust or other body corporate established by or in respect of a church that may invest money in accordance with an Act, or
- (e) a corporation or other body, or a corporation or body of a class, prescribed by the regulations for the purpose of this definition.

lender means a person who lends, or proposes to lend, a borrower money that is secured by a mortgage.

managed investment scheme has the same meaning as in the *Corporations Law*.

member of a managed investment scheme has the same meaning as in the *Corporations Law*.

mortgage means an instrument under which an interest in real property is charged, encumbered or transferred as security for the payment or repayment of money, and includes:

- (a) any instrument that is prescribed by the regulations as being a mortgage, and
- (b) a proposed mortgage.

professional misconduct has the same meaning as in Part 10.

regulated mortgage means a mortgage (including a contributory mortgage) other than:

- (a) a mortgage under which the lender is a financial institution, or
- (b) a mortgage under which the lender or contributors nominate the borrower, but only if the borrower is not a person introduced to the lender or contributors by the solicitor who acts for the lender or contributors or by:

- (i) an associate of the solicitor, or
 - (ii) an agent of the solicitor, or
 - (iii) a person engaged by the solicitor for the purpose of introducing the borrower to the lender or contributors, or
- (c) a mortgage, or a mortgage of a class, that the regulations prescribe as exempt from this definition.

responsible entity has the same meaning as in the *Corporations Law*.

run-out mortgage means a regulated mortgage that was entered into before the date of commencement of section 117, as inserted by the *Legal Profession Amendment (Mortgage Practices) Act 2000*, which is not:

- (a) a State regulated mortgage, or
- (b) a mortgage that forms part of a managed investment scheme that is required to be operated by a responsible entity under the *Corporations Law* (as modified by any ASIC exemption or the regulations under the *Corporations Law*).

State regulated mortgage is defined in section 116.

State regulated mortgage practice means a solicitor's practice in respect of which a nomination made in accordance with section 118 is in force.

116 State regulated mortgage—meaning

For the purposes of this Part, a regulated mortgage is a **State regulated mortgage**, in relation to a solicitor, if:

- (a) the solicitor's practice is a State regulated mortgage practice, and
- (b) the regulated mortgage does not form part of a managed investment scheme or, if it does form part of a managed investment scheme, the managed investment scheme is not required to be operated by a responsible entity under the *Corporations Law* (as modified by any ASIC exemption or the regulations under the *Corporations Law*).

Division 2 Mortgage practices

117 Conduct of mortgage practices

- (1) A solicitor must not, in the solicitor's capacity as solicitor for a lender or contributor, negotiate the making of or act in respect of a regulated mortgage unless:
 - (a) the mortgage is a State regulated mortgage, or
 - (b) the mortgage is a run-out mortgage, or
 - (c) the mortgage forms part of a managed investment scheme that is operated by a responsible entity.
- (2) A solicitor must not, in the solicitor's capacity as solicitor for a lender or contributor, negotiate the making of or act in respect of a regulated mortgage except in accordance with:
 - (a) the *Corporations Law*, or the *Corporations Law* as modified by any ASIC exemption or the regulations under the *Corporations Law*, and
 - (b) this Act, the regulations and solicitors rules.
- (3) A solicitor must not, in the solicitor's capacity as solicitor for a lender or contributor, negotiate the making of or act in respect of a regulated mortgage that forms part of a managed investment scheme unless the solicitor complies with any ASIC exemption that applies to managed investment schemes that:
 - (a) have more than 20 members, and
 - (b) are operated under the supervision of the Law Society in accordance with that exemption.

This subsection applies even if the regulated mortgage forms part of a managed investment scheme that has no more than 20 members.

- (4) Subsection (3) does not apply if the managed investment scheme is operated by a responsible entity.
- (5) A solicitor who knows that an associate has contravened a requirement referred to in subsection (1), (2) or (3) must notify the Law Society Council of that fact in writing within 21 days after becoming aware of the contravention.

- (6) A solicitor who contravenes this section commits professional misconduct.

118 Nomination of practice as State regulated mortgage practice

- (1) A solicitor who, in the solicitor's capacity as solicitor for a lender or contributor, negotiates the making of or acts in respect of a regulated mortgage, or who proposes to do so, may, by notice in writing given to the Law Society Council, nominate the solicitor's practice as a State regulated mortgage practice.
- (2) A nomination may, with the approval of the Law Society Council, be made for a solicitor by another solicitor (for example, by a solicitor on behalf of members of a firm of solicitors).
- (3) A nomination of a solicitor's practice as a State regulated mortgage practice takes effect on the date the notice of the nomination is given to the Law Society Council.
- (4) A nomination ceases to be in force, in respect of a solicitor, if:
- (a) the solicitor revokes the nomination by notice in writing given to the Law Society Council, or
 - (b) the practising certificate of the solicitor ceases to be in force, or
 - (c) the Law Society Council, by notice in writing served on the solicitor, rejects the nomination of the solicitor's practice.
- (5) A nomination under this section is to include such information as may be required by the regulations or the solicitor's rules.
- (6) In this section:
practising certificate includes, in respect of an interstate legal practitioner, an interstate practising certificate.

119 Requirement to notify Law Society of State regulated mortgages

- (1) A solicitor who, in the solicitor's capacity as solicitor for a lender or contributor, negotiates the making of or acts in respect of a State regulated mortgage must give the Law Society Council notice in writing of that fact in accordance with the regulations or solicitors rules.

Maximum penalty: 20 penalty units.

- (2) A solicitor who contravenes this section commits professional misconduct.

120 Solicitor to have fidelity cover in respect of regulated mortgages

- (1) A solicitor who, in the solicitor's capacity as solicitor for a lender or contributor, negotiates the making of or acts in respect of a regulated mortgage must ensure that an approved policy of fidelity insurance is in force in respect of the solicitor for the purpose of compensating persons who suffer pecuniary loss because of any dishonest failure to pay money payable under the mortgage.

- (2) A policy of fidelity insurance is an approved policy of fidelity insurance if:

- (a) the insurer and the terms of the policy have been approved by the Attorney General by order in writing given to the Law Society, and
- (b) any conditions imposed by the order are complied with.

- (3) A solicitor who, in the solicitor's capacity as solicitor for a lender or contributor, negotiates the making of or acts in respect of a regulated mortgage without ensuring that an approved policy of fidelity insurance is in force in respect of the solicitor in accordance with this section is guilty of an offence.

Maximum penalty: 20 penalty units.

- (4) A solicitor who contravenes this section commits professional misconduct.

- (5) This section does not apply in respect of any regulated mortgage that forms part of a managed investment scheme that is operated by a responsible entity.

Note. See Division 4 for transitional arrangements applying to mortgages entered into before the commencement of this section.

121 Bar on claims against Fidelity Fund relating to regulated mortgages

- (1) A person who is a lender or contributor under a regulated mortgage is not entitled to make a claim against the Fidelity Fund for the purpose of obtaining compensation for a pecuniary loss if the claim relates to a regulated mortgage in respect of which a solicitor is required to have fidelity insurance under section 120.
- (2) Subsection (1) does not apply if the solicitor who acts for the lender or contributor fails to comply with the requirements of section 120 in respect of the mortgage.
- (3) However, any claim on the Fidelity Fund by a lender or contributor to whom subsection (2) relates is to be dealt with as if the solicitor had complied with section 120 and, in particular, is to be subject to the same restrictions (including as to the amount of any compensation payable) as would have applied to a claim under a policy of fidelity insurance had such a policy been in force in respect of the solicitor as required by that section.

122 Notification of insurance arrangements for regulated mortgage

- (1) If a client entrusts money to a solicitor and the money, or part of the money, is proposed to be advanced to a borrower for a regulated mortgage, the solicitor must, within 7 days after the money is entrusted to the solicitor, give the client a notice in writing that:
 - (a) advises the client of the effect of section 121, and
 - (b) includes details of the policy of fidelity insurance referred to in section 120 (1).
- (2) The solicitor must not advance any of the money to a borrower for a regulated mortgage unless:
 - (a) the client has been given the notice referred to in subsection (1), and
 - (b) after having been given that notice, the client has given the solicitor a specific authority in writing to advance the money for that mortgage.
- (3) A solicitor who contravenes this section commits professional misconduct.

- (4) A contravention of this section does not limit the operation of section 121.
- (5) This section does not apply in respect of a regulated mortgage that forms part of a managed investment scheme that is operated by a responsible entity.

122A Failure to obtain fidelity insurance for regulated mortgage

- (1) The Law Society Council must not issue a practising certificate to an applicant who is or will be required to comply with section 120 unless it is satisfied that:
 - (a) there is, or will be, in force with respect to the applicant an approved policy of fidelity insurance within the meaning of section 120, and
 - (b) the policy is, or will be, in force with respect to the applicant during the currency of the applicant's practising certificate.
- (2) The Law Society Council must suspend the practising certificate of a solicitor who is required to comply with section 120 unless it is satisfied that:
 - (a) there is in force with respect to the solicitor an approved policy of fidelity insurance within the meaning of section 120, and
 - (b) the policy is in force with respect to the solicitor during the currency of the solicitor's practising certificate.
- (3) The Law Society Council must suspend the entitlement under Part 3B to practise in this State of a solicitor who is required to comply with section 120 unless it is satisfied that:
 - (a) there is, or will be, in force with respect to the solicitor an approved policy of fidelity insurance within the meaning of section 120, and
 - (b) the policy is not to expire before the expiration of the entitlement under Part 3B to practise in this State of the solicitor to whom the policy relates.

Division 3 Managed investment schemes

122B Involvement of solicitors in managed investment schemes

- (1) This Part does not prevent a solicitor from carrying out any legal work in connection with a managed investment scheme that is operated by a responsible entity, or from having an interest in such a managed investment scheme or in the responsible entity for such a managed investment scheme.
- (2) However, if a client entrusts, or proposes to entrust, money to a solicitor to be invested in a managed investment scheme that is operated by a responsible entity, and the solicitor has a prescribed interest in the managed investment scheme, the solicitor must give the client a notice in writing that advises the client that:
 - (a) the solicitor has an interest in the managed investment scheme, and
 - (b) the operation of the managed investment scheme does not form part of the solicitor's practice, and
 - (c) there is no claim against the Fidelity Fund for a pecuniary loss arising from an investment in the managed investment scheme.
- (3) The notice is to include such other matters as may be required by the regulations or the solicitors rules.
- (4) The solicitor must not advance the money entrusted to the solicitor to the responsible entity for the managed investment scheme or to any other person unless the client has been given the notice.
- (5) A solicitor who knows that an associate has contravened a requirement referred to in this section must notify the Law Society Council in writing of that fact within 21 days after becoming aware of the contravention.
- (6) A solicitor who contravenes this section commits professional misconduct.

- (7) For the purposes of this section, a solicitor has a *prescribed interest* in a managed investment scheme if:
- (a) the solicitor, or an associate of the solicitor, is a director of or concerned in the management of the responsible entity for the managed investment scheme, or
 - (b) the solicitor, or an associate of the solicitor, is a shareholder in the responsible entity for the managed investment scheme, or
 - (c) the solicitor, or an associate of the solicitor, is taken to be an agent of the responsible entity under Chapter 5C of the *Corporations Law*, or
 - (d) the solicitor, or an associate of the solicitor, receives any pecuniary benefit from the managed investment scheme or the responsible entity for the managed investment scheme if a client of the solicitor invests in the managed investment scheme, or
 - (e) the solicitor, or an associate of the solicitor, has an interest of a kind prescribed by the regulations or solicitors rules in the managed investment scheme or the responsible entity for the managed investment scheme.
- (8) In this section:
- legal work* includes general legal work (within the meaning of section 48E).

122C Claims against Fidelity Fund relating to managed investment schemes connected with solicitors

- (1) A person who entrusts money to a solicitor to be invested in a managed investment scheme that is operated by a responsible entity is not entitled to make a claim against the Fidelity Fund for the purpose of obtaining compensation for any pecuniary loss arising from that investment if section 122B (2) applied in respect of the entrustment of that money.
- (2) Subsection (1) does not apply if the solicitor who acted for the person failed to comply with the notice requirements set out in section 122B.
- (3) The *notice requirements* set out in section 122B are the requirements of subsections (2), (3) and (4) of that section.

122D Transfer of mortgages to responsible entity

- (1) A solicitor who, in the solicitor's capacity as solicitor for a lender or contributor, is responsible for the administration of a regulated mortgage must not transfer that mortgage to a responsible entity for a managed investment scheme unless the lender or contributor has given the solicitor authority in writing to transfer the regulated mortgage to the responsible entity.
- (2) A solicitor who contravenes this section commits professional misconduct.
- (3) For the purposes of this section, a solicitor transfers a regulated mortgage to a responsible entity when the solicitor does anything that results in:
 - (a) a responsible entity for a managed investment scheme becoming the holder or custodian of the regulated mortgage, or
 - (b) any advances of money made in respect of the mortgage, or the property that is charged or encumbered by the mortgage, becoming scheme property (within the meaning of the *Corporations Law*) of a managed investment scheme.

122E Regulations and rules relating to managed investment schemes

Without limiting section 122M, the regulations and solicitors rules may include provisions for the purpose of:

- (a) ensuring that the operation of a managed investment scheme by a responsible entity is kept separate from a solicitor's practice, and
- (b) ensuring that clients of a solicitor are aware that the operation of such a managed investment scheme does not form part of the solicitor's practice.

Division 4 Transitional arrangements—pre-existing mortgages

122F Part extends to pre-existing mortgages

Except as provided by this Division, this Part extends to mortgages that were entered into before the commencement of section 117 (as inserted by the *Legal Profession Amendment (Mortgage Practices) Act 2000*).

122G Requirement to obtain fidelity insurance in respect of pre-existing mortgages

- (1) Section 120 does not apply in respect of a regulated mortgage that was entered into before the relevant commencement date.
- (2) Despite subsection (1), section 120 applies in respect of a solicitor if money entrusted to the solicitor by a client (whether before, on or after the relevant commencement date) is advanced or proposed to be advanced on or after the relevant commencement date to a borrower for a regulated mortgage entered into before the relevant commencement date. In such a case:
 - (a) the solicitor must ensure that a policy of fidelity insurance is in force in respect of the advance in accordance with section 120, and comply with section 122, and
 - (b) section 121 (1) applies to any claim against the Fidelity Fund in so far as it relates to such an advance.
- (3) For the purpose of applying section 122 (1) in such a case, the date that money is entrusted to the solicitor by a client is taken to be the relevant commencement date, or the date on which the money is entrusted to the solicitor, whichever is the later.
- (4) This section is subject to section 122I (which allows solicitors to substitute lenders under a run-out mortgage without obtaining fidelity insurance).
- (5) In this section, the *relevant commencement date* means the date of commencement of section 120, as inserted by the *Legal Profession Amendment (Mortgage Practices) Act 2000*.

122H No further action to be taken in respect of run-out mortgages

- (1) A solicitor must not, in the solicitor's capacity as solicitor for a lender or contributor:
 - (a) advance any money entrusted to the solicitor to a borrower for a run-out mortgage, or
 - (b) do any work for the purpose of extending the term of a run-out mortgage, or
 - (c) accept any money from a client for the purpose of advancing that money to a borrower for a run-out mortgage, or
 - (d) do anything else with respect to a run-out mortgage in contravention of the regulations or the solicitors rules relating to run-out mortgages.
- (2) A solicitor who contravenes this section commits professional misconduct.

122I Substitution of lender or contributor under run-out mortgage

- (1) A solicitor may, despite section 122H, accept money from a client, and do any other work that is necessary, solely for the purpose of substituting a lender or contributor under a run-out mortgage.
 - (2) Section 120 does not apply in respect of such action. Accordingly, the solicitor is not required to obtain fidelity insurance for the purpose of compensating the substitute lender or contributor for any pecuniary loss.
 - (3) If a client entrusts or proposes to entrust money to a solicitor for the purpose of substituting a lender or contributor under a run-out mortgage, the solicitor must give the client a notice in writing that advises the client:
 - (a) of the effect of section 122J, and
 - (b) that the solicitor is not required to have fidelity insurance in respect of the run-out mortgage.
 - (4) The solicitor must not advance the money to a borrower for a run-out mortgage unless the solicitor has given the client the notice referred to in subsection (3).
 - (5) A solicitor who contravenes this section commits professional misconduct.
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122J No claims against Fidelity Fund by substitute lenders

- (1) A person who becomes a lender or contributor under a run-out mortgage after the commencement of section 117, as inserted by the *Legal Profession Amendment (Mortgage Practices) Act 2000*, is not entitled to make a claim against the Fidelity Fund for the purpose of obtaining compensation for a pecuniary loss if the claim relates to that mortgage.
- (2) Subsection (1) does not apply if the solicitor who acts for the person fails to give the client the notice referred to in section 122I in accordance with that section.

Division 5 Miscellaneous

122K Law Society may require information about mortgage practices

- (1) The Law Society Council may, by notice in writing, require a solicitor to provide information to the Law Society Council about any of the following:
 - (a) whether the solicitor, an associate of the solicitor or a person engaged by the solicitor negotiates the making of or acts in respect of regulated mortgages or has done so in the past,
 - (b) details of regulated mortgages that continue to have effect,
 - (c) whether the solicitor proposes:
 - (i) to nominate the solicitor's practice as a State regulated mortgage practice, or
 - (ii) to transfer responsibility for any regulated mortgage, or
 - (iii) to take no further action in respect of any regulated mortgage,
 - (d) such other information, relating to regulated mortgages, as the regulations or the solicitors rules may require to be provided.
- (2) A solicitor who fails to comply with such a notice commits professional misconduct.

122L Indemnity insurance

Nothing in this Part affects the terms of any policy of indemnity insurance approved under section 41.

122M Regulations and rules relating to Part

- (1) The regulations and, subject to the regulations, the solicitors rules may make provision for or with respect to:
 - (a) regulated mortgages, including run-out mortgages, and
 - (b) the involvement of solicitors in managed investment schemes.
- (2) In particular, the regulations and the solicitors rules may make provision for or with respect to the following:
 - (a) the negotiation of the making of or acting in respect of regulated mortgages by solicitors,
 - (b) the manner in which the Law Society Council is to be given any notice or other information under this Part,
 - (c) the form of notices and authorities for the purposes of this Part,
 - (d) the manner in which notices are to be given in accordance with this Part.
- (3) If the regulations or the solicitors rules prescribe a form of notice or authority for the purposes of this Part, the notice or authority is to be given in the prescribed form.

[8] Schedule 8 Savings, transitional and other provisions

Insert at the end of clause 1A (1):

Legal Profession Amendment (Mortgage Practices) Act 2000

[9] Schedule 8

Insert at the end of Schedule 8 (with appropriate Part and clause numbering):

Part Provisions consequent on enactment of Legal Profession Amendment (Mortgage Practices) Act 2000

Definitions

In this Part:

amending Act means the *Legal Profession Amendment (Mortgage Practices) Act 2000*.

client has the same meaning as in Part 9.

Application of section 61A

Section 61A:

- (a) applies only to money received by a solicitor on or after the commencement of that section, and
- (b) applies even if the costs referred to in that section were awarded by the Compensation Court before the commencement of that section.

Requirement to notify insurance arrangements for State regulated mortgages

- (1) Section 122 (2), as inserted by the amending Act, applies in respect of an advance of money made or proposed to be made on or after the relevant commencement date by a solicitor to a borrower for a State regulated mortgage even if:
 - (a) the money was entrusted to the solicitor by the client before the relevant commencement date, or
 - (b) an authority to advance the money was given to the solicitor by the client before the relevant commencement date, or
 - (c) the regulated mortgage was entered into before the relevant commencement date.

- (2) An authority given by a client before the relevant commencement date in accordance with clause 55 of the *Legal Profession Regulation 1994* is taken to be an authority for the purpose of section 122 (2) (b) but not if it is a general lending authority given under clause 55 of the *Legal Profession Regulation 1994*.
- (3) In this clause, the ***relevant commencement date*** means the date of commencement of section 122, as inserted by the amending Act.

Managed investment scheme provisions

Section 122B, as inserted by the amending Act, applies to money entrusted to a solicitor by a client after the commencement of that section, and section 122C applies accordingly.

[Minister's second reading speech made in—
Legislative Council on 3 May 2000
Legislative Assembly on 24 May 2000]