(Only the Explanatory note is available for this Bill)

[Act 1998 No 50]

New South Wales

Legal Profession Amendment (Solicitors' Mortgage Practices) Bill 1998

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The object of this Bill is to amend the *Legal Profession Act 1987,* so as:

(a) to provide for the stricter regulation of certain mortgage work carried out by solicitors, and

(b) to exclude the payment, from the Solicitors' Fidelity Fund. of compensation for pecuniary loss suffered by persons who advance money for investment on certain mortgages but to require solicitors who act for such persons to ensure that separate fidelity insurance is in force for the protection of these persons, and

(c) to enact other provisions of a consequential, ancillary or transitional nature.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act by proclamation.

Clause 3 is a formal provision giving effect to the amendments to the *Legal Profession Act 1987* set out in Schedule 1.

Schedule 1 Amendments

Schedule 1 [l] inserts definitions of certain words and expressions in the *Legal Profession Act 1987* ***(the Principal Act),*** including the following:

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

(b) ***contributor*** means a person who lends, or proposes to lend, money on the security of a contributory mortgage arranged by a solicitor.

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

(d) ***excluded mortgage*** means a mortgage (including a contributory mortgage) other than:

- (i) a mortgage in which the lender is a financial institution, or
- (ii) a mortgage in which the lender nominates the borrower and the borrower is not a person introduced to the lender by the solicitor (or an associate of the solicitor) who arranges for the making of the mortgage.
- (iii) a mortgage that the regulations prescribe as not being an excluded mortgage.

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

Schedule 1 [2] provides that. so far as solicitors who are local legal practitioners are concerned, the Law Society Council is prohibited from issuing a practising certificate to a solicitor who does excluded mortgage work as solicitor for lenders or contributors unless it is satisfied that appropriate arrangements have been made for fidelity insurance (see note concerning **Schedule 1 [6]** below) and that the required insurance policy will not expire before the expiration of the practising certificate. Similarly, the Law Society Council is required to suspend the practising certificate of a solicitor who undertakes such work without the required fidelity insurance cover.

So far as interstate legal practitioners who do such excluded mortgage work are concerned, the Law Society Council is required to suspend the entitlement under the Principal Act of the practitioner to practise in the NSW unless it is satisfied that appropriate arrangements have been made for fidelity insurance and that the required insurance policy will not expire before the entitlement of the practitioner to practise in NSW expires.

Schedule 1 [3] provides that a solicitor who, as solicitor for a lender or contributor, negotiates the making or acts in respect of an excluded mortgage without ensuring that fidelity insurance cover is in force in accordance with proposed section 80C (see note concerning **Schedule 1 [6]** below) is guilty of an offence. A solicitor who, as solicitor for a lender or contributor, negotiates the making or acts in respect of an excluded mortgage is also required to notify the Law Society of that fact. A failure to comply with either of these requirements constitutes an offence punishable by a maximum penalty of 20 penalty units. (In accordance with section 56 of the *Interpretation Act 1987*, a penalty unit is currently equivalent to $110.)

A solicitor who, as solicitor for a lender or contributor, negotiates the making or acts in respect of an excluded mortgage must also comply with the requirements of the Principal Act, the regulations, the solicitors rules and the *Corporations Law* with respect to mortgage investments. In addition, a solicitor who knows that an associate has breached or failed to comply with any of these requirements in relation to an excluded mortgage must notify the Law Society of that fact.

A solicitor who contravenes any of these requirements commits professional misconduct.

The provisions also enable the making of regulations or solicitors rules in relation to excluded mortgages as a consequence of the enactment of the proposed Act.

Schedule 1 [4] provides that the Law Society has the function of developing educational programs to increase public awareness of requirements relating to excluded mortgages.

Schedule 1 [5] permits specified persons (including trust account inspectors and investigators under the Principal Act) to disclose to the Australian Securities Commission particulars concerning solicitors who, as solicitors for lenders or contributors, negotiate the making or act in respect of excluded mortgages, breach the requirements relating to mortgage investments or breach the conditions of certain exemptions given by the Australian Securities Commission under the *Corporations Law.*

Schedule 1 [6] inserts provisions (proposed sections 80B–80D) relating to the general non-availability of the Solicitors' Fidelity Fund ***(the Fidelity Fund)*** maintained under the Principal Act for claims by lenders or contributors arising from excluded mortgages.

Proposed section 80B provides that a person who is a lender or contributor under an excluded mortgage is not entitled to make a claim against the Fidelity Fund to obtain compensation for pecuniary loss if the claim relates to an excluded mortgage.

However, if the solicitor who acted for the lender or contributor has failed to comply with the requirements of proposed section 80C in respect of the excluded mortgage, the lender or contributor may stiII look to the Fidelity Fund for compensation but only to the extent necessary to place the person in the same position (including as to the amount of any compensation payable) that the person would have occupied had fidelity insurance cover been in force in respect of the solicitor.

Proposed section 80C requires a solicitor who, as solicitor for a lender or contributor, negotiates the making or acts in respect of an excluded mortgage to ensure that fidelity insurance cover is in force for the purpose of compensating persons who suffer pecuniary loss because of a failure to account or a dishonest default in respect of excluded mortgages. The cover is to be arranged with an insurer and on the terms approved by the Attorney General.

Proposed section 80D applies with respect to a client who entrusts. or proposes to entrust, money to a solicitor to be advanced for an excluded mortgage. (The proposed section defines ***client*** of a solicitor to mean a person who receives the solicitor's advice about investment in an excluded mortgage or who instructs the solicitor to use money for an excluded mortgage.)

A solicitor is required to give a client to whom the proposed section applies a notice as to the effect of proposed section 80B and details of the fidelity insurance cover in force under section 80C in a form prescribed by the regulations or solicitors rules.

The notice must be given before money is advanced by the solicitor for the excluded mortgage. The solicitor may advance money for an excluded mortgage only if authorised to do so by the client in writing in the form prescribed by the regulations or solicitors rules.

A solicitor who contravenes the requirements of the proposed section is guilty of professional misconduct. A failure to comply with the proposed section does not affect the operation of proposed section 80B.

Schedule 1 [7] allows regulations of a savings and transitional nature to be made consequent on the enactment of the proposed Act.

Schedule 1 [8] inserts savings and transitional provisions (proposed Part 10 to Schedule 8), including provisions that:

(a) make it clear that certain provisions do not apply in respect of anything done by a solicitor in respect of an excluded mortgage entered into before the commencement of proposed Part 10, unless it is done after the commencement of that Part, and

(b) make it clear that the Fidelity Fund continues to be available for the benefit of lenders or contributors under mortgages that were entered into before the commencement of proposed Part 10, except in relation to any further advances made in respect of a mortgage after the commencement of that Part, and

(c) apply the notice provisions (proposed section 80D) to any money that is entrusted to a solicitor and is advanced, or proposed to be advanced. to a borrower for an excluded mortgage after the commencement of Part 10.