

HomeFund Commissioner Act 1993 No 9

[1993-9]



New South Wales

Status Information

Currency of version

Repealed version for 1 July 2010 to 28 June 2015 (accessed 19 November 2024 at 5:15)

Legislation on this site is usually updated within 3 working days after a change to the legislation.

Provisions in force

The provisions displayed in this version of the legislation have all commenced.

Notes—

- **Repeal**

The Act was repealed by sec 3 (c) of the [Fair Trading Legislation \(Repeal and Amendment\) Act 2015 No 12](#) with effect from 29.6.2015.

Authorisation

This version of the legislation is compiled and maintained in a database of legislation by the Parliamentary Counsel's Office and published on the NSW legislation website, and is certified as the form of that legislation that is correct under section 45C of the [Interpretation Act 1987](#).

File last modified 29 June 2015

HomeFund Commissioner Act 1993 No 9



New South Wales

Contents

Long title	5
Part 1 Preliminary	5
1 Name of Act	5
2 Commencement	5
3 Definitions	5
4 Object of Act	6
Part 2 Appointment of Commissioner	6
5 Appointment of HomeFund Commissioner	6
6 Staff of Commissioner	6
Part 3 Functions of Commissioner	7
7 General functions	7
8 Principal functions	7
9 Delegation of functions	7
Part 4 Complaints	8
Division 1 Complaints generally	8
10 Right to complain	8
11 Preliminary assessment	8
Division 2 Dealing with and investigating complaints	8
12 Investigations	9

13 Reasons for refusal or discontinuance of investigation.....	9
14 Notice of investigation.....	9
15 Privacy.....	10
16 Information to be given	10
17 Inquiries.....	10
18 Entry on premises etc.....	10
19 Limits on secrecy and privilege (information and inquiries)	10
20 Limits on secrecy and privilege (entry of premises)	11
21 Cabinet information and proceedings.....	11
22 Submissions	12
Division 3 General provisions	12
23 Representation	12
24 General procedure.....	12
Part 5 Determinations	13
25 Determinations.....	13
26 Monetary determinations	15
26A Contributions between parties	15
26B Determinations affecting the FANMAC trustee	15
26C Determinations affected by the restructuring scheme under the HomeFund Restructuring Act 1993	16
27 Determination for suspending eviction.....	16
28 Binding nature of determinations	16
29 Consents to determinations.....	17
29A Enforcement of determinations	17
30 Form of determination	17
31 Other relief	17
Part 6 Reports	17
32 Report of complaint	17
33 Annual report.....	18
34 Special report to Parliament	18
35 Recommendations	18

Part 7 Miscellaneous	18
36 Act binds Crown.....	18
37 (Repealed)	18
37A Credit reporting agencies	18
38 Application of Act	19
39 Personal liability of Commissioner and others	19
40 Appeal	20
40A Proceedings by or against the Department of Housing	20
41 Incriminatory statement	20
42 Offences	21
42A Certain agreements prohibited.....	21
43 Proceedings for offences	22
44 Regulations.....	22
45 (Repealed)	22
46 Expiry of Act	22
Schedule 1 Provisions relating to Commissioner	22
Schedule 2 (Repealed)	24

HomeFund Commissioner Act 1993 No 9



New South Wales

An Act to provide for the appointment and functions of the HomeFund Commissioner; and for other purposes.

Part 1 Preliminary

1 Name of Act

This Act may be cited as the *HomeFund Commissioner Act 1993*.

2 Commencement

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

3 Definitions

(1) In this Act:

complaint means a complaint under this Act.

determination means a determination under Part 5.

exercise of a function includes, if the function is a duty, the performance of the duty.

FANMAC means First Australian National Mortgage Acceptance Corporation Limited.

FANMAC trustee means the trustee of funds raised from time to time by FANMAC for the purposes of home lending.

function includes a power, authority or duty.

guarantee includes indemnity.

HomeFund borrower means the mortgagor under a HomeFund mortgage or the guarantor under an associated contract of guarantee, and includes:

- (a) a person who was such a mortgagor or guarantor, and
- (b) the estate of a deceased mortgagor or guarantor, where relevant.

HomeFund Commissioner means the HomeFund Commissioner appointed under

this Act.

HomeFund mortgage means a mortgage executed by Permanent Trustee Company Limited as mortgagee in its capacity as FANMAC trustee, and includes:

- (a) the credit contract secured by such a mortgage, and
- (b) any contract of guarantee or other contract associated with such a mortgage or credit contract.

investigation means an investigation under this Act.

mortgage has the same meaning as in the [Conveyancing Act 1919](#).

party to a determination means a person or body named in the determination as being covered by the determination.

public authority has the same meaning as in the [Ombudsman Act 1974](#), but does not include a Minister of the Crown.

- (2) If there is more than one HomeFund borrower connected with a particular HomeFund mortgage, references in this Act to the borrower or a borrower are (when applying to that mortgage) taken to be references to all or any of the borrowers.

4 Object of Act

The object of this Act is to provide for the appointment of a HomeFund Commissioner to investigate and deal with complaints made by HomeFund borrowers.

Part 2 Appointment of Commissioner

5 Appointment of HomeFund Commissioner

- (1) The Governor may, on the recommendation of the Minister, appoint a person to be HomeFund Commissioner.
- (2) Schedule 1 has effect with respect to the Commissioner.

6 Staff of Commissioner

- (1) The staff of the Commissioner is (subject to this section) to be employed under Part 2 of the [Public Sector Management Act 1988](#).
- (2) The Commissioner may employ other staff with the approval of the Minister. Part 2 of the [Public Sector Management Act 1988](#) does not apply to the employment of any such staff.
- (3) The Commissioner may arrange for the use of the services of any staff (by secondment or otherwise) or facilities of a Government agency or any other public or

local authority. Any staff of whose services the Commissioner makes use is taken to be the staff of the Commissioner for the purposes of this Act.

- (4) The Commissioner may, with the approval of the Minister, engage consultants or other persons for the purpose of getting expert assistance.

Part 3 Functions of Commissioner

7 General functions

- (1) The Commissioner has the functions conferred or imposed on the Commissioner by or under this or any other Act.
- (2) The Commissioner may do all such things as are supplemental or incidental to the exercise of the Commissioner's functions.

8 Principal functions

- (1) The principal functions of the Commissioner are to receive complaints from HomeFund borrowers arising from the promotion of, negotiations for, entering of, terms of, and administration and enforcement of, the HomeFund mortgages to which they are or were parties, and (in connection with any such complaints):
 - (a) to provide advice about the relief and remedies available to HomeFund borrowers,
 - (b) to refer HomeFund borrowers to appropriate authorities,
 - (c) to investigate complaints,
 - (d) to conciliate complaints,
 - (e) to make determinations in accordance with this Act.
- (2) The Commissioner may exercise the functions of providing advice, referring borrowers and conciliating complaints before, during, following or without an investigation.
- (3) The Commissioner may make recommendations to persons who appear to be materially involved in the subject-matter of a complaint. Any such recommendation may be made before, during, following or without an investigation, and whether or not the Commissioner has made or proposes to make any determinations.
- (4) The Commissioner is, to the extent considered appropriate by the Commissioner, to keep records and to collate and assess information in connection with functions under this Act and, in particular, to facilitate the making of reports and recommendations as occasion requires.

9 Delegation of functions

- (1) The Commissioner may delegate to an authorised person any of the functions of the

Commissioner other than this power of delegation.

- (2) A delegate may sub-delegate to an authorised person any function delegated by the Commissioner if the delegate is authorised in writing to do so by the Commissioner.
- (3) In this section, **authorised person** means:
 - (a) a member of the staff of the Commissioner, or
 - (b) (Repealed)
 - (c) a person of a class prescribed by the regulations or approved by the Minister.

Part 4 Complaints

Division 1 Complaints generally

10 Right to complain

- (1) A HomeFund borrower may complain to the Commissioner about the promotion of, negotiations for, entering of, terms of, or administration or enforcement of, the HomeFund mortgage to which the borrower is or was a party.
- (2) Complaints must be made before 31 March 1994. However, the Commissioner has a discretion to accept a complaint after that date.
- (3) A complaint may be in writing or verbal, but the Commissioner may require a verbal complaint to be reduced to writing.
- (4) The Commissioner may require information about a complaint to be provided by the complainant in a particular manner or form, and may require a complaint to be verified by statutory declaration.
- (5) No fee is payable for making a complaint to the Commissioner.
- (6) The Commissioner may agree to the amendment or withdrawal of a complaint.
- (7) The Commissioner may treat a complaint as consisting of two or more separate complaints.

11 Preliminary assessment

The Commissioner may conduct a preliminary assessment of a complaint, for the purpose of deciding whether to exercise any other functions under this Act in relation to the complaint.

Division 2 Dealing with and investigating complaints

12 Investigations

- (1) The Commissioner may investigate a complaint or may choose not to do so.
- (2) The Commissioner may discontinue an investigation.
- (2A) The Commissioner may, at any time, recontinue an investigation that has been discontinued.
- (3) In deciding whether to investigate a complaint or whether to discontinue an investigation, the Commissioner may have regard to such matters as the Commissioner thinks fit, and without limitation may have regard to whether in the Commissioner's opinion:
 - (a) the complaint is frivolous, vexatious or not in good faith, or
 - (b) the subject-matter of the complaint is trivial, or
 - (c) there is available to the complainant an alternative, satisfactory and readily available means of redress, or
 - (d) the complainant has no interest or an insufficient interest in the subject-matter of the complaint, or
 - (e) the complainant does not have an entitlement to a legal remedy, or
 - (f) the conduct of the complainant does not warrant the matter to be pursued by the Commissioner.

13 Reasons for refusal or discontinuance of investigation

If a complaint has been made to the Commissioner and the Commissioner:

- (a) refuses to investigate the complaint, or
- (b) discontinues an investigation of the complaint,

the Commissioner is required to inform the complainant in writing of the decision and the reasons for the decision.

14 Notice of investigation

- (1) The Commissioner is required to give notice of an investigation to the complainant and (so far as practicable) to such other persons as appear to be materially involved in the subject-matter of the complaint.
- (2) The notice must be in writing and describe the subject-matter of the complaint.

15 Privacy

An investigation is to be conducted in the absence of the public.

16 Information to be given

- (1) For the purposes of a preliminary assessment or an investigation, the Commissioner may require any person:
 - (a) to give the Commissioner a statement of information, or
 - (b) to produce to the Commissioner any document or other thing, or
 - (c) to give the Commissioner a copy of any document.
- (2) A requirement under this section must be in writing, must specify or describe the information, document or thing required, and must fix a time and place for compliance.
- (3) (Repealed)

17 Inquiries

- (1) The Commissioner, in the course of an investigation, may make or hold inquiries.
- (2) For the purposes of any inquiry under this section, the Commissioner has the powers, authorities, protections and immunities conferred on a commissioner by Division 1 of Part 2 of the *Royal Commissions Act 1923* and that Act (section 13 and Division 2 of Part 2 excepted) applies to any witness summoned by or appearing before the Commissioner in the same way as it applies to a witness summoned by or appearing before a commissioner, but section 11 (2) of that Act has effect subject to section 19 of this Act.

18 Entry on premises etc

The Commissioner may, in the course of an investigation:

- (a) enter and inspect any premises occupied or used by a public authority as a public authority, and
- (b) inspect any document or thing in or on the premises.

19 Limits on secrecy and privilege (information and inquiries)

- (1) This section applies where the Commissioner requires any person under section 16 or 17:
 - (a) to give any statement of information, or
 - (b) to produce any document or other thing, or

- (c) to give a copy of any document, or
 - (d) to answer any question.
- (2) The Commissioner must set aside the requirement if it appears to the Commissioner that any person has a ground of privilege whereby, in proceedings in a court of law, the person might resist a like requirement and it does not appear to the Commissioner that the person consents to compliance with the requirement.
- (3) The person must however comply with the requirement despite:
- (a) any rule of law which in proceedings in a court of law might justify an objection to compliance with a like requirement on grounds of public interest, or
 - (b) any privilege of a public authority which the authority could have claimed in a court of law, or
 - (c) any duty of secrecy or other restriction on disclosure applying to a public authority.

20 Limits on secrecy and privilege (entry of premises)

- (1) This section applies to the powers of entry and inspection conferred by section 18.
- (2) The powers are not to be exercised if it appears to the Commissioner that any person has a ground of privilege whereby, in proceedings in a court of law, the person might resist inspection of the premises or production of the document or thing and it does not appear to the Commissioner that the person consents to the inspection or production.
- (3) The powers may however be exercised despite:
- (a) any rule of law which in proceedings in a court of law might justify an objection to an inspection of the premises or to production of the document or thing on grounds of public interest, or
 - (b) any privilege of a public authority, or
 - (c) any duty of secrecy or other restriction on disclosure applying to a public authority.

21 Cabinet information and proceedings

- (1) This Act does not enable the Commissioner:
- (a) to require any person:
 - (i) to give any statement of information, or
 - (ii) to produce any document or other thing, or

(iii) to give a copy of any document, or

(iv) to answer any question,

which relates to information that is Cabinet information under the *Government Information (Public Access) Act 2009* or to confidential proceedings of Cabinet or any committee of Cabinet, or

(b) to inspect any document or thing which so relates.

(2) For the purposes of this section, a certificate of the Director-General or Deputy Director-General (General Counsel) of the Department of Premier and Cabinet that:

(a) any information, document, thing or question relates to confidential proceedings of Cabinet or of a committee of Cabinet, or

(b) information is Cabinet information,

is conclusive of that fact.

22 Submissions

(1) The Commissioner must give an opportunity to make submissions on the subject-matter of the complaint the subject of the investigation to any person given notice under section 14.

(2) The Commissioner may determine the mode in which a person is to be given an opportunity to make any such submissions, the manner and period in which any such submissions must be made, and the scope of any such submissions.

Division 3 General provisions

23 Representation

(1) A person is not entitled to be represented by another person before the Commissioner (whether at an inquiry or otherwise) without the leave of the Commissioner.

(2) Leave is not to be given under this section for a person to be represented by an Australian legal practitioner unless the Commissioner is satisfied that leave should be given in the special circumstances of the case.

(3) The Commissioner may allow any person appearing before the Commissioner the services of an interpreter.

24 General procedure

(1) Subject to this Act, the Commissioner:

(a) may determine the procedures to be followed in exercising functions under this Act, including the procedures to be followed at an inquiry (if one is to be held), and

- (b) is to act as quickly as is practicable in the circumstances, and
- (c) is to act in an informal manner (including avoiding conducting formal hearings) as far as possible, and
- (d) is not bound by the rules of evidence and may inform himself or herself on any matter in any way that he or she considers to be just, and
- (e) is to act according to the substantial merits of the case without undue regard to technicalities.

- (2) The Commissioner may form views on and decide any matter on the information before the Commissioner, without being required to seek the giving of evidence.

Part 5 Determinations

25 Determinations

- (1) The Commissioner may make determinations about the whole or any part of the subject-matter of a complaint.
- (2) A determination applies to such of the following as are named in the determination as being covered by it:
 - (a) the parties to a HomeFund mortgage,
 - (b) the parties to an ancillary contract or arrangement to which a HomeFund borrower is or was a party (including, for example, a real estate developer, real estate agent or Australian legal practitioner),
 - (c) a co-operative housing society,
 - (d) the Department of Housing,
 - (e) FANMAC,
 - (f) any person or body (other than a person or body referred to in paragraphs (a)–(e)) who appears to be materially involved in the subject-matter of the complaint,
 - (g) any person or body (other than a person or body referred to in paragraphs (a)–(f)) who consents to being covered by the determination.
- (2A) A person or body cannot be named as a party to a determination unless the person or body has been given notice of the investigation of the complaint (under section 14) and an opportunity to make submissions on the subject-matter of the complaint (under section 22).
- (3) Determinations may be made, only, for any one or more of the following:

- (a) relieving a HomeFund borrower of specified obligations, including current or future payments and arrears of payments,
 - (b) setting aside or altering a HomeFund mortgage,
 - (c) setting aside a HomeFund mortgage and entering into a new transaction,
 - (d) ordering the payment to a HomeFund borrower by a person or body (other than a HomeFund borrower) of an amount of money, whether by way of damages or compensation, or otherwise, for financial loss (including, without limitation, ordering a refund of payments made by a HomeFund borrower),
 - (e) ordering the payment to the FANMAC trustee by a person or body (other than a HomeFund borrower) of an amount referred to in section 26B (1) (b),
 - (f) granting such other relief as is consequential or ancillary to the relief granted by paragraphs (a)-(e),
 - (g) ordering the doing of anything else that is necessary to give effect to the determination.
- (4) The Commissioner is not to make a determination applying to any person or body (other than a HomeFund borrower) unless satisfied that the complainant has (apart from this Act) an entitlement to a legal remedy against that person or body in relation to the complaint.
- (5) Having established that entitlement, the determination may give such relief (of the kind authorised by subsection (3)) as appears to be appropriate in the circumstances and to the entitlement. Accordingly, the relief need not be identical to that which would be available to be given by a court or tribunal in similar circumstances.
- (6) Nothing in this section affects the operation of section 26, 26A, 26B or 26C or the power to make a determination under section 27.
- (7) Without affecting the generality of subsection (3) (g), an order referred to in that paragraph may order the disposition of an interest in land, either by the holder of the interest or, if the holder fails to comply with such an order, by some other person.
- (8) The regulations may make provision for or with respect to the things that must be done before an order for the disposition of land takes effect, and any person (including the Registrar-General) who is required by the regulations to do any thing is authorised to do it.
- (9) No stamp duty is payable in connection with an instrument that is required to be executed for the purpose of giving effect to any relief granted by a determination.

26 Monetary determinations

- (1) This section applies to a determination under section 25 ordering the payment to a HomeFund borrower of an amount of money, whether by way of damages or compensation, or otherwise, for financial loss.
- (2) The maximum amount that can be ordered to be paid to a HomeFund borrower is \$30,000 in relation to a parcel of mortgaged property. This is also the maximum amount payable where there is more than one mortgage of the same property, and is also the maximum amount payable to joint mortgagors.
- (3) However, the Commissioner may, if of the opinion that special circumstances exist, include in the determination a recommendation to the Minister that a specified amount in excess of \$30,000 be paid.
- (4) (Repealed)

26A Contributions between parties

- (1) This section applies where the Commissioner finds that two or more of the parties named or proposed to be named as covered by a determination each bore a measure of responsibility in respect of the subject-matter of the complaint.
- (2) The determination may require a contribution to be made between those parties in respect of any payment ordered to be made to a HomeFund borrower or to any other party.
- (3) In the event that the determination contains such a requirement, the Commissioner must make the determination in such terms as will enable the determination to be enforced against each of those parties to such an extent as appears appropriate in the circumstances.

26B Determinations affecting the FANMAC trustee

- (1) The Commissioner may make a determination applying to the FANMAC trustee even if the complainant does not have an entitlement to a legal remedy against the FANMAC trustee, so long as:
 - (a) the Commissioner is satisfied that the complainant has such an entitlement against one or more of the other parties to the determination, and
 - (b) the Commissioner makes an order requiring some or all of those other parties to pay to the FANMAC trustee such amount as, in the Commissioner's opinion, is sufficient to compensate the FANMAC trustee for the costs incurred by the FANMAC trustee in complying with the requirements of the determination.
- (2) The FANMAC trustee is not obliged to comply with the requirements of a determination referred to in subsection (1) until it has received (whether or not from a

party specified in an order referred to in subsection (1) (b)) an amount, by way of compensation for the costs referred to in that paragraph, of at least the amount specified in the order.

26C Determinations affected by the restructuring scheme under the [HomeFund Restructuring Act 1993](#)

- (1) The Commissioner is not to make a determination granting relief to a HomeFund borrower if the granting to the HomeFund borrower of such relief is excluded by the [HomeFund Restructuring Act 1993](#).
- (2) The Commissioner may make a determination referred to in section 15 (2) of the [HomeFund Restructuring Act 1993](#) despite section 15 (1) of that Act and as if section 15 (1) of that Act had not extinguished the action, liability, claim or demand on which any relevant entitlement to a legal remedy is based.
- (3) However, the Commissioner is not to make a determination referred to in section 15 (2) of the [HomeFund Restructuring Act 1993](#) if the sole basis of the proposed determination is the existence of an entitlement to a legal remedy under the [Trade Practices Act 1974](#) of the Commonwealth.

27 Determination for suspending eviction

- (1) The Commissioner may make a determination specifying premises occupied by a complainant and declaring that the Commissioner is satisfied that the complainant should remain in occupation of the premises while the determination remains in force.
- (2) Subject to this section, the Commissioner may determine the period during which the determination remains in force.
- (3) While it remains in force, the determination operates as a stay on all action and proceedings for the eviction of the complainant (and any members of the complainant's household or any other persons specified in the determination) from the premises. However, the determination does not operate on action or proceedings of a kind specified in the determination as being excluded from its operation.
- (4) The Commissioner may vary or revoke the determination at any time.
- (5) The determination remains in force for 3 months, unless it expires or is revoked at an earlier time. It may, however, be renewed or remade (in the same or different terms).
- (6) The determination may be made before, during, following or without an investigation.

28 Binding nature of determinations

A determination binds the complainant and all of the parties named as covered by the determination.

29 Consents to determinations

- (1) Consent may, for the purposes of this Part, be given generally, for classes of cases or for specific cases.
- (2) The borrower to whom a proposed determination applies need not give consent until the terms of the proposed determination have been communicated to the borrower.
- (3) Once given, consent is irrevocable, unless the Commissioner authorises withdrawal of consent where the Commissioner is of the opinion that special circumstances exist.
- (4) The Commissioner may establish procedures for seeking and recording consents.

29A Enforcement of determinations

- (1) A determination has effect as if it were a judgment or order of a court of competent jurisdiction and, on registration in such a court, may be enforced against a person or body bound by the determination as if the determination were a judgment or order of that court.
- (2) In particular, an order of the kind referred to in section 25 (7) has effect as if it were an order of the Supreme Court and, in the case of an order relating to land under the provisions of the *Real Property Act 1900*, section 86 of that Act has effect accordingly.
- (3) Regulations or rules of court may be made for the purposes of this section for or with respect to the registration and enforcement of determinations. Regulations prevail over rules of court to the extent of any inconsistency.

30 Form of determination

A determination is to be in writing and is to contain a statement of the Commissioner's findings (both of fact and of law) and the Commissioner's reasons for the determination.

31 Other relief

- (1) The Commissioner may refrain from making a determination if other relief has been sought or obtained.
- (2) The Commissioner may make a determination on the condition that the HomeFund borrower to whom it relates executes an instrument that precludes the borrower from seeking or obtaining other relief (whether generally or of specified kinds).

Part 6 Reports

32 Report of complaint

- (1) The Commissioner may report on any complaint under this Act and any matters arising in relation to any such complaint, and in particular may report on any investigation under this Act.

- (2) The Commissioner is to give a copy of any such report to the Minister.
- (3) The Commissioner may (but need not) give a copy of any such report to the complainant or to such public authorities and other persons as appear to be materially involved in the subject-matter of the complaint concerned.

33 Annual report

- (1) The Commissioner is, as soon as practicable after 30 June in each year, to prepare and submit to the Minister a report of his or her work and activities for the 12 months preceding that date.
- (2) The Minister is to lay that report or cause it to be laid before each House of Parliament as soon as practicable after receiving it.
- (3) If the first annual report would relate to a period of less than 3 months, the report need not be prepared and the period may instead be covered by the next annual report.

34 Special report to Parliament

- (1) The Commissioner may, at any time, make a special report to the Minister for presentation to Parliament on any matter arising in connection with the discharge of his or her functions.
- (2) The Commissioner may include in a report under this section a recommendation that the report be made public immediately.
- (3) If a report under this section contains a recommendation that it be made public immediately, the Minister may make it public before it is presented to Parliament.

35 Recommendations

A report under this Act may contain such specific or general recommendations as appear to the Commissioner to be appropriate in relation to HomeFund borrowers, HomeFund mortgages, associated schemes or arrangements of loans, and associated matters.

Part 7 Miscellaneous

36 Act binds Crown

This Act binds the Crown.

37 (Repealed)

37A Credit reporting agencies

- (1) The Commissioner may make an order prohibiting a specified person or body (such as a credit reporting agency within the meaning of the [Privacy Act 1988](#) of the

Commonwealth) from furnishing to any other person or body any information or report:

(a) to the effect that a specified person is, or has been, in default with respect to a HomeFund mortgage, or

(b) that casts doubt on:

(i) a person's eligibility to be provided with credit, or

(ii) a person's history in relation to credit, or

(iii) a person's capacity to repay credit,

on the basis that the person is, or has been, in default with respect to a HomeFund mortgage.

(2) Such an order may be made on the Commissioner's own motion or on application made by a HomeFund borrower. An application may be made to the Commissioner whether or not the applicant is also a complainant with respect to a complaint currently before the Commissioner.

(3) The Commissioner may not make an order under this section unless satisfied:

(a) that the person concerned is not, and has not been, in default with respect to a HomeFund mortgage, or

(b) that the person concerned is, or has been, in default with respect to a HomeFund mortgage but the default has occurred as a result of some act or omission with respect to the mortgage for which the person is not, and should not be held to be, responsible.

(4) A person must not wilfully contravene an order in force under this section.

Maximum penalty: 100 penalty units.

38 Application of Act

(1) This Act applies to a HomeFund mortgage entered into before the date of assent to this Act as well as to a HomeFund mortgage entered into afterwards.

(2) A complaint may be made under this Act even though the mortgage to which the complaint relates has been discharged.

39 Personal liability of Commissioner and others

A matter or thing done by the Commissioner, a member of the staff of the Commissioner or a person acting under the direction of the Commissioner does not, if the matter or thing was done or omitted in good faith for the purpose of executing this or any other Act, subject the Commissioner, member of staff or person so acting to any action, liability,

claim or demand.

40 Appeal

- (1) A determination or other decision of the Commissioner and any other act, matter or thing done or omitted by the Commissioner may not be appealed against, reviewed, quashed or called in question by any court or tribunal.
- (2) However, an appeal lies to the Supreme Court, on a question of law, against a determination of the Commissioner.
- (3) Such an appeal may be made only with the leave of the Supreme Court.
- (4) Application for leave to appeal must be made to the Supreme Court within 28 days after the determination is made or within such further time as the Supreme Court may allow in a particular case.
- (5) The parties to an appeal are the Commissioner and, except as otherwise provided by the regulations, each of the parties to the determination against which the appeal is made.
- (6) The Minister may intervene in an appeal at any stage. On intervening, the Minister becomes a party to the appeal and has all the rights of a party to the appeal.
- (7) Subject to any direction of the Supreme Court to the contrary, the making of an application for leave to appeal operates to stay the decision to which the application relates.
- (8) The Supreme Court is not to award costs to or against any party to an appeal.

40A Proceedings by or against the Department of Housing

- (1) Proceedings under this Act may be commenced and maintained:
 - (a) by the Director of Housing as nominal plaintiff for the Department of Housing, or
 - (b) against the Director of Housing as nominal defendant for the Department of Housing,and may be continued until their final determination regardless of any change in the office of the Director during the course of the proceedings.
- (2) The Director of Housing is not personally liable under any order or judgment arising from any such proceedings.

41 Incriminatory statement

- (1) If under section 16 a person is required to give a statement that tends to incriminate the person, neither the requirement nor the statement may be used in any

proceedings against that person, except proceedings under section 42 (1) (c).

- (2) Subsection (1) applies whether the person required to give a statement objects to giving it or not.

42 Offences

- (1) A person must not:

- (a) without lawful excuse, wilfully obstruct, hinder or resist the Commissioner or a member of the staff of the Commissioner in the exercise of functions under this or any other Act, or
- (b) without lawful excuse, refuse or wilfully fail to comply with any lawful requirement of the Commissioner or a member of the staff of the Commissioner under this Act, or
- (c) wilfully make any false statement to or mislead, or attempt to mislead, the Commissioner or a member of the staff of the Commissioner in the exercise of functions under this or any other Act.

Maximum penalty: 10 penalty units.

- (2) A person must not directly or indirectly:

- (a) where the person is not the Commissioner—represent that he or she is the Commissioner, or
- (b) where the person has not been appointed under this Act as acting Commissioner—represent that he or she has been so appointed, or
- (c) where the person is not a person to whom a delegation has been made under this Act—represent that he or she is such a person, or
- (d) where the person is not a member of the staff of the Commissioner—represent that he or she is a member of that staff.

Maximum penalty: 10 penalty units.

- (3) For the purposes of subsection (2), a person represents that a state of affairs exists if the person does or says anything, or causes, permits or suffers anything to be done or said, whereby it is represented, or whereby a belief may be induced, that the state of affairs exists.

42A Certain agreements prohibited

- (1) A person is not entitled to charge or recover any fee for assisting another person to make a complaint or to furnish information to the Commissioner (such as in the form of a complaints guide) with respect to a complaint.

- (2) A person who charges or recovers, or who attempts to recover, any such fee is guilty of an offence.

Maximum penalty: 100 penalty units.

- (3) Nothing in subsections (1) and (2) applies in relation to advice given by an Australian legal practitioner about relief under the [HomeFund Restructuring Act 1993](#).
- (4) An agreement is void to the extent to which it purports to assign to any person, in payment for assistance of the kind referred to in subsection (1), any money received by a complainant as a result of a determination arising from the complaint.
- (5) An agreement is void to the extent to which it purports to exclude, modify or restrict the operation of this section.
- (6) This section applies to any agreement, whether in writing or not and whether entered into before or after the commencement of this section. Acts occurring before the commencement of this section do not give rise to an offence under subsection (2).

43 Proceedings for offences

Proceedings for an offence under this Act may only be dealt with summarily before the Local Court.

44 Regulations

The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.

45 (Repealed)

46 Expiry of Act

- (1) This Act expires on a day to be appointed by proclamation published on the NSW legislation website.
- (2) Despite subsection (1), the person holding office as Commissioner at the expiry of this Act is required to make a report under section 33 for so much of the current period of 12 months as had passed before the expiry. The report is to be made as soon as possible after the expiry of this Act.

Schedule 1 Provisions relating to Commissioner

(Section 5)

1 Appointment of acting Commissioner

- (1) The Minister may, from time to time, appoint a person to act in the office of the Commissioner during the illness or absence of the Commissioner (or during a vacancy

in the office of the Commissioner). The person, while so acting, has all the functions of the Commissioner and is taken to be the Commissioner.

- (2) The Minister may, at any time, remove a person from office as acting Commissioner.
- (3) An acting Commissioner is entitled to be paid such remuneration (including travelling and subsistence allowances) as the Minister may from time to time determine.

2 Terms and conditions of appointment

- (1) Subject to this Act, the Commissioner holds office on terms and conditions approved by the Minister.
- (2) Subject to clause 4, the Commissioner holds office for such period (not exceeding 2 years) as is specified in the Commissioner's instrument of appointment, but is eligible (if otherwise qualified) for re-appointment.

3 Remuneration

The Commissioner is entitled to be paid such remuneration (including travelling and subsistence allowances) as the Minister may from time to time determine.

4 Vacancy in office

- (1) The office of Commissioner becomes vacant on the expiry of this Act or if the holder of the office:
 - (a) dies, or
 - (b) completes a term of office and is not re-appointed, or
 - (c) resigns the office by letter addressed to the Minister, or
 - (d) is removed from office by the Governor under this clause, or
 - (e) becomes bankrupt, applies to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounds with his or her creditors or makes an assignment of his or her remuneration for their benefit, or
 - (f) becomes a mentally incapacitated person, or
 - (g) is convicted in New South Wales of an offence that is punishable by imprisonment for 12 months or more or is convicted elsewhere than in New South Wales of an offence that, if committed in New South Wales, would be an offence so punishable.
- (2) The Governor may remove the Commissioner from office for misbehaviour, incapacity or incompetence.

5 Effect of certain other Acts

- (1) The employment of the Commissioner is not subject to Part 2 or 8 of the *Public Sector Management Act 1988*.
- (2) If by or under any Act provision is made:
 - (a) requiring a person who is the holder of a specified office to devote the whole of his or her time to the duties of that office, or
 - (b) prohibiting the person from engaging in employment outside the duties of that office,

the provision does not operate to disqualify the person from holding that office and also the office of Commissioner or from accepting and retaining any remuneration payable to the person as Commissioner.

Schedule 2 (Repealed)