

HOMEFUND RESTRUCTURING BILL 1993*

NEW SOUTH WALES



EXPLANATORY NOTE

(This Explanatory Note relates to this Bill as introduced into Parliament)

The object of this Bill is to give legislative effect to a restructuring scheme for HomeFund borrowers.

PART 1—PRELIMINARY

Clause 1 sets out the short title of the proposed Act.

Clause 2 provides that the proposed Act will commence on a day or days to be proclaimed.

Clause 3 defines expressions used in the proposed Act. For the purposes of the proposed Act, the definition of HomeFund borrower is principally directed at a mortgagor under a HomeFund mortgage.

Clause 4 sets out the objects of the proposed Act, which are to enable HomeFund borrowers to participate in a restructuring scheme and to provide for the consequences of the scheme.

Clause 5 makes it clear that notes contained in the body of the proposed Act do not form part of it.

PART 2—RESTRUCTURING SCHEME

Clause 6 provides for the restructuring scheme. The scheme is a scheme to be established by the Home Purchase Assistance Authority, with the consent of the Minister, as generally contemplated by the report of the Home Purchase Assistance Authority to the Minister for Housing dated 6 December 1993. The principal features of the restructuring scheme are set out in proposed Schedule 1.

* Amended in committee—see table at end of volume.

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Clause 7 provides that the Home Purchase Assistance Authority, with the consent of the Minister, may appoint a day for the extension of the restructuring scheme to cover State Partnership Loans and Rent-buy Loans. The extension of the scheme must comply with the principal features set out in the Act, subject to the regulations. The proposed section also enables the Authority, with the consent of the Minister, to vary the scheme, but not so as to be inconsistent with the principal features of the scheme.

Clause 8 makes HomeFund borrowers eligible to participate in the restructuring scheme.

Clause 9 gives the Home Purchase Assistance Authority the function of managing the restructuring scheme and confers functions on it for that purpose.

Clause 10 enables a HomeFund borrower to appeal to the HomeFund Advisory Panel against a categorisation of the borrower by the Home Purchase Assistance Authority under the restructuring scheme. In hearing an appeal, the Advisory Panel must apply the same criteria for determining categories as the Authority.

Clause 11 provides that, after hearing an appeal, the HomeFund Advisory Panel is to recommend to the Home Purchase Assistance Authority that the category be changed or that the category stay the same. The Authority is to determine the matter after taking into account the Advisory Panel's recommendation.

Clause 12 enables regulations to be made relating to procedures for appeals.

Clause 13 formally confers the appeal functions on the HomeFund Advisory Panel.

PART 3—CONSEQUENCES OF RESTRUCTURING SCHEME

Clause 14 exempts the Crown, FANMAC, the FANMAC trustee and co-operative housing societies, including persons acting on their behalf, from any action, liability, claim or demand (and provides that a determination may not be made) in respect of any HomeFund mortgage, in respect of any transaction relating to, preliminary to or arising from such a mortgage or in respect of the promotion, origination or management of any HomeFund mortgage or HomeFund scheme. Any HomeFund borrowers who are eligible to participate in the restructuring scheme and former HomeFund borrowers who have refinanced will not be able to obtain a determination by the HomeFund Commissioner except about a complaint (or part of a complaint) relating to an administrative matter listed in proposed Schedule 2 or the regulations. The power of the Commissioner to make determinations altering mortgages when making determinations about complaints by any such borrowers or former borrowers is also removed. The Commissioner will still be able to make monetary determinations about such matters.

Clause 15 sets out the way in which entitlements and complaints are affected by proposed section 14. The proposed section 14 will not affect determinations made before its commencement.

The result of the proposed sections 14 and 15 is that the Commissioner may still make:

- (a) monetary determinations about complaints by HomeFund borrowers who are eligible for the restructuring scheme or by former HomeFund borrowers who have refinanced relating to administrative matters listed in proposed Schedule 2 or the regulations; and

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- (b) determinations about HomeFund borrowers under State Partnership Loans or Rent-buy Loans, until the restructuring scheme is extended to cover those borrowers; and
- (c) determinations about all matters relating to HomeFund borrowers who have ceased to be HomeFund borrowers otherwise than by means of refinancing; and
- (d) determinations about eviction in relation to all HomeFund borrowers.

PART 4—MISCELLANEOUS

Clause 16 provides that the proposed Act will bind the Crown.

Clause 17 makes it clear that HomeFund mortgages permit capitalisation of interest as originally contemplated.

Clause 18 removes the requirement for the FANMAC trustee to obtain certain consents in relation to the restructuring scheme.

Clause 19 requires the Home Purchase Assistance Authority to report on the operation and effectiveness of the restructuring scheme in its annual report.

Clause 20 enables the Governor to make regulations for the purposes of the proposed Act.

Clause 21 is a formal provision giving effect to Schedule 3, which amends other Acts.

Clause 22 is a formal provision giving effect to Schedule 4, which contains savings and transitional provisions.

Clause 23 provides for the proposed Act to be reviewed by the Minister after 5 years.

SCHEDULE 1—RESTRUCTURING SCHEME

The Schedule contains the principal features of the restructuring scheme. It sets out the categories of borrowers and the assistance under the scheme, as well as other incidents of the scheme. Borrowers will be divided into categories based on their financial position and the kind of assistance will vary accordingly. Assistance offered to the categories of borrowers includes the following:

- Category A—the opportunity to refinance;
- Category B—restructured income-g geared loans;
- Category C—sale back to the Authority and waiver of excess debt, together with rent back for 5 years and further provision of public housing thereafter;
- Category D—3 months in which to pay arrears together with arrangements for rent back or other assistance, if arrears are paid or arrangements to pay are made;
- Category E—reduction in interest rate payable under Aged-Persons Update Loans;
- Category F—relief relating to the rental component of State Partnership Loans or Rent-buy Loans.

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SCHEDULE 2—COMPLAINTS THAT MAY BE THE SUBJECT OF A DETERMINATION UNDER THE HOMEFUND COMMISSIONER ACT 1993

The Schedule lists the kinds of complaint (or part of a complaint) about which the HomeFund Commissioner may still make a determination in relation to HomeFund borrowers who are eligible to participate in the restructuring scheme or who have refinanced. The complaints listed include complaints relating to matters such as incorrect accounting, improper refusal of mortgage relief and improper threats about legal action. The regulations may provide for other complaints (or parts of complaints) about which determinations may also be made.

SCHEDULE 3—AMENDMENT OF OTHER ACTS

Defamation Act 1974

The amendment to this Act ensures that there is absolute privilege for a publication to or by the HomeFund Advisory Panel, or to or by any member of that Panel, for the purposes of section 10, 11 or 12 of the proposed Act. Under the proposed Act, the Advisory Panel is to have the function of hearing appeals from categorisation decisions of the Home Purchase Assistance Authority under the proposed restructuring of the HomeFund scheme.

Home Purchase Assistance Authority Act 1993

Item (1) inserts a definition of “Panel” (meaning the HomeFund Advisory Panel) into section 3.

Item (2) ensures that the Home Purchase Assistance Authority (“the Authority”) is able to grant financial assistance to eligible applicants with or without security. It is contemplated that the restructuring scheme under the proposed Act will involve the granting of such assistance.

Item (3) reproduces as section 17B a provision that is currently section 37 of the HomeFund Commissioner Act 1993. This is done to ensure that the Panel can continue to exercise its functions (including, in particular, its functions under the proposed Act) after the expiry of the HomeFund Commissioner Act 1993.

Item (4) amends section 18 (**Personal liability of members and others**) as a consequence of the proposed reconstitution of the Panel under the Act.

Item (5) creates an offence (proposed section 21A) of furnishing false or misleading information to the Authority or the Panel. It also inserts a provision (proposed section 21B) with respect to proceedings for offences under the Act (proposed section 21A creates the first such offence).

HomeFund Commissioner Act 1993

Item (1) clarifies the meaning of “party” when used in connection with a determination under the Act.

Item (2) amends section 9 as a consequence of the proposed reconstitution of the HomeFund Advisory Panel under the Home Purchase Assistance Authority Act 1993.

Item (3) facilitates the acceptance by the HomeFund Commissioner of complaints that are made out of time.

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Item (4) is consequential on the amendments made by items (6) and (7).

Item (5) ensures that the HomeFund Commissioner can reopen an investigation that has previously been discontinued.

Items (6) and (7) extend the powers of the HomeFund Commissioner to require persons to furnish information.

Item (8):

- (a) extends the classes of persons and bodies to whom a determination under section 25 can apply (proposed section 25 (2) and (2A));
- (b) extends the classes of orders that the HomeFund Commissioner can make as part of a determination (proposed section 25 (3) (e)–(g));
- (c) makes it clear that the HomeFund Commissioner is not to make a determination against any person or body unless satisfied that the complainant has an entitlement to a legal remedy against that person or body (proposed section 25 (4));
- (d) contains other ancillary amendments (proposed section 25 (6)–(9)).

Item (9) omits section 26 (4) as a consequence of the enactment of proposed section 29A.

Item (10) inserts new sections 26A, 26B and 26C.

Proposed section 26A will enable the HomeFund Commissioner to apportion liability when making a monetary determination. The effect of the apportionment will be that a party to a determination requiring two or more parties to pay money will be liable only for the amount apportioned against that party.

Proposed section 26B provides that:

- (a) the prohibition referred to in proposed section 25 (4) does not apply with respect to determinations against the FANMAC trustee, but that such a determination cannot be made unless a determination is made ordering some other person or body (being a person or body against whom the complainant does have an entitlement to a legal remedy) to compensate the FANMAC trustee for the trustee's costs in complying with the determination; and
- (b) the FANMAC trustee is not obliged to comply with a determination referred to in paragraph (a) until it has received the costs of doing so.

Proposed section 26C:

- (a) prevents the HomeFund Commissioner from granting relief to a HomeFund borrower if the granting to the HomeFund borrower of such relief is excluded by the proposed Act; and
- (b) makes it clear that the HomeFund Commissioner may make certain determinations despite proposed section 14 (1) of that Act, thus overriding two obstacles:
 - (i) the first obstacle is that section 14 (1) would operate directly to prevent the making of such a determination;
 - (ii) the second obstacle is that section 14 (1) would operate indirectly to prevent the making of such a determination, since the making of the determination would require the existence of an entitlement to some other legal remedy; and

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- (c) prevents the HomeFund Commissioner from making certain determinations on the sole basis of the existence of an entitlement to a legal remedy under the Trade Practices Act 1974 of the Commonwealth.

Item (11) substitutes section 28. The proposed section will provide that all parties named as covered by a determination will be bound by the determination. Currently, persons other than public authorities are bound only with their consent.

Item (12) inserts a new section 29A. The proposed section provides for the enforcement of determinations generally. Currently, the Act provides only for the enforcement of monetary determinations (existing section 26 (4)).

Item (13) substitutes section 30. The proposed section will require all determinations to be in writing and to give reasons. Currently, a determination is only required to be reduced to writing if a party so requests.

Item (14) omits section 37 (**HomeFund Advisory Panel**) as a consequence of the proposed reconstitution of the Panel under the Home Purchase Assistance Authority Act 1993.

Item (15) inserts a new section 37A. The proposed section will enable the HomeFund Commissioner to prevent persons (such as credit reporting agencies) from giving adverse credit reports on persons who are, or who have been, in default of a HomeFund mortgage where the HomeFund Commissioner is satisfied that any such default has arisen from circumstances for which the person is not, and should not be held to be, responsible.

Item (16) amends section 39 (**Personal liability of Commissioner and others**) as a consequence of the proposed reconstitution of the HomeFund Advisory Panel under the Home Purchase Assistance Authority Act 1993.

Item (17) amends section 40 (**Appeal**) so as to allow appeals to the Supreme Court on questions of law. Currently no appeals can be made against a determination of the HomeFund Commissioner. The proposed amendments provide:

- (a) that such an appeal may be made only with the leave of the Supreme Court (proposed section 40 (3));
- (b) that an application for leave to appeal must be made within 28 days or such further time as the Supreme Court may allow (proposed section 40 (4));
- (c) that the Minister may intervene and, on intervening, becomes a party to the appeal (proposed section 40 (6));
- (d) that the making of an application for leave to appeal operates to stay the decision to which the application relates (proposed section 40 (7));
- (e) that the Supreme Court is not to make any order as to costs with respect to an appeal (proposed section 40 (8)).

Item (18) inserts a new section 40A. The proposed section will facilitate the taking of legal action by and against the Department of Housing.

Item (19) inserts a new section 42A. The proposed section will prohibit the charging or recovery of any fee for assisting a person to make a complaint under the Act or to furnish information with respect to any complaint. Agreements to exclude the operation of the proposed section will be void.

SCHEDULE 4—SAVINGS AND TRANSITIONAL PROVISIONS

The Schedule contains savings and transitional provisions consequent on the enactment of the proposed Act. The provisions include:

- (a) a definition clause (clause 1);
 - (b) a provision that applies the amendments to the HomeFund Commissioner Act 1993 to complaints made before the commencement of those amendments as well as to complaints made after their commencement (clause 2);
 - (c) a provision that ensures that the amendments to the HomeFund Commissioner Act 1993 do not apply to determinations made before the commencement of those amendments (clause 3);
 - (d) a provision to the effect that the HomeFund Advisory Panel constituted under the Home Purchase Assistance Authority Act 1993 is a continuation of the HomeFund Advisory Panel constituted under the HomeFund Commissioner Act 1993, and that members of the Advisory Panel are to continue in office in accordance with the terms of their appointments (clause 4).
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