

Legal Profession Practice (Amendment) Bill

EXPLANATORY MEMORANDUM

Clause 1 sets out the purposes of the Act.

Clause 2 provides for the Act, except sections 5 and 9, to come into operation on the day on which the Act receives Royal Assent. Section 9 will come into operation on a day to be proclaimed, but not later than 1 April 1996. Section 5 will come into operation on a day to be proclaimed, but not later than 1 July 1996.

Clause 3 provides that in the Act, the **Legal Profession Practice Act 1958** is called the Principal Act.

Clause 4 inserts a new definition of “**direct mortgage**” in section 39 (1) of the Principal Act, which is the same as the new definition of “direct mortgage” in section 51 (1) of the Principal Act.

Clause 5 inserts a new section 40^{AA} into the Principal Act, which makes it an offence for a solicitor to receive any payment or repayment of principal under a direct mortgage in any form other than a cheque or bank draft payable to the order of the mortgagor or the lender. The clause aims to ensure that any payment or repayment of principal is made directly from the lender(s) to the borrower (or vice-versa) without going through a solicitor’s trust account.

Clause 6 inserts the following new definitions into section 51 (1) of the Principal Act:

“**direct mortgage**”—a mortgage where the only parties are the person(s) actually lending the money and the person borrowing the money, or where the lender is a financial institution. The definition excludes mortgages (commonly called contributory or pooled mortgages) where a solicitor or solicitor’s nominee company, while not actually providing the money to be lent, is the mortgagee for the purpose of the documentation of the mortgage;

“**financial institution**”—a bank, building society, credit union or other person whose sole or principal business activities are the borrowing and lending of money, or a person declared by regulation to be a financial institution;

“**mortgage**”—any document purporting to regulate, or create a security for, the repayment of money.

The clause also provides for the Governor in Council to make regulations prescribing persons or classes of persons for the purpose of the definition of “financial institution”.

Clause 7 requires all contributions by solicitors under the new section 61A of the Principal Act to be paid into the Income Suspense Account of the Solicitors’ Guarantee Fund.

Clause 8 inserts new sections 61A–61D, which provide for a solicitor in a specified class who has or applies for a 1996 practising certificate to pay a contribution to the Solicitors’ Guarantee Fund of an amount determined by the Attorney-General up to \$1500. The contribution is additional to any contribution already paid or payable to the Fund. The Attorney-General’s determination must be made by 31 December 1995.

Section 61A provides for the amount of the contribution to be varied according to the type of practising certificate, the date of application for a practising certificate, the length of time a solicitor has been in practice, whether the solicitor is a sole practitioner, whether the solicitor principally practises outside Victoria, whether the solicitor during the 1994–5 financial year received trust money (and if so the amount received) or was employed by a firm or solicitor that did and whether the solicitor during the 1994–5 financial year received money from a client to be lent on security of a contributory mortgage (i.e. a mortgage other than a direct mortgage).

Section 61B requires solicitors who currently hold a practising certificate to pay the additional contribution by 31 March 1996 and all other applicants for a 1996 practising certificate to pay the contribution at the time of application.

Section 61C provides that, in the case of solicitors who currently hold a practising certificate, failure to pay the required contribution by 31 March 1996 will result in automatic suspension of the solicitor's 1996 practising certificate until the contribution is paid and that, in the case of all other applicants for a 1996 practising certificate, failure to pay the required contribution will result in refusal to issue the certificate. The institute may recover any unpaid contributions in the Magistrates' Court.

Section 61D provides that an employer may pay the contribution required to be paid by an employee solicitor and that, where an employee solicitor pays the contribution himself or herself, the employer must at the employee solicitor's request reimburse him or her within 21 days after the request.

Clause 9 amends section 64 of the Principal Act to exclude from the ambit of the Solicitors' Guarantee Fund certain types of defalcations. The Fund will no longer cover defalcations arising from mortgages other than direct mortgages (i.e. contributory mortgages) entered into after the commencement of clause 9. Nor will the Fund cover defalcations arising from the investment of a client's money after the commencement of clause 9, unless the investment is either:

- merely incidental to a solicitor's practice; or
- is part of the administration by the solicitor of the estate of a deceased person or a mentally ill person who is a represented or protected person under the **Guardianship and Administration Board Act 1986**.