

First print



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.
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## 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 [1]** 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

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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 still 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.

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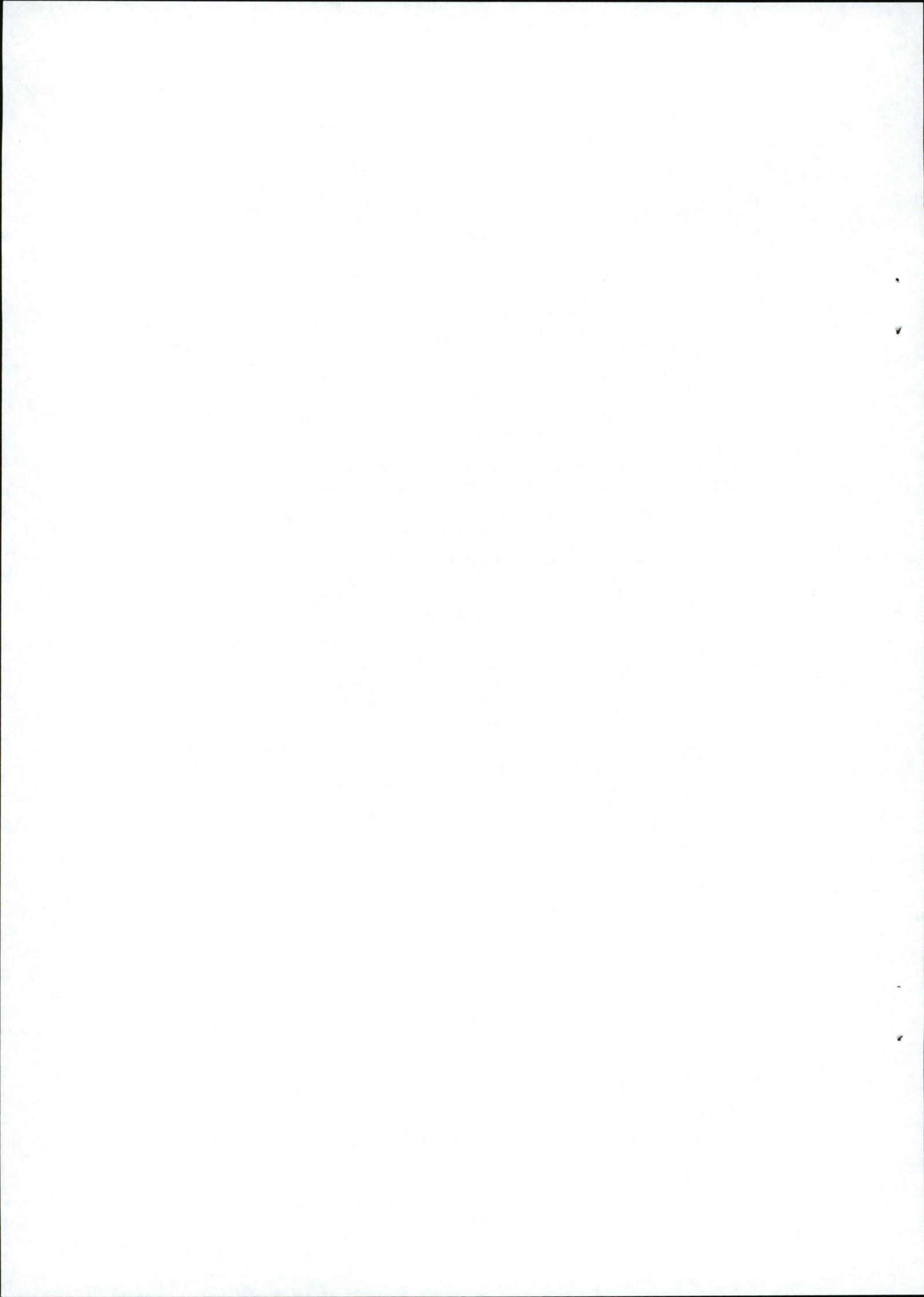
The notice must be given before money is advanced by the solicitor for the excluded mortgage. The solicitor may advance money for an excluded mortgage only if authorised to do so by the client in writing in the form prescribed by the regulations or solicitors rules.

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.



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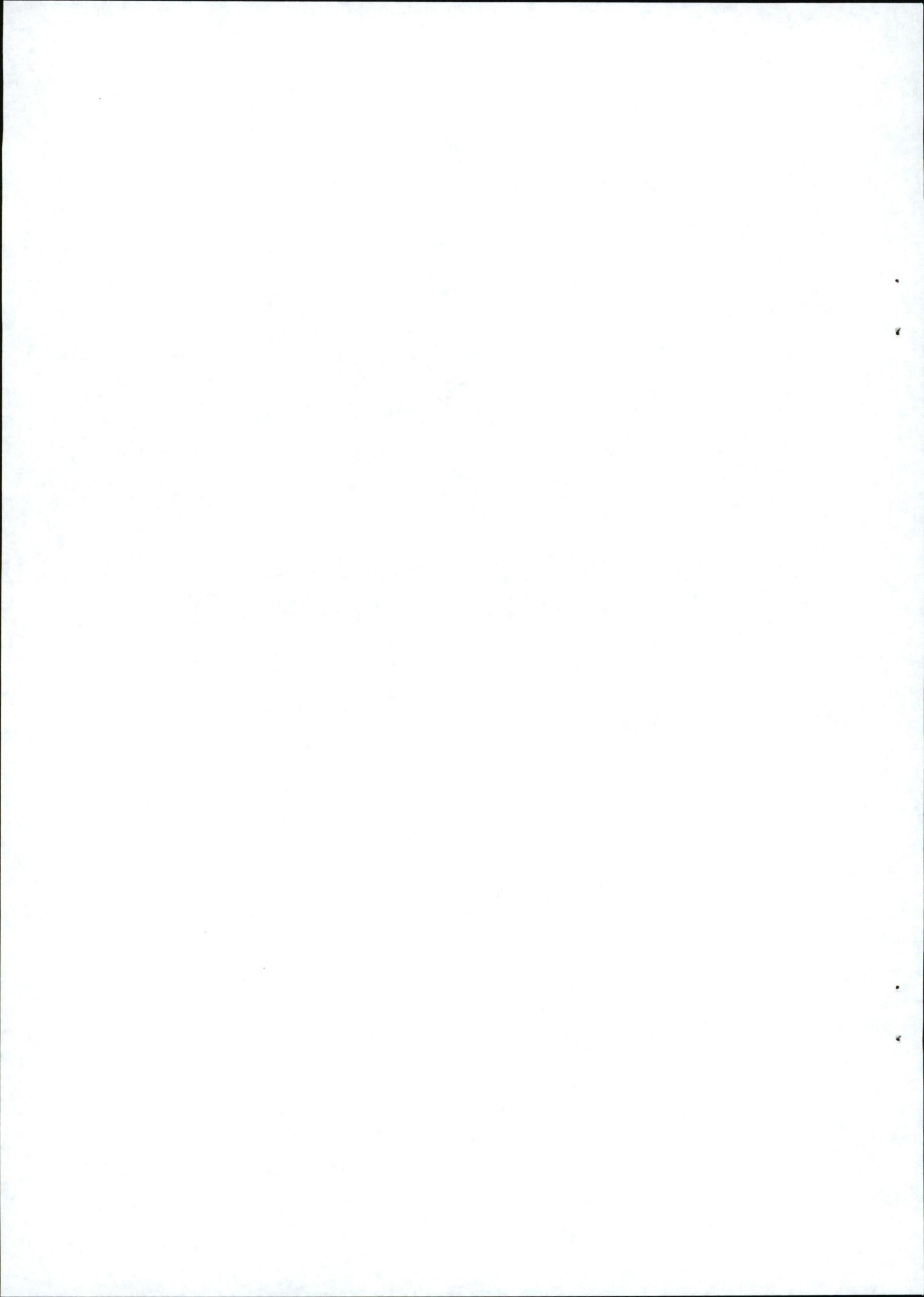
# Legal Profession Amendment (Solicitors' Mortgage Practices) Bill 1998

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New South Wales

# **Legal Profession Amendment (Solicitors' Mortgage Practices) Bill 1998**

No. , 1998

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## **A Bill for**

An Act to amend the *Legal Profession Act 1987* to regulate the conduct of solicitors' mortgage practices; and for other purposes.

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**The Legislature of New South Wales enacts:**

**1 Name of Act**

This Act is the *Legal Profession Amendment (Solicitors' Mortgage Practices) Act 1998*.

**2 Commencement**

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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.

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## Schedule 1 Amendments

(Section 3)

### [1] Section 3 Definitions

Insert in alphabetical order in section 3 (1):

*borrower* means a person who borrows from a lender or contributor money that is secured by a mortgage. 5

*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, whether or not held in the name of a person who holds the mortgage, as mortgage, in trust for or on behalf of those contributors. 10

*excluded mortgage* means a mortgage (including a contributory mortgage) other than: 15

(a) a mortgage in which the lender is a financial institution, or

(b) a mortgage in which the lender or contributors nominate the borrower and the borrower is not a person introduced to the lender or contributors by the solicitor (or an associate of the solicitor within the meaning of Part 6) who arranges for the making of the mortgage, or 20

(c) a mortgage, or class of mortgage, that the regulations prescribe as not being an excluded mortgage. 25

*financial institution* means:

(a) a bank, building society or credit union, or

(b) a friendly society incorporated under the *Friendly Societies (New South Wales) Code*, or 30

(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 a church that may invest money in accordance with an Act, or
- (e) a corporation or other body, or class of corporation or other body, prescribed by the regulations for the purpose of this definition. 5

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

*mortgage* means any instrument, or proposed instrument, under which an interest in real property is charged or encumbered as security for the payment or repayment of money, and includes a contributory mortgage. 10

**[2] Section 31A**

Insert after section 31:

**31A Failure to obtain fidelity insurance for solicitors' mortgage practices** 15

- (1) The Law Society Council must not issue a practising certificate to a solicitor who, as solicitor for a lender or contributor, negotiates the making or acts in respect of an excluded mortgage unless it is satisfied that: 20
  - (a) there is, or will be, in force with respect to the solicitor a policy of fidelity insurance that complies with the requirements of section 80C, and
  - (b) the policy is, or will be, in force with respect to the solicitor during the currency of the solicitor's practising certificate. 25
- (2) The Law Society Council must suspend the practising certificate of a solicitor who, as solicitor for a lender or contributor, negotiates the making or acts in respect of an excluded mortgage unless it is satisfied that: 30
  - (a) there is in force with respect to the solicitor a policy of fidelity insurance that complies with the requirements of section 80C, 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, as solicitor for a lender or contributor, negotiates the making or acts in respect of an excluded mortgage and is an interstate legal practitioner unless it is satisfied that: 5

(a) there is, or will be, in force with respect to the solicitor a policy of fidelity insurance that complies with the requirements of section 80C, and 10

(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. 15

**[3] Sections 38KA and 38KB**

Insert after section 38K:

**38KA Solicitors' mortgage practices**

(1) A solicitor who, as solicitor for a lender or contributor, negotiates the making or acts in respect of an excluded mortgage without ensuring that a policy of fidelity insurance is in force in respect of the solicitor in accordance with section 80C is guilty of an offence. 20

Maximum penalty: 20 penalty units.

**Note.** See also section 80B which generally excludes claims by lenders and contributors on the Fidelity Fund in respect of excluded mortgages and section 80D which imposes certain obligations as to disclosure on solicitors in these circumstances. 25

(2) A solicitor who, as solicitor for a lender or contributor, negotiates the making or acts in respect of an excluded mortgage must notify the Law Society of that fact in the manner prescribed by the regulations or the solicitors rules. 30

Maximum penalty: 20 penalty units.

- (3) A solicitor who, as solicitor for a lender or contributor, negotiates the making or acts in respect of an excluded mortgage must comply with the requirements of:
- (a) this Act, and
  - (b) the regulations and solicitors rules, and 5
  - (c) the *Corporations Law*, or the *Corporations Law* as modified by any exemption given by the Australian Securities Commission under section 1084 (2) of that Law, 10
- with respect to mortgage investments.
- (4) A solicitor who knows that an associate has breached or failed to comply with a requirement referred to in subsection (3) in relation to an excluded mortgage must notify the Law Society of that fact in the manner prescribed by the regulations or the solicitors rules. 15
- (5) A solicitor who contravenes a requirement of this section commits professional misconduct (within the meaning of Part 10).
- (6) In subsection (4), *solicitor* includes an associate of a solicitor within the meaning of Part 6. 20

**38KB Regulations and rules as to solicitors' mortgage practices**

The regulations and, subject to the regulations, the solicitors rules may make provision for or with respect to excluded mortgages and, in particular, for or with respect to:

- (a) the negotiation of the making or acting in respect of excluded mortgages by solicitors, and
- (b) the manner in which the Law Society is to be notified of the negotiation of the making or acting in respect of excluded mortgages by solicitors, and 30
- (c) the form of notices and authorities for the purposes of section 80D.

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**[4] 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 relating to solicitors who negotiate the making or act in respect of excluded mortgages.

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**[5] 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 Commission particulars of:

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(a) any solicitor who, as solicitor for a lender or contributor, negotiates the making or acts in respect of excluded mortgages, or

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(b) any breach by such a solicitor of:

(i) a requirement of this Act, the regulations or solicitors rules about mortgage investments, or

(ii) a condition of an exemption given by the Australian Securities Commission under section 1084 (2) of the *Corporations Law*.

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**[6] Sections 80B–80D**

Insert after section 80A:

**80B Bar on certain claims against Fidelity Fund by lenders or contributors under excluded mortgages**

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(1) Despite section 80, a person who is a lender or contributor under an excluded mortgage is not entitled to make a claim against the Fidelity Fund for the purpose of obtaining compensation for pecuniary loss if the claim relates to the excluded mortgage.

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- (2) Subsection (1) does not apply if the solicitor who acted for the lender or contributor failed to comply with the requirements of section 80C in respect of the excluded 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 80C 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. 5 10

**80C Solicitor dealing in excluded mortgages to have fidelity cover**

- (1) A solicitor who, as solicitor for a lender or contributor, negotiates the making or acts in respect of an excluded mortgage must ensure that a policy of fidelity insurance is in force in respect of the solicitor for the purpose of compensating persons who suffer pecuniary loss because of a failure to account or a dishonest default in respect of the excluded mortgage. 15 20
- (2) The cover must be arranged with an insurer, and on the terms, approved by the Attorney General by order in writing given to the Law Society.

**80D Notification of non-availability of Fidelity Fund for excluded mortgages and of alternative insurance arrangements** 25

- (1) If a client entrusts, or proposes to entrust, money to a solicitor and the money, or part of the money, is proposed to be advanced to a borrower for an excluded mortgage, the solicitor must give the client a notice of the effect of section 80B, including details of the policy of fidelity insurance referred to in section 80C (1), in the form prescribed by the regulations or solicitors rules. 30
- (2) The solicitor must not advance any of the money to a borrower for an excluded mortgage unless: 35

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- (a) the solicitor has given the client the notice referred to in subsection (1), and
- (b) the client has given the solicitor authority in writing, in the form prescribed by the regulations or solicitors rules, to advance the money for an excluded mortgage. 5
- (3) If the authority given by the client is in the form of a general lending authority, the notice referred to in subsection (1) is to be given to the client before money is advanced to a borrower pursuant to that general lending authority for the first time, but is not required to be given every time money is proposed to be advanced to a borrower pursuant to that general lending authority. 10
- (4) A solicitor who contravenes this section commits professional misconduct (within the meaning of Part 10). 15
- (5) A contravention of this section does not limit the operation of section 80B.
- (6) In this section:
- client*, in relation to a solicitor, means a person who:
- (a) receives the solicitor's advice about investment in an excluded mortgage, or 20
- (b) gives the solicitor instructions to use money for an excluded mortgage.
- general lending authority* means a form of authority prescribed by the regulations or solicitors rules as a general lending authority for the purpose of this section. 25

**[7] Schedule 8 Savings, transitional and other provisions**

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

*Legal Profession Amendment (Solicitors' Mortgage Practices) Act 1998*

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**[8] Schedule 8, Part 10**

Insert after Part 9:

**Part 10 Provisions consequent on enactment of  
Legal Profession Amendment (Solicitors'  
Mortgage Practices) Act 1998** 5

**57 Definitions**

In this Part:

*amending Act* means the *Legal Profession Amendment (Solicitors' Mortgage Practices) Act 1998*.

*client* has the same meaning as in section 80D. 10

*existing excluded mortgage* means an excluded mortgage entered into before the commencement of this Part.

**58 Application of amending Act to existing excluded mortgages** 15

- (1) Sections 31A and 38KA, as inserted by the amending Act, do not apply in respect of an existing excluded mortgage, except as provided by this clause.
- (2) Sections 31A and 38KA extend to an existing excluded mortgage if an advance is made to a borrower for the existing excluded mortgage after the commencement of this clause. 20
- (3) Accordingly, a solicitor is taken, for the purpose of those sections, to have acted in respect of an excluded mortgage if the solicitor advances any money entrusted to the solicitor by a client to a borrower for an existing excluded mortgage after the commencement of this clause. 25

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**59 Claims on Fidelity Fund in relation to existing excluded mortgages**

- (1) Sections 80B and 80C, as inserted by the amending Act, do not apply to an existing excluded mortgage, and Part 7 of this Act, as in force immediately before its amendment by the amending Act, continues to apply in relation to any such mortgage. 5
- (2) Despite subsection (1), sections 80B and 80C apply if money entrusted to a solicitor by a client (whether before or after the commencement of this clause) is advanced after the commencement of this clause by the solicitor to a borrower for an existing excluded mortgage. In such a case: 10
- (a) section 80B applies to any claim in so far as it relates to such an advance (but Part 7 of this Act, as in force immediately before its amendment by the amending Act, continues to apply in relation to any such claim in so far as it relates to any advances made to a borrower before the commencement of this clause), and 15 20
- (b) the solicitor is taken, for the purpose of section 80C, to have acted in respect of the existing excluded mortgage and accordingly must ensure that a policy of fidelity insurance is in force in respect of advances made to the borrower for the excluded mortgage after the commencement of this clause. 25

**60 Application of section 80D**

- (1) Section 80D, as inserted by the amending Act, applies in respect of an advance of money by a solicitor to a borrower after the commencement of that section for an excluded mortgage even if: 30
- (a) the money was entrusted to the solicitor by the client before the commencement of that section, or

- (b) the money is advanced pursuant to an authority given in writing to the solicitor by the client before the commencement of that section, or
  - (c) the excluded mortgage is an existing excluded mortgage. 5
- (2) An authority given by a client before the commencement of section 80D in accordance with clause 55 of the *Legal Profession Regulation 1994* is taken to be an authority for the purpose of section 80D (2) (b).
- (3) However, section 80D (3) does not apply in respect of a general lending authority given to a solicitor by a client in accordance with clause 55 of the *Legal Profession Regulation 1994* before the commencement of section 80D. That is, a solicitor who has been given such an authority by a client is required to give the client the notice referred to in section 80D (1) each time money entrusted to the solicitor by the client is proposed to be advanced to a borrower for an excluded mortgage pursuant to that general lending authority. 10  
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