

FIRST PRINT

HOMEFUND COMMISSIONER (AMENDMENT) 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 amend the HomeFund Commissioner Act 1993 in order to extend the remedies available under that Act to HomeFund borrowers who are unable to make payments because of:

- (a) illness, unemployment or relocation of employment; or
- (b) a high interest rate in comparison with the market rate for new residential loans made by the Commonwealth Bank; or
- (c) other reasonable cause.

The Bill also makes other amendments of a minor, consequential or ancillary nature.

Clause 1 states the short title of the proposed Act.

Clause 2 provides for the proposed Act to commence on the date of assent.

Clause 3 amends the HomeFund Commissioner Act 1993 as set out in Schedule 1.

Schedule 1 (1) inserts definitions of:

- (a) "FANMAC Guidelines", which comprise Part II (Credit Requirements and Property Guidelines) and Part IV (Loan Management) of the document published by FANMAC under that name; and
- (b) "Panel", which is the HomeFund Advisory Panel; and
- (c) "Tribunal", which is the Commercial Tribunal of New South Wales.

Schedule 1 (2) extends the principal functions of the HomeFund Commissioner ("the Commissioner") to include authority to refer to the Panel a complaint made to the Commissioner, if the Commissioner considers that the complainant may be entitled to the relief provided by proposed Part 8 (Schedule 1 (7)).

HomeFund Commissioner (Amendment) 1993

Schedule 1 (3) inserts proposed section 25A. While section 25 prevents the Commissioner from making a determination unless satisfied that the complainant has an entitlement to a legal remedy in relation to the complaint, the proposed section 25A states particular circumstances in which a complainant has such an entitlement.

Schedule 1 (4) makes a consequential amendment.

Schedule 1 (5) requires the Commissioner to arrange for the use by the Panel of staff of the Commissioner, and the provision of resources and legal representation to assist the Panel.

Schedule 1 (6) inserts new section 42A which excludes the period between 10 May 1993 and the eventual expiration of the HomeFund Commissioner Act 1993 in calculating the period limited under certain Acts as that after which action may not be taken in relation to certain decisions of the Commissioner.

Schedule 1 (7) inserts new Part 8 comprising proposed sections 47–53.

- Section 47 defines “relevant debtor” as a HomeFund borrower who, for various specified reasons, is unable to discharge an obligation under a HomeFund mortgage.
- Section 48 enables a relevant debtor to apply to the mortgagee for a variation of a HomeFund mortgage and sets out the kind of variation (such as an extension of the term of the loan) that may be applied for.
- Section 49 enables a relevant debtor whose application to the mortgagee under section 48 has been refused to apply to the Panel for assistance in negotiating the desired variation and sets out the manner in which the Panel is to deal with the application. If the Panel is unable to reach agreement with the mortgagee, it is to refer the matter to the Tribunal.
- Section 50 sets out the functions of the Tribunal in dealing with an application made to it by the mortgagor or referred to it by the Panel.
- Section 51 prohibits a HomeFund mortgagee from commencing proceedings, or exercising a right, following a default by the HomeFund borrower unless at least 1 month has expired since the HomeFund borrower was given written notice of the mortgagee’s intentions.
- Section 52 enables a court or the Tribunal to order a HomeFund mortgagee to compensate the relevant debtor if the mortgagee fails to comply with proposed section 51.
- Section 53 excludes the operation of the Credit (Home Finance Contracts) Act 1984 in relation to a home finance contract under that Act if it is a HomeFund mortgage the subject of an application under the new Part 8 being inserted by Schedule 1 (7).

Schedule 1 (8) inserts the Form to be used by a HomeFund mortgagee in giving the notice required under proposed section 51 (being inserted by Schedule 1 (7)).

FIRST PRINT

HOMEFUND COMMISSIONER (AMENDMENT) BILL 1993

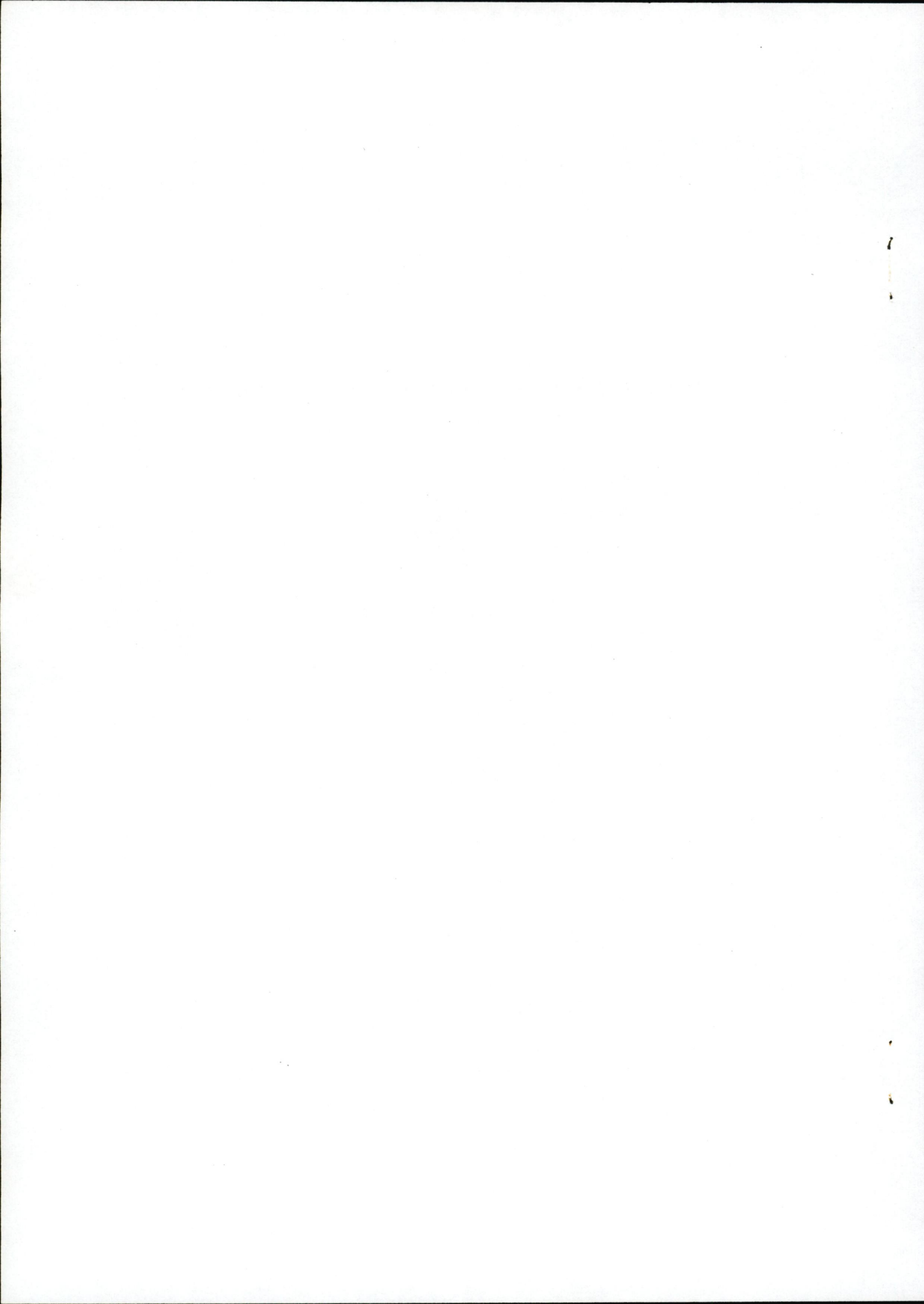
NEW SOUTH WALES



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SCHEDULE 1—AMENDMENTS



HOMEFUND COMMISSIONER (AMENDMENT) BILL 1993

NEW SOUTH WALES



No. , 1993

A BILL FOR

An Act to amend the HomeFund Commissioner Act 1993 by requiring certain complaints to be referred initially to the HomeFund Advisory Panel; to provide for variation of a HomeFund mortgage in certain circumstances; to require notice to be given of intention to commence proceedings under a HomeFund mortgage; and for other purposes.

HomeFund Commissioner (Amendment) 1993

The Legislature of New South Wales enacts:

Short title

1. This Act may be cited as the HomeFund Commissioner (Amendment) Act 1993.

5 Commencement

2. This Act commences on the date of assent.

Amendment of HomeFund Commissioner Act 1993 No. 9

3. The HomeFund Commissioner Act 1993 is amended as set out in Schedule 1.

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SCHEDULE 1—AMENDMENTS

(Sec. 3)

(1) Section 3 (**Definitions**):

Insert in section 3 (1), in alphabetical order, the following definitions:

15

“**FANMAC Guidelines**” means so much of the document published by FANMAC under that name as is comprised in:

20

(a) PART II—CREDIT REQUIREMENTS AND PROPERTY GUIDELINES; and

(b) PART IV—LOAN MANAGEMENT;

“**Panel**” means the HomeFund Advisory Panel established under section 37;

“**Tribunal**” means the Commercial Tribunal of New South Wales.

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(2) Section 8 (**Principal functions**):

After section 8 (1) (e), insert:

30

(f) without affecting the generality of paragraph (b)—to refer HomeFund borrowers to the Panel if it appears to the Commissioner that the borrowers may be entitled to the relief provided for by Part 8.

HomeFund Commissioner (Amendment) 1993

SCHEDULE 1—AMENDMENTS—*continued*

- (3) Section 25 (**Determinations**):
- (a) After section 25 (2) (d), insert:
 - (e) the Home Purchase Assistance Authority.
 - (b) In section 25 (4), after “complaint”, insert “or is entitled to a remedy under Part 8”. 5
 - (c) After section 25, insert:

Specific entitlements to legal remedy

25A. (1) For the purposes of section 25 (4) but without limiting that subsection, a HomeFund borrower has an entitlement to a legal remedy in relation to a complaint if the circumstances leading to entry into the HomeFund mortgage to which the complaint relates did not comply with the FANMAC Guidelines in force: 10

 - (a) at the time the loan was granted; or 15
 - (b) at the time of the event to which the complaint relates.

(2) For the purposes of section 25 (4) but without limiting that subsection, a HomeFund borrower has an entitlement to a legal remedy if the Commissioner is satisfied that, at the time the HomeFund borrower entered into the mortgage to which the complaint relates: 20

 - (a) any one of the parties referred to in section 25 (2) (b); or
 - or
 - (b) the relevant officers of a co-operative housing society; or 25
 - or
 - (c) the relevant officers of the Department of Housing, knew, or could have found by reasonable inquiry at the time, that the borrower could not pay in accordance with the terms of the mortgage or could not do so without substantial hardship. 30
- (4) Section 31 (**Other relief**):
- In section 31 (1), after “relief”, insert “(excluding relief under Part 8)”.
- (5) Section 37 (**HomeFund Advisory Panel**):
- (a) In section 37 (2), after “Commissioner” where last occurring, insert “, and to exercise such other functions as are conferred and imposed on the Panel by this Act”. 35

HomeFund Commissioner (Amendment) 1993

SCHEDULE 1—AMENDMENTS—*continued*

(b) After section 37 (5), insert:

(6) The Commissioner must arrange:

- 5 (a) for the use of the services of the staff of the Commissioner, and for the provision of such resources, as the Panel may reasonably require; and
- (b) for the Panel to be legally represented in all proceedings relating to matters referred to the Tribunal by the Panel.

10 (6) Section 42A:

After section 42, insert:

Calculation of limitation period for certain actions

15 42A. The period between 10 May 1993 and the date on which this Act expires, both inclusive, is not to be counted under:

- (a) the Limitation Act 1969; or
- (b) the Contracts Review Act 1980; or
- (c) the Fair Trading Act 1987,

20 when determining the last day on which action may be taken by the HomeFund borrower in relation to a decision of the Commissioner that is made under section 13, that is a determination made under section 25 or that is a determination made under section 29 to which the HomeFund borrower does not consent.

25 (7) After section 46, insert:

PART 8—HARDSHIP ASSISTANCE

Meaning of “relevant debtor”

30 47. In this Part, “relevant debtor” means a HomeFund borrower who is unable to discharge an obligation under the HomeFund mortgage because of:

- (a) illness, unemployment or relocation of employment; or
- (b) a high interest rate in comparison with the market rate for new residential loans made by the Commonwealth Bank; or
- 35 (c) other reasonable cause.

HomeFund Commissioner (Amendment) 1993

SCHEDULE 1—AMENDMENTS—*continued*

Circumstances in which relevant debtor may apply for variation of mortgage

48. (1) A relevant debtor may apply to the HomeFund mortgagee for a variation of the HomeFund mortgage if the relevant debtor reasonably expects to be able to meet the periodic commitments under the mortgage should the variation be granted. 5

(2) The variation that may be applied for is:

(a) an extension of the term of the mortgage in order to reduce, without a change in the interest rate, the amount of each payment due under the mortgage; or 10

(b) a postponement of payments due under the mortgage during a specified period without a change in the interest rate; or 15

(c) action under both paragraph (a) and paragraph (b).

Application to Panel if variation refused

49. (1) If an application is made under section 48 and the application is refused, the relevant debtor may apply to the Panel for assistance in negotiating a variation of the HomeFund mortgage. 20

(2) If an application is made under this section, the Panel is to seek the views of the applicant, the HomeFund mortgagee and any other person who, in the opinion of the Panel, might be affected by a variation of the HomeFund mortgage. 25

(3) After giving each person whose views are sought a reasonable opportunity to be heard, and after making such other inquiries as the Panel considers to be appropriate, the Panel is to determine whether or not to seek to arrange with the HomeFund mortgagee a variation of the HomeFund mortgage. 30

(4) If the Panel decides not to seek a variation of the HomeFund mortgage, it must so inform the relevant debtor who may then apply directly to the Tribunal. 35

(5) If the Panel seeks a variation of the HomeFund mortgage but is unable to reach agreement with the HomeFund mortgagee within a reasonable time, the Panel must refer the relevant debtor's application to the Tribunal.

HomeFund Commissioner (Amendment) 1993

SCHEDULE 1—AMENDMENTS—*continued*

5 (6) If an application is made under subsection (4) or referred under subsection (5), the HomeFund mortgagee may not institute proceedings, or exercise a right, under the HomeFund mortgage before the Tribunal has decided whether or not to make an order under section 50 and has notified the mortgagee of the decision.

10 (7) Without limiting its power to consider an application made under this section, the Panel may arrange for the provision of relief under any mortgage relief scheme administered by the Government or the Home Purchase Assistance Authority.

Order on application referred to Tribunal

15 50. (1) If an application is made or referred to the Tribunal under section 49, the Tribunal, after giving the persons whose views were sought under that section an opportunity to be heard:

20 (a) may order, or refuse to order, a variation of the HomeFund mortgage to which the application relates; and

(b) if it orders a variation, may make such other orders as it thinks fit.

25 (2) The duration of any postponement of payments made by a variation under this section is not to exceed 6 months.

30 (3) Without limiting the matters that the Tribunal may take into account in determining whether to make an order under this section, the Tribunal is to take into account the relative hardship, as between the relevant debtor and the HomeFund mortgagee, that would result from the making of such an order.

(4) Either the HomeFund mortgagee or the relevant debtor may apply to the Tribunal for a variation of an order made under this section and the Tribunal may, after considering the application, vary the order or refuse to do so.

35 (5) In exercising its jurisdiction under this section, the Tribunal is not to make any order as to costs.

(6) An order in force under this section, and such an order as varied from time to time, has effect according to its tenor.

HomeFund Commissioner (Amendment) 1993

SCHEDULE 1—AMENDMENTS—*continued*

Notice to be given by HomeFund mortgagee

51. (1) A HomeFund mortgagee must not, as a consequence of a default under the HomeFund mortgage, commence proceedings, or exercise a right, under the HomeFund mortgage until at least 1 month has expired after service in accordance with this section of a legible notice in the form set out in Schedule 3. 5

(2) The notice is to be served personally or by post:

- (a) on the HomeFund borrower; or 10
- (b) on each HomeFund borrower, if the HomeFund borrower comprises 2 or more persons.

(3) If another Act requires a mortgagee to give notice to the mortgagor before instituting proceedings, or exercising a right, under the mortgage, this Act does not derogate from that requirement. 15

(4) A notice to be given under this section does not fail to comply with this section just because it includes matter required to be specified in a notice required under another Act before the proceedings are commenced or the right exercised. 20

Failure by HomeFund mortgagee to give notice

52. If a HomeFund mortgagee fails to comply with section 51, a court or the Tribunal may, on the application of the relevant debtor, order the HomeFund mortgagee to compensate the relevant debtor for any loss suffered by the relevant debtor as a result of that failure. 25

Exclusion of Credit (Home Finance Contracts) Act 1984

53. The Credit (Home Finance Contracts) Act 1984 does not apply to a home finance contract defined in that Act, or a guarantee related to such a contract, if the home finance contract is a HomeFund mortgage the subject of an application under this Part. 30

HomeFund Commissioner (Amendment) 1993

SCHEDULE 1—AMENDMENTS—*continued*

(8) Schedule 3:

After Schedule 2, insert:

SCHEDULE 3—NOTICE BY HOMEFUND MORTGAGEE

(Sec. 51)

HomeFund Commissioner Act 1993

(Sec. 51)

.....

(Date)

10

To

(Name of HomeFund mortgagor or guarantor)

.....

(Address)

After 1 month from the receipt of this notice

.....

(Name of HomeFund mortgagee)

15

intends to take legal action or exercise a right under a HomeFund mortgage against

.....

(Name of HomeFund mortgagor)

The HomeFund mortgagee's reasons are given at the end of this Notice together with:

20

- the amount the HomeFund mortgagee claims to be owed under the HomeFund mortgage; and
- details of the HomeFund mortgage.

This notice is given to the debtor under the HomeFund mortgage and any guarantor involved.

25

You should discuss this matter with the HomeFund mortgagee as soon as possible.

HomeFund Commissioner (Amendment) 1993

SCHEDULE 1—AMENDMENTS—continued

The person to contact is:

.....
(Name or title of officer or agent)

of
(Name of HomeFund mortgagee or agent)

Telephone number

5

If this notice is given to you because you have guaranteed repayment of the debt of the HomeFund borrower, you should also discuss this matter with the borrower.

If you are the HomeFund borrower and you cannot come to a suitable arrangement with the HomeFund mortgagee, contact the HomeFund Commissioner immediately.

10

If you have been **unemployed or sick**, or if there is another **good reason** why you cannot meet your commitments, then the HomeFund mortgage may be able to be varied under the law to meet your situation.

15

If you have guaranteed repayment of the debt under the HomeFund mortgage and the HomeFund mortgagee looks to you to pay out the mortgage, you have a right, similar to that of the HomeFund borrower, to seek a variation of your commitments in circumstances of hardship.

20

If you disagree with anything in this Notice, including what it says is owed, contact the HomeFund Commissioner or seek legal advice immediately. There are other people, such as financial counsellors, who may be able to help.

25

REASONS FOR, AND NATURE OF, INTENDED LEGAL ACTION OR EXERCISE OF RIGHT

(a) *Arrears:*

Amount \$

*Other amounts owing \$

30

..... \$

TOTAL..... \$ _____

Number of payments in arrears:

Period to which arrears relate

*Specify nature of each amount

35

HomeFund Commissioner (Amendment) 1993

SCHEDULE 1—AMENDMENTS—continued

(b) Other reasons (if any)

(c) Nature of intended legal action or exercise of right:

DETAILS OF HOMEFUND MORTGAGE

5 Loan No. (if any)
Current interest rate
Amount borrowed \$.....
Net balance due at date of this Notice \$
Date of loan
10 Duration of loan
Registered Mortgage No. (if any)
Address of any mortgaged property
Description of any mortgaged property:
Vol.
15 Folio
Other
.....
.....

20 If you have lodged a claim, or have notified your intention to lodge a claim, with the HomeFund Commissioner, you may be eligible for mortgage assistance or an order to vary the terms of your mortgage or a short term deferment of legal proceedings against you.

HomeFund Commissioner (Amendment) 1993

SCHEDULE 1—AMENDMENTS—*continued*

For further advice on your rights to seek such assistance measures, please contact the office of the HomeFund Commissioner on (02) 895 0111.
