

FIRST PRINT

## HOMEFUND COMMISSIONER 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 provide for the appointment of a HomeFund Commissioner to investigate and deal with complaints made by HomeFund borrowers. The Commissioner will be able to give advice, conciliate complaints, refer complaints to the appropriate authorities, and in appropriate cases make determinations affecting rights.

The HomeFund scheme principally involves loans known as Premier Low Start Loans, Low Start Loans, Low Start Affordable Home Loans and Affordable Home Loans. These loans were part of a program developed in conjunction with the Department of Housing, were negotiated through the agency of co-operative building societies, were largely funded by FANMAC (First Australian National Mortgage Acceptance Corporation Limited) and were secured by mortgages to FANMAC Trustees.

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#### PART 1—PRELIMINARY

Clause 1 specifies the short title of the proposed Act.

Clause 2 provides for the commencement of the proposed Act.

Clause 3 defines certain terms used in the proposed Act.

Clause 4 sets out the object of the proposed Act.

#### PART 2—APPOINTMENT OF COMMISSIONER

Clause 5 provides for the appointment of the HomeFund Commissioner.

Clause 6 provides for the appointment of staff of the Commissioner, for the use of the staff of other agencies, and for the engagement of consultants and other experts.

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**PART 3—FUNCTIONS OF COMMISSIONER**

Clause 7 is a formal provision describing generally the functions of the Commissioner.

Clause 8 sets out the principal functions of the Commissioner. These are:

- to receive complaints from HomeFund borrowers
- to provide advice
- to refer borrowers to appropriate authorities
- to investigate complaints
- to conciliate complaints
- to make determinations.

The clause enables the Commissioner to make recommendations to the parties to a complaint. It also requires the Commissioner to keep records (this will facilitate the making of reports and recommendations).

Clause 9 allows the Commissioner to delegate functions.

**PART 4—COMPLAINTS****Division 1—Complaints generally**

Clause 10 confers a right on HomeFund borrowers to make complaints to the Commissioner by 1 August 1993. No fees are payable.

Clause 11 allows the Commissioner to carry out a preliminary assessment of a complaint for the purpose of deciding whether to carry out further functions under the proposed Act.

**Division 2—Investigations**

Clause 12 allows the Commissioner to carry out an investigation of a complaint and to discontinue an investigation.

Clause 13 requires the Commissioner to notify the complainant of a decision not to carry out an investigation of a complaint or to discontinue an investigation. Reasons are to be given.

Clause 14 requires the Commissioner to give notice of an investigation.

Clause 15 requires investigations to be conducted privately.

Clause 16 allows the Commissioner to require a public authority to give information and produce documents. This power extends to co-operative housing societies, FANMAC, a FANMAC trustee, the Home Purchase Assistance Fund Trust, and any body or person prescribed by regulation.

Clause 17 authorises the Commissioner to hold inquiries. For this purpose, the Commissioner has certain powers of a royal commissioner.

Clause 18 allows the Commissioner to enter the premises of a public authority and inspect documents.

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Clauses 19 and 20 impose limits on secrecy and privilege when the Commissioner exercises powers of requiring information or entering premises. These limits are similar to those in the Ombudsman Act 1974.

Clause 21 protects cabinet documents.

Clause 22 gives affected parties the right to make submissions to the Commissioner.

**Division 3—General provisions**

Clause 23 provides that a person is not to be represented before the Commissioner without the leave of the Commissioner. Leave is not to be given for a practising lawyer to appear for a person unless the Commissioner is satisfied special circumstances exist.

Clause 24 enables the Commissioner to determine the procedures in exercising functions. Speed and informality are to be features of these procedures.

**PART 5—DETERMINATIONS**

Clause 25 authorises the Commissioner to make determinations in connection with complaints. The determinations may apply to the parties to a HomeFund mortgage, the parties to an ancillary contract or arrangement, a co-operative housing society and the Department of Housing. The determinations that may be made are as follows:

- (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 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).

A determination can only be made if the borrower has an entitlement to a legal remedy, but once that entitlement is established the determination is not limited to that remedy.

Clause 26 makes further provisions regarding monetary determinations. They are limited to a maximum of \$20,000, and may be enforced as a debt.

Clause 27 enables the Commissioner to make temporary determinations that have the effect of suspending action to evict HomeFund borrowers from their homes.

Clause 28 provides that determinations are binding on a public authority and are also binding on other consenting parties.

Clause 29 makes provision for the giving of consents. They may be general or specific, and are irrevocable except in special circumstances.

Clause 30 provides for a borrower to request a determination to be reduced to writing.

Clause 31 empowers the Commissioner to refrain from making a determination if other relief has been sought or obtained, and to make it a condition of a determination that the borrower will not seek other relief.

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**PART 6—REPORTS**

Clause 32 provides for reports to be made about complaints.

Clause 33 requires the submission of an annual report by the Commissioner.

Clause 34 allows the Commissioner to make special reports to Parliament. The Commissioner will be able to recommend that these reports be released before being tabled.

Clause 35 makes it clear that the Commissioner can make general or specific recommendations about HomeFund matters.

**PART 7—MISCELLANEOUS**

Clause 36 provides that the proposed Act binds the Crown.

Clause 37 sets up the HomeFund Advisory Panel.

Clause 38 makes it clear that the proposed Act extends to HomeFund mortgages entered into before the date of assent. The clause also makes it clear that a complaint may be made even though the mortgage to which the complaint relates has been discharged, but action may not be taken in such a case unless special circumstances exist.

Clause 39 gives protection to the Commissioner and staff against personal liability.

Clause 40 provides that there is no appeal from the Commissioner.

Clause 41 provides that if under clause 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 clause 42.

Clause 42 creates offences about obstructing the Commissioner and staff, failing to comply with lawful requirements of the Commissioner and staff, making false statements and impersonating the Commissioner and staff.

Clause 43 provides that offences are to be dealt with before Local Courts.

Clause 44 allows regulations to be made.

Clause 45 is a formal provision giving effect to the Schedule of amendments.

Clause 46 provides the proposed Act will expire on a day to be appointed by proclamation.

**SCHEDULE 1—PROVISIONS RELATING TO COMMISSIONER**

Schedule 1 contains provisions relating to the terms and conditions of appointment of the Commissioner.

**SCHEDULE 2—AMENDMENT OF OTHER ACTS**

Schedule 2 amends other Acts.

The Defamation Act 1974 is amended to give protection to publications to or by the Commissioner, and also to reports made public before being tabled in Parliament.

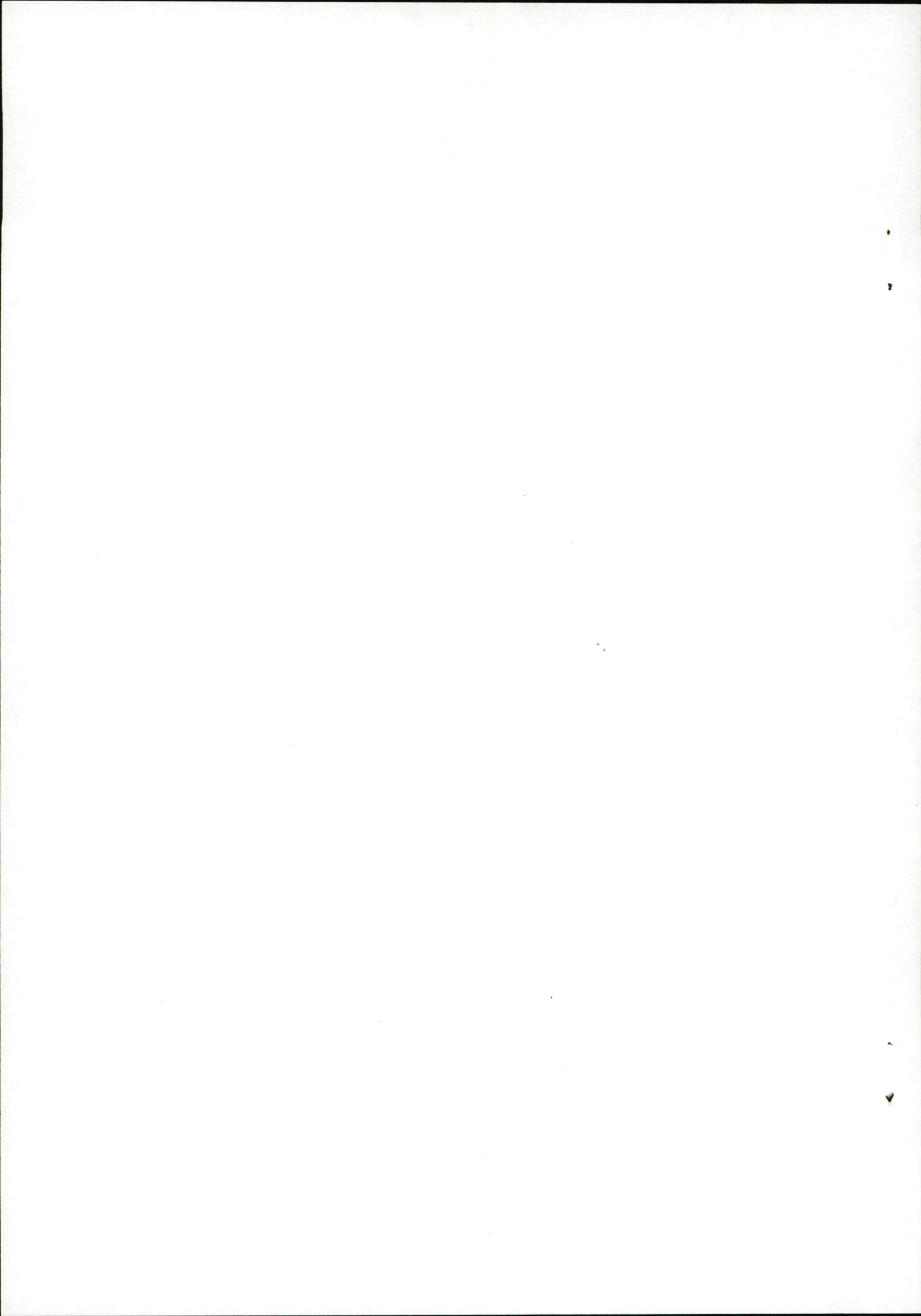
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The Ombudsman Act 1974 is amended to exclude the Commissioner from being the subject of investigation under that Act.

The Public Sector Management Act 1988 is amended to create the HomeFund Commissioner's Office as an administrative office, with the Commissioner exercising the functions of a Department Head.

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## HOMEFUND COMMISSIONER BILL 1993

NEW SOUTH WALES



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SCHEDULE 1—PROVISIONS RELATING TO COMMISSIONER  
SCHEDULE 2—AMENDMENT OF OTHER ACTS

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**HOMEFUND COMMISSIONER BILL 1993**

NEW SOUTH WALES



No. , 1993

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**A BILL FOR**

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

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The Legislature of New South Wales enacts:

**PART 1—PRELIMINARY**

**Short title**

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

**5 Commencement**

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

**Definitions**

3. (1) In this Act:

10 “**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;

15 “**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;

20 “**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

25 (b) the estate of a deceased mortgagor or guarantor, where relevant;

“**HomeFund Commissioner**” means the HomeFund Commissioner appointed under this Act;

30 “**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;

35 “**mortgage**” has the same meaning as in the Conveyancing Act 1919;

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“**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. 5

**Object of Act**

4. 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. 10

**PART 2—APPOINTMENT OF COMMISSIONER****Appointment of HomeFund Commissioner**

5. (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. 15

**Staff of Commissioner**

6. (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. 20

(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. 25

(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****General functions** 30

7. (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.

**Principal functions**

8. (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;
- 10 (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.

**25 Delegation of functions**

9. (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) a member of the HomeFund Advisory Panel appointed under this Act; or
  - 35 (c) a person of a class prescribed by the regulations or approved by the Minister.

**PART 4—COMPLAINTS****Division 1—Complaints generally****Right to complain**

10. (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. 5

(2) Complaints must be made before 1 August 1993.

(3) A complaint may be in writing or verbal, but the Commissioner may require a verbal complaint to be reduced to writing. 10

(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. 15

(7) The Commissioner may treat a complaint as consisting of two or more separate complaints.

**Preliminary assessment**

11. 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. 20

**Division 2—Investigations****Investigations**

12. (1) The Commissioner may investigate a complaint or may choose not to do so. 25

(2) The Commissioner may discontinue an investigation.

(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: 30

(a) the complaint is frivolous, vexatious or not in good faith; or

(b) the subject-matter of the complaint is trivial; or

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- (c) there is or was 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
- 5 (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.

**Reasons for refusal or discontinuance of investigation**

- 10 **13.** 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.

15 **Notice of investigation**

- 14.** (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.
- 20 (2) The notice must be in writing and describe the subject-matter of the complaint.

**Privacy**

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

**Information to be given**

- 25 **16.** (1) For the purposes of an investigation, the Commissioner may require an authority (as defined in subsection (3)):
- (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.
- 30 (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) In this section, “**authority**” means a public authority, a co-operative housing society, FANMAC, a FANMAC trustee, the Home Purchase Assistance Fund Trust or any body or person (or any body or person of a class) prescribed by the regulations for the purposes of this section.
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**Inquiries**

17. (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. 5 10

**Entry on premises etc.**

18. 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 15
- (b) inspect any document or thing in or on the premises.

**Limits on secrecy and privilege (information and inquiries)**

19. (1) This section applies where, in the course of an investigation, the Commissioner requires any person under section 16 or 17:

- (a) to give any statement of information; or 20
- (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. 25

(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 30
- (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. 35

**Limits on secrecy and privilege (entry of premises)**

20. (1) This section applies to the powers of entry and inspection conferred by section 18.

5 (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.

10 (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

15 (c) any duty of secrecy or other restriction on disclosure applying to a public authority.

**Cabinet proceedings**

21. (1) This Act does not enable the Commissioner:

(a) to require any person:

20 (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,

25 which relates 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 head of The Cabinet Office that any information, document, thing or question relates to confidential proceedings of cabinet or of a committee of cabinet is  
30 conclusive that it does so relate.

**Submissions**

22. (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.



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(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**

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**Representation**

23. (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 a practising barrister or practising solicitor unless the Commissioner is satisfied that leave should be given in the special circumstances of the case.

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

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**General procedure**

24. (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

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(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

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(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.

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**PART 5—DETERMINATIONS****Determinations**

25. (1) The Commissioner may make determinations about the whole or any part of the subject-matter of a complaint.

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(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;
- 5 (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 lawyer);
- (c) a co-operative housing society;
- (d) the Department of Housing.

10 (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;
- 15 (c) setting aside a HomeFund mortgage and entering into a new transaction;
- (d) ordering the payment to 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).

20 (4) The Commissioner is not to make a determination unless satisfied that the complainant has an entitlement to a legal remedy (apart from this Act) 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  
25 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 power to make a determination under section 27.

### 30 **Monetary determinations**

26. (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.

35 (2) The maximum amount that can be ordered to be paid to a HomeFund borrower is \$20,000 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.

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(3) Such an amount ordered to be paid may be recovered as a debt in any court of competent jurisdiction.

**Determination for suspending eviction**

27. (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. 5

(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. 10  
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(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). 20

(6) The determination may be made before, during, following or without an investigation.

**Binding nature of determinations**

28. (1) A determination binds a public authority to which it applies.

(2) A determination binds the other persons to whom it applies, provided they have consented. 25

**Consents to determinations**

29. (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. 30

(3) Once given, consent is irrevocable, unless the Commissioner authorises withdrawal of consent where the Commissioner is of the opinion that special circumstances exist. 35

(4) The Commissioner may establish procedures for seeking and recording consents.

#### **Form of determination**

5     **30.** On request by a person to whom a determination applies, the determination is to be reduced to writing and is to contain a statement of relevant findings and reasons.

#### **Other relief**

**31.** (1) The Commissioner may refrain from making a determination if other relief has been sought or obtained.

10    (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**

#### **15 Report of complaint**

**32.** (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.

20    (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.

#### **25 Annual report**

**33.** (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.

30    (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.

**Special report to Parliament**

34. (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. 5

(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.

**Recommendations 10**

35. 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 15****Act binds Crown**

36. This Act binds the Crown.

**HomeFund Advisory Panel**

37. (1) There is to be a HomeFund Advisory Panel, consisting of members appointed by the Minister. 20

(2) The functions of the Panel are to assist the Commissioner in the exercise of the Commissioner's functions under this Act, as determined by the Commissioner.

(3) A member of the Panel is entitled to be paid such remuneration (including travelling and subsistence allowances) as the Minister may from time to time determine in respect of the member. 25

(4) The regulations may make provision for or with respect to the Panel, including provisions for or with respect to conferring additional advisory functions on the Panel, its procedures, the appointment of its members, the terms of office of its members, and the termination of membership of the Panel. 30

(5) 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

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(b) prohibiting the person from engaging in employment outside the duties of that office,

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

**Application of Act**

10 **38.** (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.

15 (3) However, action may not be taken under this Act in relation to a complaint referred to in subsection (2) unless the Commissioner is of the opinion that special circumstances exist. This does not apply to a preliminary assessment of the complaint, a decision of the Commissioner not to investigate the complaint, or a decision of the Commissioner to discontinue an investigation of the complaint.

**Personal liability of Commissioner and others**

20 **39.** A matter or thing done by the Commissioner, a member of the staff of the Commissioner, the HomeFund Advisory Panel, a member of the Panel 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 Act, subject the Commissioner, member of  
25 staff, member of the Panel or person so acting to any action, liability, claim or demand.

**Appeal**

30 **40.** 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.

**Incriminary statement**

35 **41.** (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).

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

**Offences**

42. (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 5
- (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 10
- (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. 15

(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 20
- (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. 25

(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.

**Proceedings for offences 30**

43. Proceedings for an offence under this Act may only be dealt with summarily before a Local Court constituted by a Magistrate sitting alone.

**Regulations**

44. 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.

**Amendment of other Acts**

45. The Acts specified in Schedule 2 are amended as set out in that Schedule.

**Expiry of Act**

46. (1) This Act expires on a day to be appointed by proclamation.

(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.

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**SCHEDULE 1—PROVISIONS RELATING TO  
COMMISSIONER**

(Sec. 5)

**Appointment of acting Commissioner**

1. (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. 5

(2) The Minister may, at any time, remove a person from office as acting Commissioner. 10

(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.

**Terms and conditions of appointment** 15

2. (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. 20

**Remuneration**

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

**Vacancy in office** 25

4. (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 30
- (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 35

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**SCHEDULE 1—PROVISIONS RELATING TO COMMISSIONER—**  
*continued*

- (f) becomes a mentally incapacitated person; or
- 5 (g) is convicted in New South Wales of an offence which is punishable by penal servitude or imprisonment for 12 months or more or is convicted elsewhere than in New South Wales of an offence which, if committed in New South Wales, would be an offence so punishable.
- 10 (2) The Governor may remove the Commissioner from office for misbehaviour, incapacity or incompetence.

**Effect of certain other Acts**

5. (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:
- 15 (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,
- 20 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—AMENDMENT OF OTHER ACTS**

(Sec. 45)

**Defamation Act 1974 No. 18**

- 25 (1) After section 17N, insert:

**Matters relating to the HomeFund Commissioner**

- 30 17O. (1) There is a defence of absolute privilege for a publication to or by the HomeFund Commissioner, as HomeFund Commissioner, or to any member of the staff of the HomeFund Commissioner, as such a member.

(2) Subsection (1) applies in relation to an acting HomeFund Commissioner in the same way as it applies in relation to the HomeFund Commissioner.

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SCHEDULE 2—AMENDMENT OF OTHER ACTS—*continued*

(3) There is a defence of absolute privilege for the publication under section 34 (3) of the HomeFund Commissioner Act 1993 of a report.

(4) There is a defence of absolute privilege for the publication, under the authority of the Minister for the time being administering the HomeFund Commissioner Act 1993, of a copy of a report previously made public under section 34 (3) of that Act. 5

(2) Schedule 2, clause 2 (**Proceedings of Public Concern**): 10

After paragraph (19), insert:

(20) proceedings of the HomeFund Commissioner, so far as those proceedings are included in a report previously made public under section 34 (3) of the HomeFund Commissioner Act 1993. 15

**Ombudsman Act 1974 No. 68**

Schedule 1 (**Excluded Conduct of Public Authorities**):

At the end of the Schedule, insert:

25. Conduct of the HomeFund Commissioner or a member of the staff of the HomeFund Commissioner, when exercising functions under the HomeFund Commissioner Act 1993. 20

**Public Sector Management Act 1988 No. 33**

Schedule 2 (**Administrative Offices**):

Insert in alphabetical order (of body, organisation or group):

HomeFund Commissioner's Office 25

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**HOMEFUND COMMISSIONER BILL**

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Schedule of the amendments referred to in the Legislative  
Assembly's Message of 29 April 1993.

**Russell D. Grove**  
Clerk of the Legislative Assembly

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1. Page 5, clause 10 (2), line 8. Omit all words on that line, insert instead:
  - (2) Complaints must be made within the period of 3 months ending on a day nominated by the Commissioner and notified by advertisement in newspapers circulating in New South Wales. However, the Commissioner may accept a complaint outside that period if of the opinion that special circumstances exist.
2. Page 6, clause 12 (3) (c), line 1. Omit "or was".
3. Page 10, clause 26 (2), line 36. Omit "\$20,000", insert instead "30,000".
4. Page 10, clause 26. After line 39, insert:
  - (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.
5. Page 14, clause 38 (3), lines 13-18. Omit all words on those lines.

**Examined**  
**WENDY MACHIN**  
Chairman of Committees

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# HOMEFUND COMMISSIONER ACT 1993 No. 9

NEW SOUTH WALES



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SCHEDULE 1—PROVISIONS RELATING TO COMMISSIONER  
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**HOMEFUND COMMISSIONER ACT 1993 No. 9**

**NEW SOUTH WALES**



**Act No. 9, 1993**

An Act to provide for the appointment and functions of the HomeFund Commissioner; and for other purposes. [Assented to 4 May 1993]

The Legislature of New South Wales enacts:

**PART 1—PRELIMINARY**

**Short title**

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

**Commencement**

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

**Definitions**

3. (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;

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“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.

### **Object of Act**

4. 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**

### **Appointment of HomeFund Commissioner**

5. (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.

### **Staff of Commissioner**

6. (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**

### **General functions**

7. (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.

**Principal functions**

8. (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.

**Delegation of functions**

9. (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) a member of the HomeFund Advisory Panel appointed under this Act; or
- (c) a person of a class prescribed by the regulations or approved by the Minister.

**PART 4—COMPLAINTS****Division 1—Complaints generally****Right to complain**

10. (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 within the period of 3 months ending on a day nominated by the Commissioner and notified by advertisement in newspapers circulating in New South Wales. However, the Commissioner may accept a complaint outside that period if of the opinion that special circumstances exist.

(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.

**Preliminary assessment**

11. 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—Investigations****Investigations**

12. (1) The Commissioner may investigate a complaint or may choose not to do so.

(2) The Commissioner may discontinue an investigation.

(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:

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- (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.

**Reasons for refusal or discontinuance of investigation**

13. 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.

**Notice of investigation**

14. (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.

**Privacy**

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

**Information to be given**

16. (1) For the purposes of an investigation, the Commissioner may require an authority (as defined in subsection (3)):

- (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.

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(3) In this section, “**authority**” means a public authority, a co-operative housing society, FANMAC, a FANMAC trustee, the Home Purchase Assistance Fund Trust or any body or person (or any body or person of a class) prescribed by the regulations for the purposes of this section.

**Inquiries**

17. (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.

**Entry on premises etc.**

18. 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.

**Limits on secrecy and privilege (information and inquiries)**

19. (1) This section applies where, in the course of an investigation, 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

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- (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.

**Limits on secrecy and privilege (entry of premises)**

**20. (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.

**Cabinet proceedings**

**21. (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 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 head of The Cabinet Office that any information, document, thing or question relates to confidential proceedings of cabinet or of a committee of cabinet is conclusive that it does so relate.



**Submissions**

22. (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****Representation**

23. (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 a practising barrister or practising solicitor 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.

**General procedure**

24. (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****Determinations**

25. (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 lawyer);
- (c) a co-operative housing society;
- (d) the Department of Housing.

(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 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).

(4) The Commissioner is not to make a determination unless satisfied that the complainant has an entitlement to a legal remedy (apart from this Act) 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 power to make a determination under section 27.

**Monetary determinations**

26. (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) Such an amount ordered to be paid may be recovered as a debt in any court of competent jurisdiction.

**Determination for suspending eviction**

27. (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.

**Binding nature of determinations**

28. (1) A determination binds a public authority to which it applies.

(2) A determination binds the other persons to whom it applies, provided they have consented.

**Consents to determinations**

29. (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.

**Form of determination**

30. On request by a person to whom a determination applies, the determination is to be reduced to writing and is to contain a statement of relevant findings and reasons.

**Other relief**

31. (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****Report of complaint**

32. (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.

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(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.

**Annual report**

33. (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.

**Special report to Parliament**

34. (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.

**Recommendations**

35. 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****Act binds Crown**

36. This Act binds the Crown.

**HomeFund Advisory Panel**

37. (1) There is to be a HomeFund Advisory Panel, consisting of members appointed by the Minister.

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(2) The functions of the Panel are to assist the Commissioner in the exercise of the Commissioner's functions under this Act, as determined by the Commissioner.

(3) A member of the Panel is entitled to be paid such remuneration (including travelling and subsistence allowances) as the Minister may from time to time determine in respect of the member.

(4) The regulations may make provision for or with respect to the Panel, including provisions for or with respect to conferring additional advisory functions on the Panel, its procedures, the appointment of its members, the terms of office of its members, and the termination of membership of the Panel.

(5) 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 member of the Panel or from accepting and retaining any remuneration payable to the person as a member of the Panel.

**Application of Act**

38. (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.

**Personal liability of Commissioner and others**

39. A matter or thing done by the Commissioner, a member of the staff of the Commissioner, the HomeFund Advisory Panel, a member of the Panel 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 Act, subject the Commissioner, member of staff, member of the Panel or person so acting to any action, liability, claim or demand.

**Appeal**

40. 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.

**IncrimINARY statement**

41. (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.

**Offences**

42. (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.

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(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.

**Proceedings for offences**

43. Proceedings for an offence under this Act may only be dealt with summarily before a Local Court constituted by a Magistrate sitting alone.

**Regulations**

44. 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.

**Amendment of other Acts**

45. The Acts specified in Schedule 2 are amended as set out in that Schedule.

**Expiry of Act**

46. (1) This Act expires on a day to be appointed by proclamation.

(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.

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**SCHEDULE 1—PROVISIONS RELATING TO  
COMMISSIONER**

(Sec. 5)

**Appointment of acting Commissioner**

1. (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.

**Terms and conditions of appointment**

2. (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.

**Remuneration**

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

**Vacancy in office**

4. (1) The office of Commissioner becomes vacant on the expiry of this Act or if the holder of the office:

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SCHEDULE 1—PROVISIONS RELATING TO COMMISSIONER—  
*continued*

- (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 which is punishable by penal servitude or imprisonment for 12 months or more or is convicted elsewhere than in New South Wales of an offence which, 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.

**Effect of certain other Acts**

5. (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—AMENDMENT OF OTHER ACTS**

(Sec. 45)

**Defamation Act 1974 No. 18**

(1) After section 17N, insert:

**Matters relating to the HomeFund Commissioner**

17O. (1) There is a defence of absolute privilege for a publication to or by the HomeFund Commissioner, as HomeFund Commissioner, or to any member of the staff of the HomeFund Commissioner, as such a member.

(2) Subsection (1) applies in relation to an acting HomeFund Commissioner in the same way as it applies in relation to the HomeFund Commissioner.

(3) There is a defence of absolute privilege for the publication under section 34 (3) of the HomeFund Commissioner Act 1993 of a report.

(4) There is a defence of absolute privilege for the publication, under the authority of the Minister for the time being administering the HomeFund Commissioner Act 1993, of a copy of a report previously made public under section 34 (3) of that Act.

(2) Schedule 2, clause 2 (**Proceedings of Public Concern**):

After paragraph (19), insert:

(20) proceedings of the HomeFund Commissioner, so far as those proceedings are included in a report previously made public under section 34 (3) of the HomeFund Commissioner Act 1993.

**Ombudsman Act 1974 No. 68**Schedule 1 (**Excluded Conduct of Public Authorities**):

At the end of the Schedule, insert:

25. Conduct of the HomeFund Commissioner or a member of the staff of the HomeFund Commissioner, when exercising functions under the HomeFund Commissioner Act 1993.

*HomeFund Commissioner Act 1993 No. 9*

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SCHEDULE 2—AMENDMENT OF OTHER ACTS—*continued*

**Public Sector Management Act 1988 No. 33**

Schedule 2 (**Administrative Offices**):

Insert in alphabetical order (of body, organisation or group):

HomeFund Commissioner's Office  
HomeFund Commissioner.

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[*Minister's second reading speech made in—  
Legislative Council on 27 April 1993  
Legislative Assembly on 28 April 1993*]

