

FIRST PRINT

**HOMEFUND MORTGAGES (REVIEWS AND APPEALS)  
BILL 1994**

NEW SOUTH WALES



**EXPLANATORY NOTE**

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

The objects of this Bill are:

- (a) to enable the Commercial Tribunal of New South Wales to exercise the powers of the Supreme Court under the Contracts Review Act 1980 in respect of mortgages of residential property in which the mortgagee is the Permanent Trustee Company Limited as trustee for the FANMAC Trusts (commonly known as "HomeFund" mortgages). Under that Act, the Supreme Court may make various orders in relation to a contract it finds to be unjust. (It may, for example, vary the terms of the contract or declare the contract void); and
- (b) to allow appeals to the Commercial Tribunal in certain cases from decisions of the HomeFund Commissioner under section 12 of the HomeFund Commissioner Act 1993 and determinations of the HomeFund Commissioner made under Part 5 of that Act; and
- (c) to suspend the running of certain limitation periods (already suspended to an extent under the HomeFund Restructuring Act 1993) until 2 years has expired after the date on which such an appeal is withdrawn or finally disposed of. (The limitation periods concerned are set out in the Limitation Act 1969, the Contracts Review Act 1980, the Fair Trading Act 1987 and the Consumer Claims Tribunals Act 1987 and apply so as to prevent civil proceedings from being commenced after the expiration of a specified period of time.)

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**Clause 1** specifies the short title of the proposed Act.

**Clause 2** provides for the commencement of the proposed Act on assent.

**Clause 3** defines the terms "HomeFund mortgage" and "Tribunal" used in the proposed Act.

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**Clause 4** declares that the proposed Act (and the amendments made by it) will apply to a HomeFund mortgage whether the mortgage was entered into before or after the commencement of the proposed Act. However, the restrictions imposed by Part 3 of the HomeFund Restructuring Act 1993 on remedies available to HomeFund mortgagors (other than mortgagors under State Partnership Loans, Rent-buy Loans or Aged-persons Update Loans) as a consequence of the restructuring scheme provided by that Act are not affected.

**Clause 5** allows the Commercial Tribunal of New South Wales to exercise the powers of the Supreme Court under the Contracts Review Act 1980 in respect of HomeFund mortgages. Currently, only courts exercise the powers for reviewing contracts under that Act.

**Clause 6** requires clauses 5-9 of the Bill to be read and construed as part of the Contracts Review Act 1980. Provision is also made for an order of the Tribunal made under the applied provisions to be enforced as if it were an order of the Supreme Court.

**Clause 7** specifies the period during which an application to the Tribunal may be made.

**Clause 8** empowers the Tribunal to re-open a transaction relating to a HomeFund mortgage and to make such orders as it sees fit in relation to the transaction or mortgage.

**Clause 9** prevents a person whose application for relief has been determined by the Supreme Court from seeking relief in respect of the same HomeFund mortgage from the Tribunal.

**Clause 10** gives effect to the amendments to the HomeFund Commissioner Act 1993 set out in Schedule 1.

**Clause 11** gives effect to the amendments to the HomeFund Restructuring Act 1993 set out in Schedule 2.

**Clause 12** gives effect to the saving and transitional provisions in Schedule 3.

At present, there is no appeal against decisions under section 12 of the HomeFund Commissioner Act 1993 (which relate to whether or not a complaint is to be investigated) and appeals against determinations under Part 5 of that Act may be made only to the Supreme Court. **Schedule 1** contains the amendments that will allow appeals to the Commercial Tribunal from certain of those decisions and determinations of the HomeFund Commissioner.

**Schedule 2** contains the amendments that will suspend the running of certain limitation periods (already suspended in a less comprehensive way by the HomeFund Restructuring Act 1993) until 2 years has expired after the date on which such an appeal is withdrawn or finally disposed of.

**Schedule 3** makes saving and transitional provisions. Appeals to the Supreme Court under section 40 of the HomeFund Commissioner Act 1993 that have already been commenced may be continued. Special extended periods are allowed for appeals to be made to the Commercial Tribunal under the amendments to the HomeFund Commissioner Act 1993 shortly after the commencement of the proposed Act.

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BILL 1994**

NEW SOUTH WALES

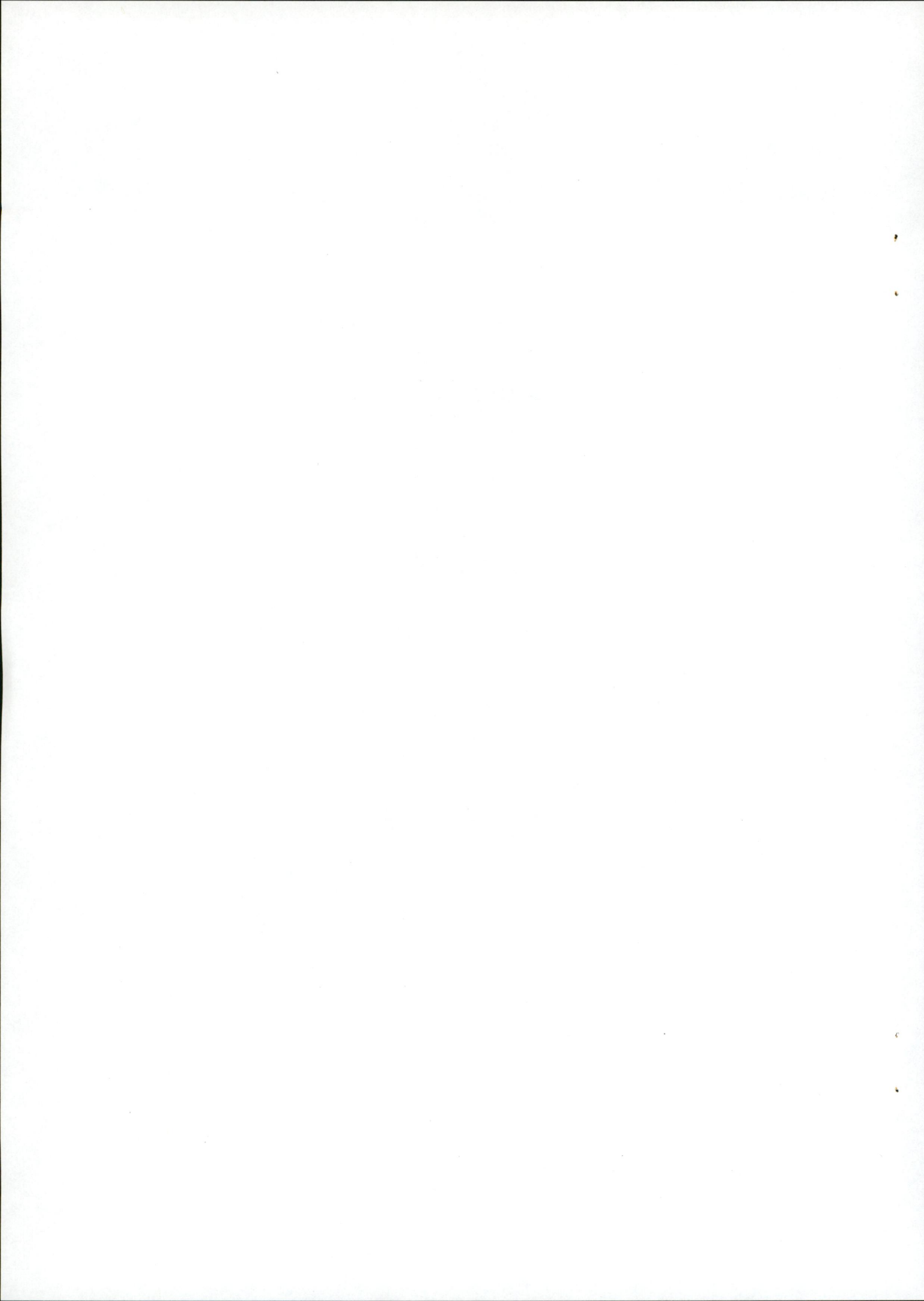


**TABLE OF PROVISIONS**

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2. Commencement
3. Definitions
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6. Application of Contracts Review Act 1980
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SCHEDULE 1—AMENDMENT OF HOMEFUND COMMISSIONER ACT 1993  
SCHEDULE 2—AMENDMENT OF HOMEFUND RESTRUCTURING ACT 1993  
SCHEDULE 3—SAVING AND TRANSITIONAL PROVISIONS

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**HOMEFUND MORTGAGES (REVIEWS AND APPEALS)  
BILL 1994**

NEW SOUTH WALES



No. , 1994

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**A BILL FOR**

An Act to provide that the powers of the Supreme Court to grant relief under the Contracts Review Act 1980 may be exercised by the Commercial Tribunal in respect of certain mortgages; to amend the HomeFund Commissioner Act 1993 to provide for appeals to that Tribunal; to amend the HomeFund Restructuring Act 1993 to extend the period allowed for taking certain proceedings; and for other purposes.

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*HomeFund Mortgages (Reviews and Appeals) 1994*

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

**Short title**

1. This Act may be cited as the HomeFund Mortgages (Reviews and Appeals) Act 1994.

5 **Commencement**

2. This Act commences on the date of assent.

**Definitions**

3. In this Act:

10 **“HomeFund mortgage”** has the same meaning as in the HomeFund Commissioner Act 1993;

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

**Mortgages to which this Act applies**

15 4. (1) This Act, and the amendments made by this Act, apply to a HomeFund mortgage entered into before the commencement of this Act as well as to a HomeFund mortgage entered into after that commencement.

20 (2) However, this Act does not affect the operation of Part 3 of the HomeFund Restructuring Act 1993 which restricts remedies that would otherwise be available in respect of HomeFund mortgages, other than such a mortgage described as a State Partnership Loan, a Rent-buy Loan or an Aged-persons Update Loan.

**Tribunal may exercise certain powers**

25 5. The jurisdiction and powers of the Supreme Court under the Contracts Review Act 1980 may also be exercised, in respect of a HomeFund mortgage, by the Tribunal on application made to it in accordance with rules of the Tribunal. The Tribunal has jurisdiction and powers accordingly.

**Application of Contracts Review Act 1980**

30 6. (1) Sections 5–9 are to be read with and construed as part of the Contracts Review Act 1980, and provisions of that Act that apply to or in consequence of the making of any order or the exercise of jurisdiction by the Supreme Court under that Act extend to apply in relation to any orders made or jurisdiction exercised under that Act by the Tribunal in accordance with this Act.

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(2) Without limiting section 11 of the Contracts Review Act 1980, the Tribunal may exercise its powers under that Act in relation to a HomeFund mortgage on application made to it in accordance with rules of the Tribunal in any proceedings relating to the mortgage brought under section 40 of the HomeFund Commissioner Act 1993. 5

(3) An order made by the Tribunal by virtue of this Act is to be complied with, and may be enforced, as if it were an order made by the Supreme Court.

(4) For the purpose of the exercise by the Tribunal of power under the Contracts Review Act 1980, references in that Act to rules of court are to be construed as references to rules of the Tribunal. 10

**When application may be made to Tribunal**

7. (1) Section 16 of the Contracts Review Act 1980 does not apply in respect of an application for relief made to the Tribunal, but an application to the Tribunal may be made only within 3 years after: 15

(a) the date on which this Act commences; or

(b) the date of the HomeFund mortgage to which the application relates,

whichever is the later date.

(2) An application may be made even though the mortgage to which the application relates has been discharged. 20

**Re-opening certain transactions**

8. Without limiting the powers of the Tribunal under section 14 of the Contracts Review Act 1980, the Tribunal may, for the purpose of exercising its powers under that Act, re-open a transaction to which a HomeFund mortgage relates and may make such orders in relation to the mortgage or transaction as it sees fit. 25

**Multiple proceedings**

9. (1) A person whose application for relief in respect of a HomeFund mortgage has been determined by a court under the Contracts Review Act 1980 may not make an application to the Tribunal for relief in respect of the same mortgage. 30

(2) A person whose application for relief in respect of a HomeFund mortgage has been determined by the Tribunal may not make an application to a court under the Contracts Review Act 1980 for relief in respect of the same mortgage. 35

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5       (3) If a person makes application both to a court under the Contracts Review Act 1980 and to the Tribunal for relief in respect of the same HomeFund mortgage, the respondent to either application may, by written notice, require the applicant to nominate the application with which the applicant intends to proceed. Both proceedings lapse unless the applicant makes that nomination and withdraws one application within 28 days after receiving the notice.

**Amendment of HomeFund Commissioner Act 1993 No. 9**

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

**Amendment of HomeFund Restructuring Act 1993 No. 112**

11. The HomeFund Restructuring Act 1993 is amended as set out in Schedule 2.

**Saving and transitional provisions**

15       12. Schedule 3 has effect.

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**SCHEDULE 1—AMENDMENT OF HOMEFUND  
COMMISSIONER ACT 1993**

(Sec. 10)

Section 40 (**Appeal**):

20       (a) Omit section 40 (2)–(5), insert instead:

25               (2) However, an appeal lies to the Commercial Tribunal of New South Wales against a decision of the Commissioner under section 12 and against a determination of the Commissioner, whether or not in either case the appeal involves a question of law.

30               (3) A notice of appeal must be lodged with the Commercial Tribunal in accordance with the rules of the Tribunal within 28 days after the decision is notified to the applicant or the determination is made or within such further time as the Commercial Tribunal may allow in the particular case.



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**SCHEDULE 1—AMENDMENT OF HOMEFUND COMMISSIONER  
ACT 1993—*continued***

- (4) The parties to an appeal are the Commissioner and, except as provided by the regulations, each person notified by the Commissioner of the decision or each of the parties to the determination against which the appeal is made. 5
- (b) Omit section 40 (7), insert instead:
- (7) The lodging of a notice of appeal operates to stay the decision or determination appealed against, subject to any direction of the Commercial Tribunal to the contrary. 10
- (c) From section 40 (8), omit “Supreme Court”, insert instead “Commercial Tribunal”.
- (d) After section 40 (8), insert:
- (9) In determining an appeal, the Commercial Tribunal:
- (a) may uphold the decision or determination appealed against; or 15
- (b) may make any decision or determination that the Commissioner could have made.
- (10) The Commercial Tribunal’s decision in respect of an appeal is final and a decision or determination made by the Commercial Tribunal is to be given effect to as if it were that of the Commissioner. 20

**SCHEDULE 2—AMENDMENT OF HOMEFUND  
RESTRUCTURING ACT 1993**

(Sec. 11) 25

**Section 20 (Suspension of limitation period):**

- (a) In section 20 (2) (a), before “determination” wherever occurring, insert “decision or”.
- (b) After section 20 (2) (a), insert:
- (a1) in the case of proceedings arising out of a HomeFund mortgage in respect of which an appeal is made to the Commercial Tribunal of New South Wales from a decision or determination made by the HomeFund Commissioner, the period between 30

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**SCHEDULE 2—AMENDMENT OF HOMEFUND  
RESTRUCTURING ACT 1993—*continued***

10 May 1993 and the date occurring 2 years after  
the proceedings before the Tribunal are withdrawn  
or finally disposed of;

(a2) in the case of proceedings arising out of a  
HomeFund mortgage in respect of which an appeal  
was made to the Supreme Court from a  
determination made by the HomeFund  
Commissioner, the period between 10 May 1993  
and the date occurring 2 years after the proceedings  
before the Tribunal were or are withdrawn or  
finally disposed of;

(c) After section 20 (2), insert:

(3) In this section, "**HomeFund mortgage**" includes  
such a mortgage described as a State Partnership Loan, a  
Rent-buy Loan or an Aged-persons Update Loan.

**SCHEDULE 3—SAVING AND TRANSITIONAL PROVISIONS**

(Sec. 12)

**Saving of certain applications and appeals**

1. The HomeFund Commissioner Act 1993 applies to proceedings  
commenced by the making of an application to the Supreme Court under  
section 40 of that Act before the commencement of this Act as if  
Schedule 1 had not been enacted.

**Appeals against decisions and determinations under HomeFund  
Commissioner Act 1993—transitional**

2. Despite section 40 of the HomeFund Commissioner Act 1993, an  
appeal may be made to the Tribunal against a decision of the HomeFund  
Commissioner under section 12 of that Act or against a determination of  
the Commissioner under Part 5 of that Act if notice of the appeal is  
lodged with the Tribunal:

(a) within 6 months after the commencement of this Act, if the  
decision or determination was made before that commencement,  
except in the case of a decision first notified to the applicant after  
that commencement; or

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SCHEDULE 3—SAVING AND TRANSITIONAL PROVISIONS—  
*continued*

- (b) within 6 months after first notification of the decision to the applicant or within 6 months after the making of the determination, if the decision is first so notified or the determination is made within 3 months after the commencement of this Act.
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SECOND PRINT

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NEW SOUTH WALES

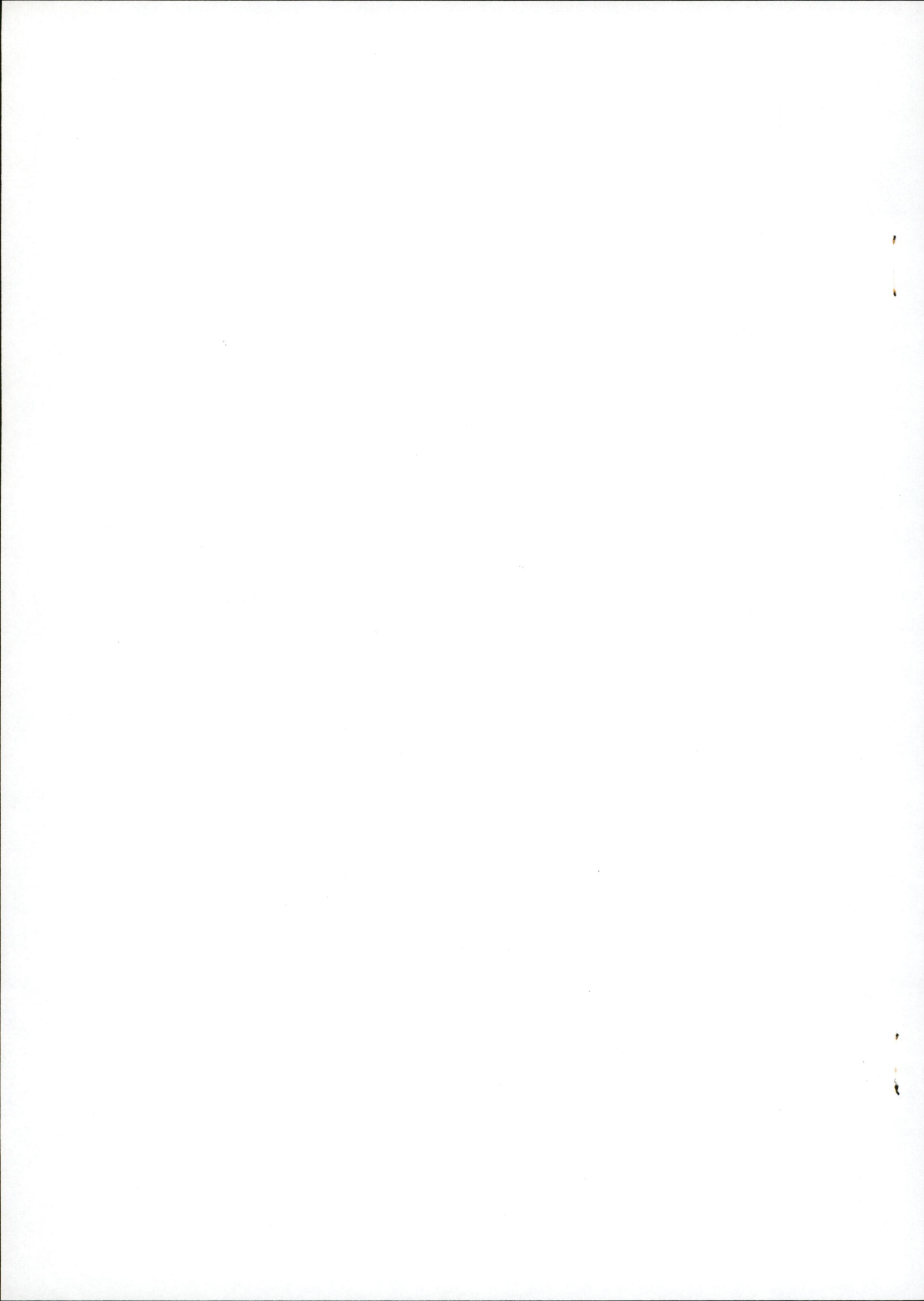


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SCHEDULE 1—AMENDMENT OF HOMEFUND COMMISSIONER ACT 1993  
SCHEDULE 2—AMENDMENT OF HOMEFUND RESTRUCTURING ACT 1993  
SCHEDULE 3—SAVING AND TRANSITIONAL PROVISIONS

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*This PUBLIC BILL, originated in the LEGISLATIVE ASSEMBLY and, having this day passed, is now ready for presentation to the LEGISLATIVE COUNCIL for its concurrence.*

*Clerk of the Legislative Assembly.*

*Legislative Assembly*

NEW SOUTH WALES



Act No.           , 1994

An Act to provide that the powers of the Supreme Court to grant relief under the Contracts Review Act 1980 may be exercised by the Commercial Tribunal in respect of certain mortgages; to amend the HomeFund Commissioner Act 1993 to provide for appeals to that Tribunal; to amend the HomeFund Restructuring Act 1993 to extend the period allowed for taking certain proceedings; and for other purposes.

*HomeFund Mortgages (Reviews and Appeals) 1994*

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

**Short title**

1. This Act may be cited as the HomeFund Mortgages (Reviews and Appeals) Act 1994.

5 **Commencement**

2. This Act commences on the date of assent.

**Definitions**

3. In this Act:

10 “HomeFund mortgage” has the same meaning as in the HomeFund Commissioner Act 1993;

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

**Mortgages to which this Act applies**

15 4. (1) This Act, and the amendments made by this Act, apply to a HomeFund mortgage entered into before the commencement of this Act as well as to a HomeFund mortgage entered into after that commencement.

20 (2) However, this Act does not affect the operation of Part 3 of the HomeFund Restructuring Act 1993 which restricts remedies that would otherwise be available in respect of HomeFund mortgages, other than such a mortgage described as a State Partnership Loan, a Rent-buy Loan or an Aged-persons Update Loan.

**Tribunal may exercise certain powers**

25 5. The jurisdiction and powers of the Supreme Court under the Contracts Review Act 1980 may also be exercised, in respect of a HomeFund mortgage, by the Tribunal on application made to it in accordance with rules of the Tribunal. The Tribunal has jurisdiction and powers accordingly.

**Application of Contracts Review Act 1980**

30 6. (1) Sections 5–9 are to be read with and construed as part of the Contracts Review Act 1980, and provisions of that Act that apply to or in consequence of the making of any order or the exercise of jurisdiction by the Supreme Court under that Act extend to apply in relation to any orders made or jurisdiction exercised under that Act by the Tribunal in accordance with this Act.



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(2) Without limiting section 11 of the Contracts Review Act 1980, the Tribunal may exercise its powers under that Act in relation to a HomeFund mortgage on application made to it in accordance with rules of the Tribunal in any proceedings relating to the mortgage brought under section 40 of the HomeFund Commissioner Act 1993. 5

(3) An order made by the Tribunal by virtue of this Act is to be complied with, and may be enforced, as if it were an order made by the Supreme Court.

(4) For the purpose of the exercise by the Tribunal of power under the Contracts Review Act 1980, references in that Act to rules of court are to be construed as references to rules of the Tribunal. 10

**When application may be made to Tribunal**

7. (1) Section 16 of the Contracts Review Act 1980 does not apply in respect of an application for relief made to the Tribunal, but an application to the Tribunal may be made only within 3 years after: 15

(a) the date on which this Act commences; or

(b) the date of the HomeFund mortgage to which the application relates,

whichever is the later date.

(2) An application may be made even though the mortgage to which the application relates has been discharged. 20

**Re-opening certain transactions**

8. Without limiting the powers of the Tribunal under section 14 of the Contracts Review Act 1980, the Tribunal may, for the purpose of exercising its powers under that Act, re-open a transaction to which a HomeFund mortgage relates and may make such orders in relation to the mortgage or transaction as it sees fit. 25

**Multiple proceedings**

9. (1) A person whose application for relief in respect of a HomeFund mortgage has been determined by a court under the Contracts Review Act 1980 may not make an application to the Tribunal for relief in respect of the same mortgage. 30

(2) A person whose application for relief in respect of a HomeFund mortgage has been determined by the Tribunal may not make an application to a court under the Contracts Review Act 1980 for relief in respect of the same mortgage. 35

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5 (3) If a person makes application both to a court under the Contracts Review Act 1980 and to the Tribunal for relief in respect of the same HomeFund mortgage, the respondent to either application may, by written notice, require the applicant to nominate the application with which the applicant intends to proceed. Both proceedings lapse unless the applicant makes that nomination and withdraws one application within 28 days after receiving the notice.

**Amendment of HomeFund Commissioner Act 1993 No. 9**

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

**Amendment of HomeFund Restructuring Act 1993 No. 112**

11. The HomeFund Restructuring Act 1993 is amended as set out in Schedule 2.

**Saving and transitional provisions**

15 12. Schedule 3 has effect.

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**SCHEDULE 1—AMENDMENT OF HOMEFUND  
COMMISSIONER ACT 1993**

(Sec. 10)

**Section 40 (Appeal):**

20 (a) Omit section 40 (2)–(5), insert instead:

25 (2) However, an appeal lies to the Supreme Court or Commercial Tribunal of New South Wales against a decision of the Commissioner under section 12 and against a determination of the Commissioner, whether or not in either case the appeal involves a question of law.

30 (3) A notice of appeal must be lodged with the Supreme Court or Commercial Tribunal in accordance with the rules of the Court or Tribunal within 28 days after the decision is notified to the applicant or the determination is made or within such further time as the Supreme Court or

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**SCHEDULE 1—AMENDMENT OF HOMEFUND COMMISSIONER  
ACT 1993—*continued***

Commercial Tribunal, respectively, may allow in the particular case.

(4) The parties to an appeal are the Commissioner and, except as provided by the regulations, each person notified by the Commissioner of the decision or each of the parties to the determination against which the appeal is made.

(b) Omit section 40 (7), insert instead:

(7) The lodging of a notice of appeal operates to stay the decision or determination appealed against, subject to any direction of the Supreme Court or Commercial Tribunal to the contrary.

(c) From section 40 (8), omit “Supreme Court”, insert instead “Supreme Court or Commercial Tribunal”.

(d) After section 40 (8), insert:

(9) In determining an appeal, the Supreme Court or Commercial Tribunal:

(a) may uphold the decision or determination appealed against; or

(b) may make any decision or determination that the Commissioner could have made; or

(c) may remit the decision or determination back to the Commissioner to be remade in accordance with law.

(10) The Commercial Tribunal’s decision in respect of an appeal is final and a decision or determination made by the Commercial Tribunal is to be given effect to as if it were that of the Commissioner.

**SCHEDULE 2—AMENDMENT OF HOMEFUND  
RESTRUCTURING ACT 1993**

(Sec. 11)

**Section 20 (Suspension of limitation period):**

(a) In section 20 (2) (a), before “determination” wherever occurring, insert “decision or”.

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**SCHEDULE 2—AMENDMENT OF HOMEFUND  
RESTRUCTURING ACT 1993—*continued***

(b) After section 20 (2) (a), insert:

5 (a1) in the case of proceedings arising out of a  
HomeFund mortgage in respect of which an appeal  
is made to the Commercial Tribunal of New South  
Wales from a decision or determination made by  
the HomeFund Commissioner, the period between  
10 May 1993 and the date occurring 2 years after  
10 the proceedings before the Tribunal are withdrawn  
or finally disposed of;

15 (a2) in the case of proceedings arising out of a  
HomeFund mortgage in respect of which an appeal  
was made to the Supreme Court from a  
determination made by the HomeFund  
Commissioner, the period between 10 May 1993  
and the date occurring 2 years after the proceedings  
before the Tribunal were or are withdrawn or  
finally disposed of;

20 (c) After section 20 (2), insert:

(3) In this section, "**HomeFund mortgage**" includes  
such a mortgage described as a State Partnership Loan, a  
Rent-buy Loan or an Aged-persons Update Loan.

**SCHEDULE 3—SAVING AND TRANSITIONAL PROVISIONS**

25

(Sec. 12)

**Saving of certain applications and appeals**

1. The HomeFund Commissioner Act 1993 applies to proceedings  
commenced by the making of an application to the Supreme Court under  
section 40 of that Act before the commencement of this Act as if  
30 Schedule 1 had not been enacted.

**Appeals against decisions and determinations under HomeFund  
Commissioner Act 1993—transitional**

2. Despite section 40 of the HomeFund Commissioner Act 1993, an  
appeal may be made to the Supreme Court or Tribunal against a decision  
35 of the HomeFund Commissioner under section 12 of that Act or against a

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SCHEDULE 3—SAVING AND TRANSITIONAL PROVISIONS—  
*continued*

determination of the Commissioner under Part 5 of that Act if notice of the appeal is lodged with the Supreme Court or Tribunal:

- (a) within 6 months after the commencement of this Act, if the decision or determination was made before that commencement, except in the case of a decision first notified to the applicant after that commencement; or 5
  - (b) within 6 months after first notification of the decision to the applicant or within 6 months after the making of the determination, if the decision is first so notified or the determination is made within 3 months after the commencement of this Act. 10
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